STATEMENT OF JURISDICTION

The district court had jurisdiction to hear the federal charges under 18 U.S.C. § 3231, and its judgment entered on June 9, 2003 (CR 251)[1] is appealable pursuant to 28 U.S.C. § 1291. Defendant/appellant Edward Rosenthal ("Rosenthal") filed a timely Notice of Appeal on June 4, 2003. (ER 308) Federal Rules of Appellate Procedure 4(b)(1)(A)(i) and 4(b)(2). This appeal is from a final judgment that disposes of all the issues before the district court.

ISSUES PRESENTED FOR REVIEW

I. DID THE DISTRICT COURT ERR IN FAILING TO DISMISS THIS PROSECUTION BECAUSE THE FEDERAL GOVERNMENT DOES NOT HAVE JURISDICTION UNDER THE COMMERCE CLAUSE TO REGULATE INTRASTATE CULTIVATION OF MEDICAL MARIJUANA AND BECAUSE THE GOVERNMENT INTRUDED UPON THE STATE'S SOVEREIGN POWERS TO DECIDE MATTERS OF PUBLIC HEALTH AND MORALS IN VIOLATION OF THE TENTH AMENDMENT?

II. DID THE DISTRICT COURT ERR IN FAILING TO FIND THAT ROSENTHAL WAS SHIELDED FROM PROSECUTION BY 21 U.S.C. § 885(d), WHICH EXPRESSLY PROVIDES THAT

---

[1] The following abbreviations will be utilized in this brief:

ER = Excerpts of Record;
CR = Clerk's Record;
RT = Reporter's Transcript at trial;
RT (date) = Reporter's Transcript (date).

"NO CIVIL OR CRIMINAL LIABILITY SHALL BE IMPOSED" UPON MUNICIPAL OFFICIALS, LIKE ROSENTHAL, "WHO SHALL BE LAWFULLY ENGAGED IN THE ENFORCEMENT OF ANY LAW OR MUNICIPAL ORDINANCE RELATING TO CONTROLLED SUBSTANCES"?

III. DID THE DISTRICT COURT ERR IN EXCLUDING ROSENTHAL'S ENTRAPMENT-BY-ESTOPPEL DEFENSE, DESPITE THE FACT THAT, AS THE DISTRICT COURT ITSELF FOUND, THE DEFENDANT ACTED REASONABLY IN RELYING ON THE ADVICE OF PUBLIC OFFICIALS THAT 21 U.S.C. § 885(d) IMMUNIZED HIM FROM PROSECUTION FOR CULTIVATING MARIJUANA FOR THE SERIOUSLY ILL?

IV. DID THE DISTRICT COURT ERR IN FAILING TO DISMISS THE INDICTMENT DUE TO MISCONDUCT BY THE PROSECUTOR IN THESE PROCEEDINGS, DESPITE THE COURT'S FINDING THAT THE PROSECUTOR'S ASSURANCES TO THE GRAND JURY REGARDING THE CONTINUED AVAILABILITY OF MEDICAL MARIJUANA WERE "FALSE AND APPARENTLY CALCULATED TO OVERCOME GRAND JURORS' CONCERNS"?

V. DID THE DISTRICT COURT ERR IN PREVENTING ROSENTHAL FROM REBUTTING THE MISLEADING AND INFLAMMATORY IMPRESSION CREATED BY THE PROSECUTOR THAT THE DEFENDANT DERIVED A SIGNIFICANT PROFIT FROM HIS MARIJUANA CULTIVATION?

VI. DID THE DISTRICT COURT ERR IN FAILING TO ORDER A NEW TRIAL AFTER LEARNING THAT TWO JURORS WERE ADVISED BY AN OUTSIDE ATTORNEY JUST BEFORE DELIBERATIONS THAT A HUNG JURY WAS IMPERMISSIBLE EXCEPT IN LIMITED CIRCUMSTANCES

AND THAT JURORS WOULD "GET INTO TROUBLE" IF THEY EXERCISED THEIR "INDEPENDENT THOUGHT" DURING DELIBERATIONS?

VII. DID THE DISTRICT COURT ERR IN INSTRUCTING THE JURY DURING ROSENTHAL'S CLOSING ARGUMENT THAT IT WAS NOT TO BRING ITS "SENSE OF JUSTICE" TO BEAR ON THIS CASE?

VIII. DID THE DISTRICT COURT ERR IN FAILING TO HOLD A *FRANKS* HEARING AND TO SUPPRESS THE EVIDENCE OBTAINED AS A RESULT OF A SEARCH WARRANT LACKING PROBABLE CAUSE OBTAINED THROUGH FALSE STATEMENTS BY THE AFFIANT?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Case Below

This is an appeal from criminal convictions for one count of cultivation of marijuana, in violation of 21 U.S.C. § 841(a)(1); one count of conspiracy to cultivate marijuana, in violation of 21 U.S.C. § 846; and one count of maintaining a place for cultivating marijuana, in violation of 21 U.S.C. § 856(a)(1). (CR 20) After six days of trial, the jury convicted Rosenthal on all counts on January 31, 2003. (CR 181) On June 4, 2003, the district court sentenced Rosenthal to one-day imprisonment and three years supervised release on all three counts to run concurrently, with credit for time served. (CR 246)

/ / /

B. Bail Status

Rosenthal is not in custody pending appeal.

SUMMARY OF THE ARGUMENT

Defendant Edward Rosenthal's non-profit, humanitarian activity in cultivating medical marijuana for local use by seriously ill patients, conduct legal under California law and specifically promoted by Oakland's municipal ordinance, cannot be constitutionally subjected to federal penal sanction. Of equal importance, under federal statute, Rosenthal was entitled to immunity from prosecution and, short of this, to present his entrapment-by-estoppel defense to the jury.

The district court denied Rosenthal's immunity claim prior to trial, despite conceding that on its face the federal immunity statute Rosenthal relied upon in cultivating marijuana for the seriously ill immunizes municipal officials like him who implement city policy relating to controlled substances. The district court then excluded Rosenthal's only viable trial defense--that of entrapment-by-estoppel--yet subsequently found at sentencing that Rosenthal's reliance on the federal immunity statute, and the advice he received from public officials concerning its scope, had been reasonable. In barring the entrapment-by-estoppel defense, the district court ignored persuasive and binding authority establishing

Rosenthal's right to present the defense to the jury. The district court also barred Rosenthal from rebutting the false allegation suggested by the prosecution's evidence that Rosenthal was engaged in the sale of drugs for profit.

The exclusion of crucial defense evidence was accompanied by other errors that unfairly limited or tainted the constitutionally required participation by the public in the decisions to charge and convict the defendant. When the grand jury expressed its unwillingness to indict Rosenthal and thereby possibly deprive the seriously ill of the medicine they need, the prosecutor falsely assured the grand jurors that the government was not seeking to close down the cannabis clubs. Days earlier, the government had done precisely that. At trial, the district court excluded nineteen jurors for cause simply for expressing pro-medical marijuana beliefs. Of the jurors that were seated, two were so troubled by a sense that relevant matters had been kept from them that they sought and obtained the advice of an outside attorney as to whether they had "leeway for independent thinking" in their deliberations. The outside attorney erroneously limited the jurors' ability to participate in a hung jury and improperly told the jurors they could "get into trouble" if they did not follow the court's instructions. The district court, however, brushed this highly prejudicial advice aside as an innocuous *ex parte* contact. It also explicitly forbade the jury from bringing its "sense of justice" to

bear on this case. Both individually and collectively, these errors deprived Rosenthal of his rights to be charged only as a result of an impartial grand jury proceeding and to have his guilt and innocence decided by a jury after a full and fair trial.

Finally, the district court erred in failing to hold a *Franks* hearing and to suppress the evidence obtained as a result of a search warrant lacking probable cause obtained through false statements by the affiant. For any and all of these reasons, this Court must reverse Rosenthal's convictions.

STATEMENT OF FACTS

To "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" without criminal penalty, fifty-six percent of the California electorate approved Proposition 215 ("the Compassionate Use Act") in November of 1996. *See* Cal. Health & Safety Code § 11362.5(b)(1). Because many of the seriously ill patients who most desperately need marijuana to alleviate their suffering are too sick or otherwise unable to grow their own, a reliable source of safe medical marijuana was needed. (ER 23, at ¶5; ER 30, at ¶6.) Recognizing this, the Oakland City Council, on July 28, 1998, unanimously passed Oakland Ordinance No. 12076, which created the City of Oakland's Medical Cannabis Distribution Program ("the Oakland Program"). (ER 8) The Program was

expressly designed to harmonize state and federal law.

Under the Oakland Program, the City Manager would designate "one or more entities as a medical cannabis provider association," which, in turn, would deputize persons as city officials to perform official tasks in furtherance of the Program. (ER 9-10 [Ordinance No. 12076, Section 3]) The newly deputized city officials would be immune from federal prosecution under 21 U.S.C. § 885(d), since this statute shields municipal officials "lawfully engaged in the enforcement of any law or ordinance relating to controlled substances" from "civil or criminal liability" under the Controlled Substances Act, 21 U.S.C § 801 *et seq.* ("the "CSA"). (*See* ER 9 [Ordinance No. 12076, Section 1.D (citing 21 U.S.C. § 885(d))])

With this immunity in mind, Oakland officials encouraged persons like Rosenthal to cultivate medical marijuana for distribution to sick and dying citizens. After the Oakland City Manager designated the Oakland Cannabis Buyers' Cooperative ("OCBC") as a medical cannabis provider association on August 12, 1998 (ER 12-16 & 30, at ¶6), the OCBC deputized Rosenthal as an Oakland City official to cultivate medical marijuana under the Oakland Program on September 4, 1998. (ER 26, at ¶2 [Declaration of Edward Rosenthal in Support of Defendant Rosenthal's Motions to Dismiss ("Rosenthal Decl.")]; ER 30, at ¶6)

When this occurred, Rosenthal was handed a letter assuring him that "you are deemed a duly authorized 'officer of the City of Oakland' and as such [are] immune from civil and criminal liability under Section 885(d) . . .copy enclosed." (ER 100 [Letter from Jeffrey Jones to Ed Rosenthal, dated September 4, 1998])

Based on these assurances, Rosenthal openly cultivated marijuana for distribution to approved entities, including the OCBC and San Francisco's Harm Reduction Center ("HRC"). (*See* ER 26, at ¶ 4 [Rosenthal Decl.]) He did not grow the plants to the point where they started to bud, but instead cultivated starter plants, or "clones", from cuttings placed in soil. (ER 26, at ¶ 4 [Rosenthal Decl.]) Qualified AIDS and cancer patients would buy and continue to grow these plants so they would no longer have to rely on street dealers or other commercial enterprises for their medicine.[2]

To put a stop to this, the government employed a multi-pronged, and increasingly punitive strategy. First, it threatened to revoke the licenses of California doctors who recommend marijuana to their patients. *See Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Then, it sought and obtained an injunction

---

[2] Marijuana stimulates the appetite, which is a tremendous benefit to cancer patients who suffer from the debilitating effects of chemotherapy and AIDS patients who suffer from "wasting syndrome." *See Conant v. Walters*, 309 F.3d 629, 644 & n.9 (9th Cir. 2002) (Kozinski, J., concurring).

prohibiting six California cooperatives from distributing marijuana to the seriously ill. *United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1091-92 & 1105-06 (N.D.Cal. 1998). Next, the government targeted individuals for criminal prosecution without warning. In the pre-dawn hours of February 12, 2002, DEA agents raided Rosenthal's home, roused him naked from his bed, and took him away in handcuffs. (*See* CR 6).

As the trial approached, Rosenthal filed a series of motions to dismiss the prosecution on constitutional and other grounds. One was based on the federal immunity provision of § 885(d) (CR 79), others on the constitutionally-prescribed limits of the federal government to regulate wholly intrastate activity (CR 80) and on a lack of due process (CR 77). The district court held pre-trial hearings on January 9, 12 and 13, 2003, in which Oakland Assistant City Attorney Barbara Parker testified. Mary Pat Jacobs, spokesperson for the Sonoma Alliance for Medical Marijuana, submitted a declaration stating that DEA Agent Michael Heald had assured her that the DEA was not interested in interfering in local efforts to implement the Compassionate Use Act. (ER 5-6, at ¶¶ 2 & 4; ER 288) In addition, Rosenthal waived his privilege against self-incrimination to testify as to his belief in the legality of his conduct based on the official advice that he had

/ / /

been given as to the scope of the immunity provided by federal law. (ER 90-94 [RT (1/9/03) at 86-90])

The district court denied all three motions without giving its reasons for doing so. *See* CR 125. On January 13, 2003, the court excluded the defendant's only viable trial defense: that of entrapment by estoppel. (ER 281 & 285-88)

Jury selection began on January 14, 2003. (CR 133) Despite having barred Rosenthal from making any reference to medical marijuana on grounds of relevancy, the district court raised the issue on its own during jury *voir dire*. (*See* ER 106 & 125-26) The trial court candidly acknowledged its view that a juror's disagreement with the law was enough to require that juror's excusal (ER 116-17), and that "[w]e're just trying to ferret out the views," (ER 105); *cf. United States v. Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998) ("a district court cannot dismiss jurors for cause based solely on their acknowledgement that they disagree with the state of the law that governs the case"). To this end, the court actively probed prospective jurors about their support for medical marijuana and excused nineteen jurors for cause *sua sponte* simply for expressing pro-medical marijuana beliefs. (*See* ER 112-14, 118-23 & 127-29) The district court refused defense counsel's request that it ask these jurors whether they could put such views aside and judge the case according to the law and evidence presented. (*See* ER 103-04; *cf. Patton*

v. Yount, 467 U.S. 1025, 1036-37 (1984) (the standard of juror impartiality is whether "he can lay aside his opinion and render a verdict based on the evidence presented in court")) By sharp contrast, the district court permitted prospective jurors who expressed strong anti-marijuana sentiments to remain over Rosenthal's objections if these jurors said they could put aside those views. (*See* ER 109-10 & 122-23)

At trial, the government presented largely undisputed evidence that Rosenthal cultivated marijuana at 1419 Mandela Parkway in Oakland, California ("Mandela"). Over the course of the five days of the government's case-in-chief, DEA Special Agents Daniel Tuey, Anthony Levey, Christopher Taylor and Jon Pickette testified that they found 190 rooted plants at Mandela and 405 such plants at HRC. (RT 521-27, 530-36, 716-25, 757-66 & 1185-90) The government then presented the testimony of an electrician and, later, an Oakland fire inspector that they had seen marijuana growing in the building at Mandela. (RT 497-500, 820-21 & 827)

The government also presented hotly disputed evidence that Rosenthal attempted to conceal his activities and that he cultivated marijuana for economic gain. The government's first witness, James Halloran, testified that he and Rosenthal were "partners dollar for dollar" in a marijuana cultivation operation at

Mandela, which Rosenthal later pursued on his own (ER 147). Halloran further testified that the building where the marijuana was grown did not have any windows and was equipped with ionizers and charcoal filters to minimize any smell. (ER 156-57) The government presented evidence that Rosenthal: was paid $5 per plant, (ER 171); received checks from HRC totaling $4,500 (ER 163-68); sought control over HRC (ER 172-73); rented space in the basement of HRC where marijuana cultivation occurred (ER 174-75); and was accused by a rival of "willful sabotage . . . in an attempt to influence the medical marijuana market, by wiping out competitors with pests on the clones which [he] provide[s]," (ER 179-80 & 255 [Exh. 27]).

Despite permitting the government to introduce evidence of profiteering and concealment by Rosenthal in its case-in-chief, the district court forbade Rosenthal from introducing evidence to rebut the evidence of a profit motive, opting instead to issue a limiting instruction on this score. (ER 186-192, 195 & 198) The court would have excluded all defense evidence rebutting the government's evidence of concealment, but for the *prosecutor's* objection to the limiting instruction proposed by the court. (RT 1166-75 [court to prosecutor: "The government has to decide what they are going to do"]) (RT (1/29/03) As a result of the prosecutor's intransigence, Oakland City Councilman Nate Miley

testified that he visited Rosenthal's Mandela facility for the purpose of observing his marijuana cultivation. (RT 1232-37)

Having been stripped of his only defense, Rosenthal presented just one other witness – marijuana expert Daniel Weaver testified that none of the plants found at Mandela had ascertainable root structures. (RT 1253 & 1265)

Later, during Rosenthal's closing argument, the district court *sua sponte* interrupted counsel and instructed the jury: "Ladies and gentlemen, you cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not." (ER 209) The jury convicted Rosenthal of all counts later that day. (ER 256)

Minutes after the verdict was announced, a juror revealed that she had engaged in improper communications with an attorney-friend. (ER 261) After the district court held an evidentiary hearing on the issue of juror misconduct on April 1 and 8, 2003 (CR 213 & 215), it denied Rosenthal's new trial motion raising that and other claims on May 16, 2001 (ER 275 [CR 231]). On June 4, 2003, the district court sentenced Rosenthal to one day imprisonment, with credit for time-served. (CR 246) The chief basis on which the court granted a substantial downward departure was its finding that Rosenthal had grown medical marijuana for the seriously ill based on his honest belief that his conduct was legal, and that

that belief on the defendant's part was reasonable, given the advice he had been provided by public officials concerning the scope of immunity provided under federal law by 21 U.S.C. § 885(d).

> [T]his court observed Mr. Rosenthal testify [in pre-trial proceedings] that he was unaware that his conduct was not immunized from Federal prosecution by the actions of the state and local governments....I find that his belief, while erroneous, was reasonable, because of the actions taken by the Oakland city council in enacting an ordinance purportedly immunizing certain actions from Federal prosecutions.

(ER 306-07 [RT (6/4/03, at 39-40])

ARGUMENT

I. THE FEDERAL GOVERNMENT LACKS SUBJECT MATTER JURISDICTION TO REGULATE WHOLLY INTRASTATE MEDICAL MARIJUANA ACTIVITY AND THIS PROSECUTION VIOLATES THE TENTH AMENDMENT

In the district court, defendant Rosenthal moved for dismissal of this prosecution on the ground that the federal government lacked jurisdiction under the Commerce Clause to prosecute the wholly-intrastate cultivation of medical marijuana, and was likewise barred by the Tenth Amendment from doing so where a state had relied on its sovereign powers to decide matters of public health and morals in enacting legislation legalizing the provision of medical marijuana. (CR 80) He renews those claims here.

This month, this Court sustained a similar claim under the Commerce Clause in a different factual context. *United States v. Stewart*, 2003 WL 22671036 (9th Cir; Nov. 13, 2003) (federal government lacks jurisdiction to prosecute owner of homemade machine gun where no showing gun traveled in, or affected, interstate commerce). Constitutional claims virtually identical to Rosenthal's involving the cultivation, possession, and distribution of medical marijuana are now pending decision in this Court in the OCBC case. *See United States v. OCBC*, No. 02-16534 (9th Cir. 2002). The federalist principles limiting the authority of the federal government are even stronger in this criminal case. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("States possess primary authority for defining and enforcing the criminal law"); *id.* At 584 (Thomas, J., concurring) ("we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (emphasis in original). This prosecution must be dismissed as lacking in jurisdiction under the Commerce Clause and barred by the Tenth Amendment.[3]

---

[3]Since Rosenthal was convicted, the Attorney General of California has written a letter supporting him in this prosecution (ER 303-04) and, on September 11, 2003, the California Legislature passed legislation "declar[ing] that it enacts [medical marijuana legislation] pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution." S.B. 420, Section 1(e) (Sept. 11, 2003).

II. THE DISTRICT COURT ERRED IN DENYING ROSENTHAL THE IMMUNITY EXPRESSLY PROVIDED TO HIM BY 21 U.S.C. § 885(d)

A. Standard Of Review

This Court reviews the district court's interpretation of § 885(d) *de novo*. *United States v. Carranza*, 289 F.3d 634, 642 (9th Cir. 2002); *United States v. Arvin*, 900 F.2d 1385, 1388 (9th Cir. 1990).

B. Argument

21 U.S.C.§ 885(d) provides:

> Except as provided in sections 2234 and 2235 of Title 18 [relating to the illegal procurement and execution of search warrants], no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

Despite acknowledging that Rosenthal's conduct "fall[s] within the literal reading of the statute" (ER 81.1-81.2 [RT (1/8/03) at 21-22]), the district court found § 885(d) to afford the defendant no protection for his seemingly immunized conduct because the court believed that such application would conflict with *its* interpretation of the purposes served by the CSA. (ER 283-84)

The Oakland ordinance indisputably "relates to" controlled substances and

Rosenthal was clearly "enforcing" it. *See Black's Law Dictionary* 528 (6th ed. 1990) (defining "enforcement" as "[t]he act of putting something such as a law into effect"); *Webster's Third New International Dictionary (Unabridged)* 751 (1993) (defining "enforce" as "to give force to"). He was deputized as a city official for this very purpose and, in any event, qualifies as public official under the functional test employed in California. *See Coulter v. Pool*, 187 Cal. 181, 185 (1921); CR 124. Rosenthal clearly "falls within the literal reading of the statute," as the district court found.

Motivated by its concern that such literal interpretation of § 885(d) would create a "loophole" permitting municipalities to nullify federal law (ER 19-20), the district court found, *first*, that "lawfully engaged" refers to the lawfulness of the municipal ordinance under federal law and, *second*, that "enforcement" means to compel compliance with the law (ER 282-83). The district court thereby transformed the broadly worded immunity statute into a shelter only for police enforcing federal narcotics policy. Every applicable rule of statutory construction – from the plain language of the statute to the rule of lenity – forbade the district court from doing this.

To begin, "legislative enactments should not be construed to render their provisions mere surplusage." *American Vantage Companies v. Table Mountain*

Rancheria, 292 F.3d 1091, 1098 (9th Cir. 2002) (quotation omitted). No one needs immunity from federal prosecution for conduct which is already legal under federal law. On the other hand, those who engage in conduct which would ordinarily violate federal laws–the cultivation, manufacture, possession, or distribution of controlled substances–when such conduct is designed to implement local laws are indeed in need of such immunity. Logically, "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances," must refer to the lawfulness of the party's conduct under local law, not the CSA. Otherwise, the entirety of § 885(d) would be rendered nugatory.

Second, "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others." *United States v. Johnson,* 529 U.S. 53, 58 (2000). By expressly excepting the illegal execution and procurement of search warrants from the immunity afforded by § 885(d), Congress expressed its intent that these were the *only* illegal activities excepted from the immunity.

Furthermore, the district court's construction unnecessarily disturbs the existing delicate federal-state balance and raises multiple constitutional questions. This Court has established that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance," *United States v. Bass,* 404 U.S. 336, 349 (1971), and "where a statute is

susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter," *Gilmore v. California*, 220 F.3d 987, 997 (9th Cir. 2000) (quotation omitted); *cf. Conant v Walters*, 309 F3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) ("the federal government [is] nearing the outer limits of its power" by attempting to regulate medical marijuana). Whereas the city of Oakland and Rosenthal's interpretation of § 885(d) harmonizes federal law with innovative local solutions to public health problems, which is central to our federalist system of government, *see Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), the district court's construction "considerably blur[s] the distinction between what is national and what is local," *see Conant*, 309 F.3d at 647, and leads to the absurd result that all seven members of the Oakland City Council who voted for the Oakland Program are guilty of a federal conspiracy. This Court can avoid such absurdities and the many constitutional questions presented simply by adhering to the letter of § 885(d).

A trial court and a unanimous court of appeal (as well as the City of Oakland) have interpreted § 885(d) in the same manner as does Rosenthal, but no court has interpreted it as did the district court. In *State v. Kama*, 178 Or. App. 561, 565, 39 P.3d 866, 867 (Or. Ct. App. 2002), the appellate court affirmed the

trial court's finding that § 885(d) immunizes Portland police officers from federal prosecution under 21 U.S.C. § 841(a), which prohibits the delivery of a controlled substance by "any person," for returning medical marijuana to persons entitled to possess it under state law. *See* 178 Or. App. at 563, 39 P.3d at 867. The court explained: "Even assuming that returning the marijuana otherwise might constitute delivery of a controlled substance, the city does not explain--and we do not understand--why police officers would not be immune from any federal criminal liability that otherwise might arise from doing so [under § 885(d)]." 178 Or. App. at 564-65, 39 P.3d at 868 (citing § 885(d)). The appellate court ordered the City of Portland to return the marijuana to its rightful owner, *id.*, which would be a prosecutable federal offense under the district court's interpretation in this case.

At the barest minimum, Rosenthal's interpretation is reasonable, so the rule of lenity mandates its adoption in this criminal case. *See, e.g., United States v. Bass*, 404 U.S. 336, 347-50 (1971) ("where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."); *United States v. Wiltberger*, 5 Wheat 76, 95, 5 L.Ed. 37 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself"). The district court admitted that a literal reading of the statute supported Rosenthal's interpretation,

but it deviated from this plain language to effectuate its vision of federal narcotics policy. It is well-established that "a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language." *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 626 (1945); *see also United States v. Molinaro*, 11 F.3d 853, 859 n.13 (9th Cir. 1993) (holding that rule of lenity requires adoption of defendant's construction of statute where its legislative history renders the language, at best, ambiguous, even if the court agrees with government's construction).

Furthermore, there are the special protections afforded to public officials performing official duties. An outgrowth of the rule of lenity is the doctrine of "qualified" or "good faith" immunity, which shields public officials from civil *or criminal* liability for performing official tasks, unless the law was "clearly established" that their conduct was illegal. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997); *Anderson v. Creighton* 483 U.S. 635, 641 (1987). Thus, even if Rosenthal's conduct does not strictly fit within the scope of § 885(d), he is entitled to immunity from prosecution, unless it had been made clear by the express terms of the statute or the interpretive gloss judicially provided that the statute would not apply to him.

Rather than clearly criminalizing Rosenthal's conduct, the case law supports

his reading of § 885(d). *State v. Kama, supra,* advances Rosenthal's construction. In *United States v. Cannabis Cultivators' Club*, et al., Case No. 98-0088 CRB (Sept. 3. 1998), the trial judge in this matter had issued an unpublished decision wherein he repeatedly distinguished injunctive relief actions from those seeking penalties for past conduct and found that § 885(d) affords immunity to public officials only for the latter. (ER 19-20); *cf. Green v. Mansour*, 474 U.S. 64, 68 (1985) (whereas prospective relief is necessary to ensure the supremacy of federal law, "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment" forbidding retrospective relief). Judge Breyer's exact words in *Cannabis Cultivators' Club* were that § 885(d) "provides an official with immunity from civil and criminal *liability*. In other words, it protects an official from paying compensation or being penalized for conduct in the past which violated the federal Controlled Substances Act. It does not purport to immunize officials from equitable relief enjoining their *future* conduct." (ER 20 (emphasis in original)) Anyone reading this Order would conclude that § 885(d) "protects an official from . . . being penalized for conduct in the past," even if this conduct was subsequently found to violate federal law. By no means can it be said that the contrary reading of § 885(d) was clearly established. Under *Lanier* and the many other tools of statutory construction cited, Rosenthal was and

is entitled to dismissal of the charges against him.

III. THE DISTRICT COURT ERRED IN EXCLUDING ROSENTHAL'S ENTRAPMENT-BY-ESTOPPEL DEFENSE

A. Introduction and Standard of Review

In a series of evidentiary hearings before trial, Rosenthal presented undisputed evidence that, in cultivating medical marijuana for the seriously ill, he relied on: (1) the express language of the immunity provisions of § 885(d); (2) the guarantees that he was so immunized made to him by local officials, and (3) the assurances of a DEA agent that the federal government was not interested in interfering in local efforts to implement California medical marijuana policy. (ER 90-94) Despite these three independent bases for the admission of Rosenthal's entrapment-by-estoppel defense, the district court excluded it at trial. (ER 281 & 284-89)

Because the exclusion of a defense implicates important constitutional values, this Court reviews such decision *de novo*, *see United States v. Hancock*, 231 F.3d 557, 561 (9th Cir. 2000); *United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir. 1991), and any error in this regard is reversible *per se*, *United States v. Becerra*, 992 F.2d 960, 963 (9th Cir. 1993); *United States v. Faust*, 850 F.2d 575, 583 (9th Cir. 1988).

B. The Right To Present An Entrapment-By-Estoppel Defense

Because "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quotation omitted), they are entitled to present evidence on any legally cognizable defense, unless "it is clear that the evidence to be offered by the defendant can, under no interpretation, be considered sufficient," *United States v. Johnson*, 32 F.3d 304, 307 (7th Cir. 1994); *cf. United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984) ("the trial court rarely rules on a defense as a matter of law"). "Only slight evidence will create the factual issue necessary to get the defense to the jury, even [if] the evidence is 'weak, insufficient, inconsistent, or of doubtful credibility.'" *Becerra*, 992 F.2d at 963 (quotation omitted); *see also United States v. Evans*, 928 F.2d 858, 860 (9th Cir. 1991) (entrapment-by-estoppel is a jury question).

Here, that defense is entrapment-by-estoppel, which requires that the defendant show, *first*, his or her reliance on misleading information or conduct by a federal official or agent authorized to render such advice, and, *second*, that this reliance was reasonable. *See Raley v. Ohio*, 360 U.S. 423, 430-31 & 437 (1959); *Brebner*, 951 F.2d at 1027; *United States v. Tallmadge*, 829 F.2d 767, 775 (9th

/ / /

Cir. 1987); *United States v. Abcaisis*, 45 F.3d 39, 44-45 (2nd Cir. 1995); *United States v. Timmins*, 464 F.2d 385, 387 (9th Cir. 1972).

C. The District Court Erred in Excluding Evidence that Rosenthal Reasonably Relied on the Federal Immunity Provisions of 21 U.S.C § 885(d)

Despite finding that a literal reading of § 885(d) seemingly affords Rosenthal protection from a prosecution like this one (ER 81.1-81.2), the district court excluded his entrapment-by-estoppel defense because it found the defense inapplicable to a defendant's reliance on a statute, as opposed to the advice of a public official (New Trial Order at 12). This reasoning was gravely flawed.

First, the defense entrapment by estoppel defense is based on "principles of fairness," *Brebner*, 951 F.2d at 1025 (citation omitted). The concept of entrapment-by-estoppel originated more than a century ago in a case remarkably similar to this one wherein local officials were indicted for failing to perform duties required of them by statute because another statute, later found unconstitutional, excused them from such duties. *State v. Godwin*, 31 S.E. 221, 221-22 (N.C. 1898). The Supreme Court of North Carolina affirmed the dismissal of the charges against them, proclaiming:

> What an anomalous state of things would we have, then, if a person believing himself to be a public officer, because of the discharge of the duties which he thought

> he owed to the public, should afterwards be indicted and punished because the courts had held the act which created the office and prescribed its duties to be against the provisions of the constitution and void! . . . Such a proposition, to us, seems opposed to every idea of justice. It could not be true.

Id. at 222.

Citing this and similar such cases, Judge Mehrige recognized that "[t]he [entrapment-by-estoppel] defense has been most commonly accepted when an individual acts in reliance on a statute later found unconstitutional. . . ." *United States v. Barker*, 546 F.2d 940, 956 (D.C. Cir. 1976) (Mehrige, J., concurring). Other courts, including this one, have noted that the entrapment-by-estoppel defense is applied "*most often* when an individual acts in reliance on a statute or an express decision by a competent court of general jurisdiction." *United States v. Brady*, 710 F.Supp. 290, 295 (D. Colo. 1989) (emphasis added) (citing *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987), *overruled on other grounds in United States v. Qualls*, 172 F.3d 1136, 1138 n.1 (9th Cir. 1999)). The reasoning of these cases, dating back more than a century, applies just as readily here.

/ / /

/ / /

Second, the United States Supreme Court has established that a defendant's reliance on a regulation may form the basis for an entrapment-by-estoppel defense. *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 675 (1973). A statute is even *more* authoritative than a regulation. Given that the defense of entrapment by estoppel is based on "principles of fairness," *Brebner*, 951 F.2d at 1025, it would not be logical (or fair) to hold that a defendant who relies on a federal regulation may raise the defense, but a defendant who relies on that same information contained in the more authoritative source of a federal statute is precluded from doing so. No case so holds.

The threshold component of an entrapment by estoppel defense is the defendant's "reliance on misleading information supplied by the government. . . ." *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970). That "misleading information" can just as readily be "supplied by the government" through a federal statute as through a regulation or government agent. The district court erred in rejecting Rosenthal's proffer on this ground.

/ / /

/ / /

/ / /

/ / /

D. The District Court Erred in Excluding Evidence That Rosenthal Relied on Assurances from a DEA Agent That the Federal Government Was Not Interested in Interfering in Local Efforts to Implement State Medical Marijuana Policy

The district court's exclusion of Rosenthal's entrapment-by-estoppel defense was flawed by a second error. DEA Agent Michael Heald assured Mary Pat Jacobs, spokesperson for the Sonoma Alliance for Medical Marijuana ("SAMM"), that the federal government would not interfere with Sonoma County's efforts to provide marijuana to the seriously ill, and Jacobs told this to Rosenthal (ER 5-6, 90-94 & 288). Notwithstanding the fact that the DEA agent's assurances were relayed to Rosenthal through an intermediary, rather than told to him directly, this is a paradigmatic example of the entrapment-by-estoppel defense. *See United States v. Levin*, 973 F.2d 463, 465-68 (6th Cir. 1992); *Commonwealth v. Twitchell*, 617 N.E.2d 609, 618-20 (Mass. 1993); *cf. United States v. Abcaisis*, 45 F.3d 39, 44 (2nd Cir. 1995) (reversing federal narcotics conviction based on assurances made to defendant by DEA agent).

The district court, however, was extremely hostile to the admission of Jacobs' testimony. At the very first mention of Jacobs' declaration by Rosenthal's counsel, the district court interrupted him to make clear that "it's rejected." (*See* ER 99) Later, when Rosenthal attempted to generate some discussion on the issue

with a subsequent proffer, the district court erected obstacles to its consideration by striking *sua sponte* the relevant portions of Jacobs' supplemental declaration as hearsay and refusing to discuss the matter because "Mary Pat Jacobs isn't here." (ER 134-39)

When Ms. Jacobs traveled to San Francisco to affirm in person the averments in her declaration, the district court prevented Rosenthal from eliciting *any* additional details by wresting the examination away from Rosenthal's counsel. (ER 181-82) The moment the judge was finished, he left the courtroom without any discussion of Rosenthal's proffer. (*See* ER 181-84) As revealed for the first time in the district court's order denying Rosenthal's motion for a new trial four months later, Judge Breyer rejected Rosenthal's proffer because "Heald did not make any assurances concerning the DEA's activities anywhere outside Sonoma County." (ER 288) Not only would Jacobs likely have testified otherwise if she had been given the opportunity to do so, Rosenthal's counsel made a proffer that Agent Heald would testify that his statements applied "generally not just in Sonoma County, but throughout the State of California. . . ." (ER 160-61). This, however, prompted the district court to quash the subpoena of Heald. (ER 161)

In any event, Rosenthal testified that *he* interpreted Heald's comments as representative of DEA policy generally. (*See* ER 90-94) Absent any caveat or

other indication that Heald's assurances were limited to Sonoma County, one not trained in the law might reasonably conclude that they were not so limited. *See Twitchell*, 617 N.E.2d at 618. Although the government would be free at trial to attack this evidence as "slight" or "weak, insufficient, inconsistent, or of doubtful credibility," *see Becerra*, 992 F.2d at 963, the determination of whether Rosenthal's construction of what was said was reasonable is a question of fact for the jury. *See Twitchell*, 617 N.E.2d at 619-20. The district court erred in removing this issue from the jury's consideration.

E. The District Court Erred in Excluding Evidence That Rosenthal Relied on Assurances From Local Officials That He Would Not Be Prosecuted

Rosenthal was repeatedly assured by Oakland officials that he was immune from prosecution for cultivating medical marijuana under § 885(d). (ER 23-24, at ¶¶3-6; ER 29-30, at ¶¶4-6). These local officials were authorized to render such advice for purposes of the entrapment by estoppel defense, due to their close cooperation with the federal government in the enforcement of the CSA. The CSA provides that "[t]he Attorney General shall cooperate with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances." 21 U.S.C. § 873(a). To this end, the federal government is authorized to: "cooperate [with local government agencies] in the

institution and prosecution of cases in the courts of the United States," 21 U.S.C. § 873(a)(2), and to "enter into contractual agreements with State and local law enforcement agencies to provide for cooperative enforcement and regulatory activities under this chapter," 21 U.S.C. § 873(a)(7). The federal government had such an agreement with the City of Oakland, which authorized the city to assist in the enforcement of state *and federal* narcotics laws. (*See* ER 83-85)

Furthermore, the structure of § 885(d) bestows the power to create immunity on state and local governments, as well as the federal government. If, for example, a new political subdivision were to be created within a state, that subdivision would have the power to create or designate officials to enforce local drug laws, and those "duly authorized officers" would then enjoy § 885(d) immunity from prosecution under the federal drug laws. If a person wished to ascertain whether he or she was among those officials "duly authorized" by "any State, territory [or] political subdivision thereof" to enforce state or local laws relating to controlled substances, it is to state or local, not federal, authorities that he or she would have to turn.

That being the case, Rosenthal was entitled to base his entrapment by estoppel defense on advice he received from local government officials as to whether he was "duly authorized" by "any State, territory [or] political subdivision

thereof" to enforce state or local laws relating to controlled substances. In *United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987), this Court held that private, federally licensed firearm dealers qualify as federal agents for purposes of the entrapment-by-estoppel defense because "the United States Government has made [them] federal agents in connection with the gathering and dispensing of information on the purchase of firearms." *Id.* at 774. Here, the government has taken an even more active role in enlisting local government officials to "cooperate [with local government agencies] in the institution and prosecution of cases in the courts of the United States," 21 U.S.C. § 873(a)(2), and in delegating to them by statute the authority to designate officials who enjoy federal immunity from such prosecutions. "If Tallmadge was entitled to rely upon the representations of the gun dealer as a complete defense, we can hardly deny the same defense to" Rosenthal who relied on the representations of local public officials. *Cf. United States v. Clegg*, 846 F.2d 1221, 1224 (9th Cir. 1988); *see also United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990) (although he could not authorize a violation of the statute, Standards of Conduct officer "is as much a responsible public officer as . . . a licensed firearms dealer" for purposes of the entrapment-by-estoppel defense). Under *Tallmadge* and its progeny, as well as

/ / /

basic principles of fairness, Rosenthal was entitled to rely on the information supplied by Oakland officials, even if it proved misleading

F. The District Court Effectively Established Its Error In Excluding The Entrapment By Estoppel Defense When It Found Rosenthal's Belief In The Legality Of His Conduct To Have Been Reasonable

As this Court has often reiterated, the core of a valid entrapment by estoppel defense is the reasonableness of the defendant's reliance upon official advice that his or her conduct is legal.

> We held in *Timmins* that the defendant must show that he relied on the false information and *that his reliance was reasonable*. *Id.* at 387; *see also United States v. Lansing,* 424 F.2d 225, 227 (9th Cir.1970) (to establish the defense of official misleading, *the defendant must establish "that his reliance on the misleading information was reasonable*--in the sense that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries").

Tallmedge, 829 F.2d at 774 (emphasis added) (citing *United States v. Timmins,* 464 F.2d 385, 386-87 (9th Cir.1972)).

At sentencing, the district court conceded that Rosenthal acted reasonably in relying on official advice that he was immunized from prosecution for cultivating medical marijuana by operation of 21 U.S.C. § 885(d). (ER 306-07) [RT (6/4/03) at 39-40]) It was on the basis of that finding that the district court substantially

departed from the guidelines in sentencing Rosenthal to only one day in custody. That finding establishes beyond peradventure that Rosenthal had made out a prima facie defense of entrapment by estoppel which he was entitled to present to the jury. The district court's wholesale exclusion of that defense requires a new trial.

IV. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT DUE TO MISCONDUCT BY THE FEDERAL PROSECUTOR IN THE GRAND JURY PROCEEDINGS

A. Introduction And Standard of Review

The grand jury "serve[s] as a kind of buffer or referee between the government and the people," *United States v. Williams*, 504 U.S. 36, 51 (1992), which may "reject an indictment that, although supported by probable cause, is based on government passion, prejudice, or injustice," *United States v. Marcucci*, 299 F.3d 1156, 1164 (9th Cir. 2002); *see also United States v. Cotton*, 535 U.S. 625, 634 (2002) ("the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power") (citing 8 Story, *Commentaries on the Constitution* § 1779 (1883)). "[T]he ancient role of the grand jury [is that it] has the *dual* function of determining if there is probable cause to believe that a crime has been committed *and* of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S.

665, 686-87 (1972) (emphasis added). "It is in keeping with the grand jury's historic function as a shield against arbitrary accusations . . . . [that it may inquire into areas of probable cause], *or [into areas] centered upon broader problems of concern to society*." *United States v. Mandujano*, 425 U.S. 564, 573 (1976) (emphasis added).

Because the grand jury clause of the Fifth Amendment "presupposes an investigative body acting independently of either prosecuting attorney or judge," *Williams*, 504 U.S. at 49, dismissal of the indictment is required where "the independence of the grand jury is substantially infringed," *see United States v. Isgro,* 974 F.2d 1091, 1094-99 (9th Cir.1992) (quotation omitted). The denial of a motion to dismiss the indictment on this basis is reviewed by this Court *de novo. Marcucci*, 299 F.3d at 1158.

B. The Prosecutor Engaged in a Pattern of Misconduct Designed to Mislead the Grand Jury and To Distract It From the Important Political and Ethical Questions Presented

At the first invitation for questions during the grand jury proceedings, the grand jurors asked the first in a series of fifteen questions about such topics as whether we are "blazing new ground here?", (ER 244); "Is this the first case where the federal government is going after the Cannabis clubs?" (ER 236), and how are

the sick and dying supposed to get the medicine they need if we indict "the Rosenthals of the world"? (ER 243). (*See also* ER 232 [grand juror asking: "Where are these cannabis clubs supposed to acquire their inventory for disbursement?"]; ER 237 [grand juror asking: "If you don't want to grow your own . . . and you have one of the four classifiable diseases to use it medicinally, what alternative do you have for getting that marijuana?"]; *see generally* ER 216-46) The most poignant illustration of what weighed on their minds appeared when one grand juror protested that "[m]ost of us probably voted for [Proposition 215]," to which the prosecutor replied "whatever." (ER 233)

Realizing that more was needed to overcome the grand jury's expressed reluctance to indict Rosenthal, the prosecutor blatantly misled it by stating: "We have not sought to shut down the operations of the club." "If you go in right now with a card in the Cannabis clubs, you know, you're probably okay." (ER 236; *see also* ER 233 ["No one's taking on the clubs as near as I can figure"]) The truth of the matter, however, was that only days before, the DEA *had* raided the Harm Reduction Center ("HRC"), stripped it of all its inventory and records, and padlocked the doors. (ER 259, at ¶2). After being assuaged in this manner, the grand jury indicted Rosenthal on February 12, 2002 (ER 1 [CR 1]).

/ / /

Despite finding that the "prosecutor's statements touching upon the continued availability of medical marijuana [were] false and apparently calculated to overcome grand jurors' concerns" (ER 293 n.5), the district court deemed the error harmless because it was "not relevant to the issue of the sufficiency of the evidence against Rosenthal," *id.* The district court refused to listen to any oral argument on the subject and it explicitly denied Rosenthal's request for additional disclosure of the transcripts of the grand jury proceedings. (*See* CR 170) In focusing exclusively on the grand jury's determination of the question of probable cause, the district court ignored the grand jury's other well-recognized function -- "serv[ing] as a kind of buffer or referee between the government and the people," *Williams*, 504 U.S. at 51, by "reject[ing] an indictment that, although supported by probable cause, is based on government passion, prejudice, or injustice," *See Marcucci*, 299 F.3d at 1164. "If the grand jury is to [function as the Framers envisioned it], limits must be set on the manipulation of grand juries by overzealous prosecutors." *See United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979); *cf. United States v. Dixon*, 658 F.2d 181, 193 (3rd Cir. 1981) (ordering new trial based on misconduct by prosecutor in grand jury proceedings). The district court erred in refusing to dismiss the indictment.

/ / /

V. THE DISTRICT COURT ERRED IN PREVENTING ROSENTHAL FROM REBUTTING THE MISLEADING AND INFLAMMATORY IMPRESSION THAT HE DERIVED A PROFIT FROM HIS CULTIVATION OF MARIJUANA

A. Introduction And Standard of Review

After the government successfully excluded any reference at trial to Rosenthal's humanitarian motive for cultivating marijuana, Rosenthal sought and obtained an order precluding the government from introducing any evidence of marijuana sales. (ER 131 & 144-45) Only minutes after this order was issued, the government repeatedly violated it by eliciting evidence that Rosenthal was motivated by profit. The government's portrayal of Rosenthal as a profiteering drug dealer was false, but the district court prevented him from neutralizing it with evidence of the truth, opting instead to issue an ineffective limiting instruction. (ER 186-92, 195 & 198) Although a district court has broad discretion to admit or exclude evidence, *United States v. Leon-Reyes*, 177 F.3d 816, 819 (9th Cir. 1999), this discretion is limited by the defendant's rights to present a defense and to confront the witnesses against him, *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985). This Court reviews *de novo* the question whether due process has been violated by the erroneous exclusion of evidence. *See United States v. Lewis*, 979 F.2d 1372, 1374 (9th Cir. 1992).

B. The Government's Evidence of Profiteering

The government attempted to portray Rosenthal as a profiteering drug dealer from its opening statement through its case-in-chief. Its very first witness, James Halloran ("Halloran"), testified only minutes into his testimony that he and Rosenthal "would be partners dollar for dollar" in cultivating marijuana. (ER 197). Robert Martin ("Martin") then testified that these dollars came from the HRC paying Rosenthal $5 per plant, which it then sold for nine dollars per plant. (ER 171; *see also* RT at 485-86, 491 [Halloran testifying that he purchased hundreds of plants from Rosenthal in cash]) To make it appear that Rosenthal had his eye on this cash cow, the government presented evidence that Rosenthal sought to wrest control over HRC from Rick Watts, and that he offered Martin a "proprietary interest" of eight to ten percent if Martin would join him. (ER 172-73 & 176-77; *see also* ER 163-69 [testimony that Rosenthal received checks from HRC totaling $4,500]) Most inflammatory of all, the government presented a letter from one of Rosenthal's rivals accusing him of "willful sabotage . . . in an attempt to influence the medical marijuana market, by wiping out competitors with pests on the clones which [he] provide[s]." (ER 255 [Exh. 27]) Only after the government emphasized this accusation in its opening statement and had Martin read it aloud to the jury (ER 146 & 179-80) did the district court redact it from the

letter (ER 202).

C. Rosenthal Was Entitled To Rebut The Government's Evidence Of Profit Motive with the Truth

Rather than issue a wholly inadequate limiting instruction, the district court should have permitted Rosenthal to rebut the inaccurate portrayal of him by the government. In *United States v.* Green, 548 F.2d 1261 (6th Cir. 1977), the court warned of the evils of injecting highly inflammatory evidence of profiteering into a drug manufacturing case and reversed defendants' convictions for conspiracy to manufacture DMT because of the introduction of such evidence. *Id.* at 1271. A unanimous panel of the Sixth Circuit explained: "We view this invocation of the 'dope peddler' image as a highly inflammatory trial tactic which innately prejudiced Appellants' right to a fair trial. . . . the trial court clearly abused its discretion by not suppressing this evidence in the first instance. . . ." *Id.* These evils were manifest here when the government presented evidence of Rosenthal as a profiteering drug dealer at trial.

Under this Court's decisions in *United States v. Whitman*, 771 F.2d 1348 (9th Cir. 1985), and *United States v. Crenshaw*, 698 F.2d 1060 (9th Cir. 1983), Rosenthal should have been permitted to introduce evidence to rebut the government's allegation of profiteering. *Cf. Whitman*, 771 F.2d at 1351 (reversing

convictions for witness tampering and murder because trial court prevented defendant from rebutting evidence of unseemly motive; "The district court was free to exclude evidence of appellant's motive, but once the government produced evidence from which the jury could reasonably infer [an incriminating] motive, appellant had the right to rebut this evidence."); *Crenshaw*, 698 F.2d at 1066 (reversing appellant's conviction for aiding and abetting robbery for same reason; "The court might properly have concluded that the evidence regarding [another person's] participation was irrelevant if the issues had been limited as initially suggested. But after the Government presented proof from which the court concluded that the jury might 'reasonably infer' that [appellant] planned the robbery, [appellant] should have been permitted to introduce evidence to rebut that inference."); *United States v. Hill*, 953 F.2d 452, 458-59 (9th Cir. 1991) (reversing convictions where limiting instruction was insufficient to cure prejudicial testimony); *see also United States v. Bradley*, 5 F.3d 1317, 1322 (9th Cir. 1993) ("An insufficient limiting instruction will not save otherwise prejudicial testimony"). Reversal is in order.

/ / /

/ / /

VI. JUROR MISCONDUCT REQUIRES REVERSAL

A. Introduction and Standard of Review

At least two jurors at Rosenthal's trial quite correctly suspected that evidence concerning the issue of medical marijuana had been kept from them and were thus unwilling to convict Rosenthal. When one contacted an attorney regarding her concerns near the end of the defendant's trial, the attorney told her that there was nothing she could do and that she "could get into trouble" if she strayed from the district court's instructions, admonitions she passed on to her fellow juror. The extrajudicial advice was erroneous, unduly coercive, and presumptively prejudicial; it thus requires a new trial. While this Court ordinarily reviews the district court's refusal to grant a new trial for abuse of discretion, *United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991), it conducts its own review if the district court applied the wrong legal standard, *United States v. Dutkel*, 192 F.3d 893, 897-98 (9th Cir. 1999).

B. Statement of Facts

Juror Marney Craig sensed that this case involved medical marijuana from the very outset of the trial and she was left "frustrated and confused" when no direct evidence on the issue was presented. (ER 261, at ¶¶1-3) So "troubled" was she about this that she discussed the issue before deliberations with Juror Pam

Klarkowski and questioned an attorney-friend about the possibility of a hung jury and whether she "had any leeway at all for independent thought." (ER 261, at ¶¶3-5; ER 264, at ¶¶2-4) Although the simple and accurate answer to this question was that a juror has the power to think independently, the attorney responded that a hung jury "could only happen if the Judge gives the jury some leeway in his instructions . . . [and you] could get into trouble if [you try] to do something outside those instructions." (ER 261, at ¶¶3-6)

On the final morning of trial, Craig shared this advice with Juror Klarkowski by stating that "there is nothing we can do." (*See* ER 261, at **¶7**; ER 264, at ¶5; RT (4/1/03) at 41)

C. The Jurors' Receipt Of Extrajudicial Legal Advice Constituted Misconduct

Due process and the Sixth Amendment demand that every criminal defendant be judged by impartial jurors unaffected by extraneous influences on their "freedom of action" as jurors. *See Remmer v. United States*, 350 U.S. 377, 381 (1955) ("*Remmer II*"); *Dutkel*, 192 F.3d at 894. The Fifth and Sixth Amendments, in addition, require that the defendant or his counsel be present at every "critical stage" of the proceedings, *Menfield v. Borg,* 881 F.2d 696, 698 (9th Cir. 1989), which includes the giving of supplementary instructions to the jury,

United States v. Rosales-Rodriguez, 289 F.3d 1106, 1109-10 (9th Cir. 2002). Both constitutional principles are compromised where, as here, an outside attorney gives legal advice to the jury amounting to a supplementary instruction.

D. In Denying A New Trial Due To Juror Misconduct, The District Court Erroneously Required Rosenthal to Demonstrate Actual Prejudice

Because the harm from an extraneous influence on the jury implicates important constitutional values and is so difficult to measure, the burden falls on the government to demonstrate its harmlessness beyond a reasonable doubt. *See Remmer v. United States*, 347 U.S. 227, 229 (1954) ("*Remmer I*"); *Mattox v. United States,* 146 U.S. 140, 150 (1892).

This Court distinguishes *ex parte* contacts that "do not include the imparting of any information that might bear on the case," *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Service Co.*, 206 F.3d 900, 906-07 (9th Cir. 2000), from extraneous communications relating to "any fact in controversy or any law applicable to the case," *Maree*, 934 F.2d at 201. Unlike *ex parte* contacts, which generally involve common, innocuous communications with persons such as court personnel, *see Sea Hawk Seafoods*, 206 F.3d at 906-07, extraneous communications intrude upon the decision making process, as "where a judge instructs a juror *ex parte* regarding the verdict" or where a third person tells a juror

"how to decide the case." *See id.* at 906. Such improper instruction to a juror on how she should reach her decision injects extraneous information into the jury's deliberative process, which creates a presumption of prejudice. *See United States v. Bensinger*, 492 F.2d 232, 238 (7th Cir. 1974) (bailiff's exhortation to jury to "reach a decision" is presumptively coercive and prejudicial); *Wheaton v. United States*, 133 F.2d 522, 526-27 (8th Cir. 1943) (bailiff's instruction to jury to consider counts in order presumed prejudicial); *cf. Sea Hawk Seafoods*, 206 F.3d at 906-07 (noting that remarks about how to reach a verdict are presumed prejudicial because of their "inherently coercive effect"); *United States v. United States Gypsum*, 438 U.S. 422, 462 (1978) (judge's *ex parte* remark to jury foreman that jury must reach a decision "one way or another" constitutes reversible error); *Jenkins v. United States*, 380 U.S. 445, 446 (1964) (per curium) (court's instruction outside presence of defendant that jury must "reach a decision in this case" required reversal)

Rather than hold the government to its proper burden, the district court characterized the outside attorney's advice as an *ex parte* contact because it did not pertain to any "substantive law" of the case, and then required Rosenthal to demonstrate that he suffered actual prejudice. (ER 298) Other courts, by contrast, have established that a "[d]iscussion between a juror and legal counsel is an

extraneous influence which the court must view as presumptively prejudicial." *United States v. Gaffney*, 676 F.Supp. 1544, 1557 (M.D. Fla. 1987); *see People v. Honeycutt*, 20 Cal.3d 150, 156, 141 Cal.Rptr. 698 (1977); *cf. Marino v. Vazquez*, 812 F.2d 499, 505 (9th Cir. 1987) ("unauthorized reference to dictionary definitions constitutes reversible error which the State must prove harmless beyond a reasonable doubt"); *see also United States v. Greer*, 620 F.2d 1383, 1385 (10th Cir. 1980) ("Any private contact with jurors about the matter pending before them is presumptively prejudicial."). A closer look at the record demonstrates that the attorney's responses to Craig's questions most definitely concerned "substantive law."

Craig asked her attorney-friend whether, as a juror, she had "any leeway at all for independent thought." While a juror certainly does enjoy that power, *United States v. Schmitz*, 525 F.2d 793, 794 (9th Cir. 1975) ("the jury has the inherent power to pardon one no matter how guilty"), judges asked that question usually only remind jurors to follow their instructions. Here, the attorney erroneously advised Juror Craig "that there was absolutely nothing else [she] could do." (ER 261, at ¶5); *cf. Lewis v. State*, 369 So.2d 667, 669 (Fla. Ct. App. 1979) ("[n]othing should be said by the trial court to the jury that would or could likely influence the decision of a single juror to abandon his conscientious belief

as to the correctness of his position") (quotation omitted).

The attorney also told Craig that a hung jury "could only happen if the Judge gives the jury some leeway in his instructions . . . [and you] could get into trouble if [you try] to do something outside those instructions." (ER 261, at ¶¶ 3-6) Both components of this advice were erroneous and imparted extraneous information. *First*, a juror is free to cause a deadlock regardless of whether the trial court gives her "leeway" to do so. *See United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977); *People v. Gainer*, 19 Cal.3d 835, 852 (1977). Without an admonition that the juror need not surrender her consciously held beliefs, the instruction was unduly coercive. *Cf. Rice v. United States*, 356 F.2d 709, 715-18 (8th Cir. 1966) (reversible error for bailiff to orally relay judge's instruction to jury that defendants must be found either guilty or not guilty on each count in response to note inquiring whether jury could be "undecided" on certain counts); *People v. Pankey*, 374 N.E.2d 1114, 1116-17 (Ill. Ct. App. 1978) (reversing battery conviction because judge improperly gave jury impression that there was no such thing as a hung jury); *see also United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) (reversible error to issue *Allen* instruction without admonition not to surrender conscientiously held beliefs); *United States v. Burley*, 460 F.2d 998, 1000 (3rd Cir. 1972) (any supplementary instruction regarding hung juries must be

supplemented with "a clear statement, or restatement, of each juror's responsibility to exercise independent judgment").

Second, and even more coercive, was the attorney's ominous warning to Craig that she would "get into trouble" if she maintained her consciously held beliefs. The judiciary eliminated the practice of punishing jurors for refusing to convict for reasons of conscience more than three centuries ago in *Bushnell's Case*. *See United States v. Thomas*, 116 F.3d 606, 615 (2nd Cir. 1997) ("Since . . . the famous opinion in *Bushnell's Case*, freeing a member of the jury arrested for voting to acquit William Penn against the weight of the evidence, nullifying jurors have been protected from being called to account for their verdicts"); *Finn v, United States*, 219 F.2d 894, 900 (9th Cir. 1955) ("Of course, in a criminal case a jury has the power to fly in the teeth of the evidence and the law and acquit a defendant; that is something that cannot be taken away from it.") (citing *Bushnell's Case*); *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2nd Cir.), *rev'd on other grounds*, 317 U.S. 269 (1942) (Hand, J.) ("[t]he individual can forfeit his liberty (to say nothing of his life) only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do"); *cf. United States v. Schmitz*, 525 F.2d 793, 794 (9th Cir. 1975) ("the jury has the inherent power to pardon one no matter how guilty").

It is widely recognized that "[p]ersonal considerations should not influence [jurors in their] conclusions; and the thought of them should never be presented to [them] as a motive for action." *Kesley v. United States*, 47 F.2d 453, 454 (5th Cir. 1931) (quotation omitted). By raising the spectre of punishment for holding to conscientiously held beliefs, the attorney injected new, and highly prejudicial information into the case. *Cf. Jenkins*, 380 U.S. at 446 ("the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration") (quoting Solicitor General's brief). The burden, therefore, fell to the government to negate even the "reasonable possibility" of prejudice. *See Remmer I*, 347 U.S. at 229; *Sea Hawk Seafoods*, 206 F.3d at 906.

E. The Government Did Not Meet Its Burden of Proving That The Extraneous Legal Advice Was Harmless Beyond A Reasonable Doubt

Rather than attempt to meet its burden of demonstrating the absence of prejudice, the government effectively blocked Rosenthal and the court from learning precisely what was said in Craig's conversation with the attorney. At the evidentiary hearing on the misconduct issue, the government refused to immunize Craig from an entirely unlikely prosecution for violating her oath, which caused her to assert her Fifth Amendment privilege. (*See* ER 266-68 [RT (4/1/03) at 23-25 & 56]) Standing alone, this uncertainty requires reversal. *Cf. Ah Fook Chang*

v. United States, 91 F.2d 805, 808-10 (9th Cir. 1937) (reversing conviction where trial court instructed jury foreman in chambers on unspecified point of law and jury foreman relayed those instructions to the jury; "[I]f the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal."); *see also Little v. United States*, 73 F.2d 861, 865 (10th Cir. 1934) ("the record is silent as to what occurred in the jury room. There is nothing therefore in this record to support a finding . . . that the error was harmless"); *Fina v. United States*, 46 F.2d 643, 644 (10th Cir. 1931) ("the record is silent as to what was said by the court to the jury. Hence to be required to show something as prejudicial on which the record is silent, and defendant had no opportunity to hear, would be requiring of the defendant the impossible. Such is not the law.").

F. The Record Demonstrates Actual Prejudice to Rosenthal

In any event, the record shows actual prejudice. Craig first revealed the improper communication with the attorney only minutes after she voted to convict Rosenthal and was informed by a spectator of her power to exercise her conscience. In her declaration, Juror Craig stated that she was "frustrated and confused" and "troubled" by what she heard at trial and that this motivated her to seek advice from her attorney-friend. (*See* ER 261, at ¶3); *cf. Dutkel*, 192 F.3d at

898 (evidence that juror was "disturbed and troubled" likely affected deliberations). That she violated the court's instructions to do this and was so persistent in her questions to the attorney about the possibility of a hung jury bespeak her intention to refuse to convict based on conscience, until she was scared into voting the other way by his threat of "trouble." Juror Klarkowski put it succinctly when she testified at the evidentiary hearing that she felt her choices were "narrowed" when she was told of the attorney's advice. (ER 273 [RT (4/1/03) at 41]); *cf. United States v. Navarro-Garcia*, 926 F.2d 818, 820 (9th Cir. 1991) (possibility of prejudice exists if the extrinsic information may have affected the reasoning of even one juror).[4]

The extraneous legal advice also affected the jurors' "freedom of action as [] juror[s]" during deliberations. *Cf. Dutkel*, 192 F.3d at 899 (quotation omitted). The fact that the jurors broached the subject of refusing to convict for reasons of conscience before deliberations clearly implies that they intended to raise this

---

[4] In reaching the opposite conclusion, the district court found it "[s]ignificant[] [that] neither juror Craig nor juror Klarkowski states in her declaration that she would have voted differently had it not been for Craig's ex parte contact." (ER 299) As the district court was well aware from its aggressive use of F.R.E. 606(b) to erroneously exclude paragraphs one through three of Craig's declaration (*see* ER 297 n.7), this was asking the impossible, since this Rule of Evidence forbids jurors from giving such testimony to impeach their verdict. *Maree*, 934 F.2d at 201.

possibility with the rest of the jury in deliberations had they not been threatened. Indeed, their behavior changed after they received the attorney's advice -- Juror Klarkowski testified that she and Craig intentionally hid their misconduct from a third juror by using coded language. (*See* ER 269-71) Such furtiveness almost certainly carried over into the jury room, causing the jurors to be "hesitant about engaging in the normal give and take of deliberations, for fear of giving [themselves] away." *See Dutkel*, 1923 F.3d at 898; *see also id.* (possibility of prejudice shown by evidence that extraneous information may have "altered [jurors'] demeanor in the jury room, which may have affected the jury's collective decision-making or the overall tenor of deliberations.").

Numerous courts have reversed convictions under far less egregious circumstances. In *United States v. Bensinger*, 492 F.2d 232 (7th Cir. 1974), the court reversed appellants' convictions for manslaughter because the bailiff told the jurors that they must reach a decision without admonishing them that no juror should relinquish his conscientiously held beliefs to join a majority verdict. *Id.* at 239. The court proclaimed: "[A]ny influence which emphasizes the importance of agreement to the exclusion of the dictates of conscience is coercive and prejudicial." *Id.* (citation omitted); *see also United States v. Gaffney*, 676 F.Supp. 1544, 1557 (M.D. Fla. 1987) (reversing conviction because juror sought advice

from attorney); *People v. Honeycutt*, 20 Cal.3d 150, 157, 141 Cal.Rptr. 698 (1977) (same; deeming such action "egregious misconduct"); *United States v. Heller*, 785 F.2d 1524, 1528 (11th Cir. 1986) (advice from accountant required new trial); *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980) (juror's consultation of medical dictionary required new trial); *McCray v. State*, 565 So.2d 673, 674-75 (Ala. Ct. Crim. App. 1990) (juror's reading of pattern instructions required new trial).

Similarly, in *Kesley v. United States*, 47 F.2d 453 (5th Cir. 1931), the court reversed defendant's convictions for unlawfully transporting intoxicating liquors because the trial court warned the jury that they were "violating the sacredness of [their] oaths as jurors" by failing to reach a verdict. *Id.* at 453. After explaining that personal considerations should not be brought to bear on the jurors' deliberative process, the reviewing court explained that such warning "might be interpreted as a threat of punishment as for contempt of court," and, thus, constituted reversible error. *See id.* at 454 (citation omitted). The improper and coercive impact of the attorney-friend's extrajudicial advice requires a new trial for the same reason.

/ / /

/ / /

VII. THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY THAT IT WAS NOT TO BRING ITS "SENSE OF JUSTICE" TO BEAR ON THIS CASE

A. Introduction and Standard of Review

On its own motion, the district court instructed the jury during Rosenthal's closing argument: "Ladies and gentlemen, you cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not." (ER 209) While a trial court need not affirmatively instruct the jury on its power to render a verdict based on reasons of conscience, it may not actively interfere with this historical power. The district court's absolute prohibition on the jury bringing its "sense of justice" to bear on this case improperly divested it of its historical function.

Whether a judge has coerced a jury's verdict is a mixed question of law and fact which this Court reviews *de novo*. *Jimenez v. Myers*, 40 F.3d 976, 979 (9th Cir. 1993).

B. The Plenary Power Of The Jury To Acquit

Since colonial juries refused to convict Peter Zenger of seditious libel, despite his admission that he committed the crime, numerous courts, including this one, have affirmed the jury's "power to acquit an accused, even though the evidence of his guilt may be clear." *United States v. Simpson*, 460 F.2d 515, 519-

520 (9th Cir. 1972) ; *see Sparf v. United States*, 156 U.S. 51, 70 (1895); *United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980) ("In criminal cases, a jury is entitled to acquit the defendant because it has not sympathy for the government's position. It has a general veto power"); *United States v. Schmitz*, 525 F.2d 793, 794 (9th Cir. 1975) ("the jury has the inherent power to pardon one no matter how guilty")

Courts have struck a delicate balance, which provides a "play in the joints" through the jury's "act[ing] as a 'safety valve' for exceptional cases," by not instructing the jury of its historical power, while not actively interfering with its exercise. *See United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972). Because this delicate balance serves a vital role in our democratic system of government, this Court has recognized that "American judges have generally avoided such interference as would divest juries of their power to acquit an accused, even though the evidence of his guilt may be clear." *Simpson*, 460 F.2d at 520.

C. The District Court Improperly Intruded Upon the Province of the Jury in Instructing It Not to Bring Its "Sense Of Justice" to Bear on This Case

Rather than abide this Court's admonition that "the comments of the judge should be carefully guarded, so that the jurors shall be free to use their

independent judgment," *Carney v. United States*, 295 F. 606, 607 (9th Cir. 1924), the district court stripped it of its historical function by explicitly and forcefully instructing it explicitly that it was not to bring its "sense of justice" to bear on the case. In *Finn v. United States*, 219 F.2d 894 (9th Cir. 1955), this Court found unduly "harsh" the trial court's instruction: "The importance of your duties requires that you consider the right of the Government of the United States to have its law properly executed, and that it is with you, citizens who are selected from this district, that finally rests the duty of determining the guilt or the innocence of those accused of crime, and unless you do your duty, the laws may just as well be stricken from the statute books." *Id.* at 902. This Court recognized: "[I]n a criminal case a jury has the power to fly in the teeth of the evidence and the law and acquit a defendant; *that is something that cannot be taken away from it*." *Id.* at 900 (citing *Bushell's Case*, 124 Eng.Rep. 1006) (emphasis added).

Likewise, in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), the court recognized "the jury as the conscience of the community," and noted that a politically sensitive prosecution is "particularly one to which a community standard or conscience was, in the jury's discretion, to be applied." *Id.* at 182 & 183. In reversing appellant's conviction for resisting the draft because the judge submitted special questions to the jury, the court emphasized that "[i]n the exercise

of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent. . . . any [such] abridgment or modification of th[e] institution [of the jury] would partly restrict its historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case." *Id.* at 181 (citations and quotation omitted); *see also United States v. McCracken*, 488 F.2d 406, 419 (5th Cir. 1974) ("A general verdict insures the input of compassion into a jury's decisional process. . . .'the jury [serves] as [the] conscience of the community'") (quoting *Spock*, 416 F.2d at 182).

Here, the district court was even more coercive in its requiring the jury to surrender its conscientiously held beliefs, as it explicitly removed from the jury any ability to bring its "sense of justice" to bear on its verdict. Thus, by taking the "justice" out of our criminal justice system and stripping the jury of its historical function, the district court committed yet another reversible error. *Cf. Spock*, 416 F.2d at 183; *Finn*, 219 F.2d at 902; *United States v. Garaway*, 425 F.2d 185, 185 (9th Cir. 1970) (instruction that jury had duty to return guilty verdict "was an unwarranted invasion by the court of the province of the jury," requiring reversal of defendant's conviction); *see also United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) ("If cases grappling with *Allen* have a common trend, it is this: the

integrity of individual conscience in the jury deliberation process must not be compromised.").

VIII. THE DISTRICT COURT ERRED IN FAILING TO HOLD A *FRANKS* HEARING AND TO SUPPRESS THE FRUITS OF AN UNCONSTITUTIONAL SEARCH OF ROSENTHAL'S BUSINESS

A. Introduction And Standard of Review

Nearly all of the evidence introduced at trial against Rosenthal was obtained from a February 12, 2002, search of 1419 Mandela Parkway ("Mandela"), which was executed pursuant to a warrant issued four days earlier. (*See* ER 33) The warrant, in turn, was obtained through deliberately false statements by the affiant, DEA Special Agent Jon Pickette, to cover up the affidavit's other deficiencies. The district court erred in denying Rosenthal's motion for a *Franks* hearing and to suppress the fruits of the unconstitutional search. (ER 78-81 [CR 74])

B. Legal Standards

Because a police officer violates the Fourth Amendment if he "recklessly or knowingly includes false material information in, or omits material information from, a search warrant affidavit," *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1295 (9th Cir. 1999), a defendant is entitled to an evidentiary hearing if he makes a "substantial preliminary showing that a [material] false

statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). "If the allegedly false statement is necessary to the finding of probable cause, . . . the search warrant must be voided and the fruits of the search excluded," notwithstanding a claim of good-faith reliance on a facially valid warrant. *Id.*; *United States v. Leon*, 468 U.S.897, 923 (1984) (citing *Franks*). The inquiry is whether the totality of the circumstances, purged of the false information, provides a substantial basis to support a finding of probable cause. *See Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) (citation omitted); *Franks*, 438 U.S. at 156.

This Court reviews *de novo* the district court's determination of probable cause in a case with redacted affidavits. *United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992).

C. The Redacted Warrant Application Lacked Probable Cause

The claimed basis for probable cause to search Mandela consisted of: a tip from an unnamed informant with an extensive history of dishonest criminal activity that Rosenthal "operates a marijuana cultivation operation across the street from an old Carnation dairy in Oakland, California" (ER 37-38 n.5 & 54-55, at ¶69); a letter from a medical marijuana competitor alleging that Rosenthal "moved

his marijuana cultivation operation from Oakland to San Francisco" and that he "sublets a basement at HARM to cultivate marijuana for sale" (ER 46, at ¶32(c)); surveillance revealing various innocuous facts such as Rosenthal's ownership of Mandela and a publishing company which produces books on marijuana cultivation and legal policy (ER 54-55, at ¶69 & 57-58, at ¶¶74 & 74); a charge against Rosenthal for marijuana possession with intent to sell that was dismissed in 1995 (ER 58, at ¶75); he once carried a small white bag from Mandela to the HRC (ER 56, at ¶¶72(b) & (c); ER 80 [RT (1/8/03) at 17]); someone driving a jeep with horticulture trays parked at Mandela and carried a fan inside (ER 59-60, at ¶78(b)); there was an air conditioner running at Mandela in fifty degree weather (ER 55, at ¶71), and the building used a "significant amount" of electricity (ER 59, at ¶77). In addition, Agent Pickette averred that he "detected a strong odor of marijuana directly in front of the building," and the "structure is a commercial building with no windows or any indications of being a legitimate business." (ER 55 & 59, at ¶¶71 & 77)

Before trial, Rosenthal established the lack of reliability of the informants' largely uncorroborated statements. (*See* CR 74 at 9-10) More importantly, he demonstrated that there were, in fact, windows at Mandela (*see* ER 75-77) and that Agent Pickette could not possibly have smelled a strong odor of marijuana

emanating from Mandela, since the young clones grown by Rosenthal were not capable of discharging such odor, (ER 31-32); *cf. United States v. Johns*, 851 F.2d 1131, 1134 (9th Cir. 1988) (*Franks*' requirement for substantial preliminary showing satisfied by evidence from expert that scientific impossibility precluded officer from smelling contraband). Based on this showing, the district court set aside these statements of Agent Pickette and those of the informants, yet still found probable cause to search Mandela based primarily on the "high" electricity usage at Mandela. (ER 78-81) This is precisely the sort of analysis rejected by this Court in *United States v. Clark*, 31 F.3d 831 (9th Cir. 1994).

In *Clark*, this Court found that there was no basis for the magistrate or a reviewing court to evaluate the affidavit's assertion that electrical usage was "unusually high" because the affidavit was "barren . . . of any information about the average residential consumption of homes in rural Alaska or other homes in the vicinity." *Id.* at 835. This Court held that, even if such electrical consumption was "high", "such consumption is consistent with numerous entirely legal activities," which cannot form the basis for probable cause to search a home. *Id.* The affidavit in this case is just as deficient.

Nor can the other innocuous conduct described in the affidavit serve to create probable cause. Rosenthal's ownership of Mandela and a publishing

company that publishes literature on marijuana policy is mere innocent conduct that is protected by the First Amendment. *Cf. United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993) ("The fact that a suspect lives at a particular location or drives a particular car does not provide any indication of criminal activity"). Rosenthal's arrest, and the subsequent dismissal of the charges against him for *possession* of marijuana, albeit with the intent to sell, does not point to a propensity to *cultivate* marijuana. Furthermore, there is nothing unusual about Rosenthal, himself a medical marijuana patient, visiting the HRC with a small bag; nor for a business to run a single air conditioner. If these innocuous details could form the basis for probable cause to search a business, nearly every business could be searched on the mere whim of any police officer. The Fourth Amendment forbids precisely such conduct. *Cf. Clark*, 31 F.3d at 835; *State v. Norris*, 47 S.W.3d 457, 469-70 (Tenn. Crim. App. 2000) (no probable cause existed where affidavit offered only conclusory statements about the result of thermal imaging scan and analysis of electrical records, plus evidence that defendant's windows were painted black and that they were arrested for growing marijuana six months before) (cited in *United States v. Huggins*, 299 F.3d 1039, 1049 n.11 (9th Cir. 2002)).

//

The district court erred in failing to suppress the evidence seized at Mandela, requiring reversal.

CONCLUSION

For the foregoing reasons, Rosenthal's convictions should be reversed.

Dated: November 24, 2003

Respectfully submitted,

DENNIS P. RIORDAN
DONALD M. HORGAN
RIORDAN & HORGAN

JOSEPH D. ELFORD

By: _____
DENNIS P. RIORDAN

By: _____
JOSEPH D. ELFORD

Attorneys for Defendant
EDWARD ROSENTHAL