

1 ROBERT AMPARÁN, SBN 172132
SHARI L. GREENBERGER, SBN 180438
2 OMAR FIGUEROA, SBN 196650
506 Broadway
3 San Francisco CA 94133
Telephone: 415/986-5591

4 Attorneys for Defendant
5 EDWARD ROSENTHAL

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

10
11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 EDWARD ROSENTHAL,

15 Defendant.

CR 02-0053 CRB

NOTICE OF MOTION AND
MOTION FOR NEW TRIAL

Date: TO BE SET

Time:

16
17 TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE OFFICE OF
THE UNITED STATES ATTORNEY:

18 PLEASE TAKE NOTICE that on a date and at a time to be
19 indicated, defendant EDWARD ROSENTHAL, through counsel, will and
20 hereby does move the United States District Court for the
21 Northern District of California for an order granting a new
22 trial in the interests of justice, because the Court system-
23 atically restricted Mr. Rosenthal from presenting a defense.

24 This motion is made pursuant to Rule 33 of the Federal
25 Rules of Criminal Procedure, as well as the Fifth and Sixth
26 Amendments to the Constitution of the United States.

27 Separate and apart from the present Motion for a New
28 Trial, Mr. Rosenthal wishes to retain new counsel to review the

1 entire trial record to identify all issues presented for
2 purposes of a new trial motion, as well as appellate relief,
3 effectively allowing a new set of eyes to identify and address
4 further issues not presently set forth by counsel.

5 This motion is based on this notice, the following
6 memorandum of points and authorities, on the files and records
7 in this case, the trial transcript, and on such other and
8 further oral and documentary evidence as may be presented at or
9 before the hearing on this motion.

10 Dated: June 11, 2007

11 Respectfully submitted,

12 ROBERT AMPARÁN
13 SHARI L. GREENBERGER
14 OMAR FIGUEROA
15 Attorneys for Defendant
16 ED ROSENTHAL

17 /s/ ROBERT AMPARÁN
18 by ROBERT AMPARÁN

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 **MR. ROSENTHAL'S MOTION FOR A NEW TRIAL MUST**
4 **BE GRANTED IN THE INTEREST OF JUSTICE**

5 On motion of the defendant, the court may grant a new
6 trial if required in the interest of justice. Federal Rules of
7 Criminal Procedure 33(a); United States v. Ramirez, 313
8 F.Supp.2d 276 (2004, SD NY). The present case and the
9 accompanying transcripts present novel issues. During trial,
10 the United States District Court for the Northern District of
11 California prevented Mr. Rosenthal from presenting his defense,
12 thus denying him his right to a fair and impartial trial, in
13 violation of his due process rights. Therefore, in the interest
14 of justice, Mr. Rosenthal respectfully urges this Court to grant
15 him a new trial.

16 A. The Court Erred in Denying Defendant a Jury of His
17 Peers and Misleading the Jury as to the Relevancy of Medical
18 Marijuana.

19 The Court erred in eliminating from the jury pool
20 California citizens who voted for Proposition 215, and or
21 supported medical marijuana, thereby denying Mr. Rosenthal a
22 fair cross section of the community and a jury of his peers.
23 Additionally, the Court did not properly use the *voir dire*
24 process to rehabilitate the potential jurors.

25 After exercising all peremptory challenges, Mr. Rosenthal
26 was still denied a jury of his peers: sixty percent of the jury
27 pool had been excused because of their views regarding medical
28 marijuana. As elucidated by prospective juror Richard

1 Thalheimer, CEO of The Sharper Image:

2 Three reasons why I could not be fair and
3 impartial. First of all, my strong beliefs
4 about medical marijuana. Two, a belief
5 that this trial is an unfortunate
6 scapegoating of Mr. Rosenthal by federal
7 prosecutors who wish to act on political
8 grounds rather than legal grounds. And
9 three, a belief that by eliminating so many
10 people who have strongly held beliefs, Mr.
11 Rosenthal is being deprived of a jury by
12 his peers. So for all those reasons, I
13 think it's tremendously unfortunate that my
14 time is being wasted and our taxpayer's
15 money is being wasted.

16 Trial Transcript, May 14, 2005, page 101,
17 lines 24-25; page 102, lines 1-9.

18 Defense counsel contends that, given the unprecedented
19 nature of the proceedings, the Court should have empaneled a
20 class of individuals representing a jury of the defendant's
21 peers, both impartial and drawn from a fair cross section of the
22 community in conformity with the requirements of the Sixth
23 Amendment to the Constitution. Uttecht v. Brown, 2007 U.S.
24 LEXIS 6965 (2007).

25 A defendant has the right to an impartial jury, including
26 defendant's right to examination designed to ascertain possible
27 prejudices of prospective jurors. United States v. Lewin, 467
28 F2d 1132 (7th Cir. 1972).

29 Thus, the trial judge has a duty to neutralize the effect
30 of any known area of prejudice, and one effective means of
31 ensuring impartiality is the *voir dire* proceedings, during which
32 questioning should expose any latent bias entertained by
33 prospective jurors. United States v. Bear Runner, 502 F2d 908
34 (8th Cir. 1974).

35 Moreover, if there is any reason to believe that jurors

1 have been exposed to prejudicial information, the trial judge is
2 obligated to investigate the effect of that exposure on the
3 outcome of trial. United States v. Vento, 533 F.2d 838 (3rd Cir.
4 1976) (negative unrelated treatment regarding warrantless search
5 of automobiles).

6 Although there is no generally accepted formula for deter-
7 mining the appropriate breadth and depth of *voir dire*, a court's
8 discretion is nevertheless subject to essential demands of
9 fairness. United States v. Dellinger, 472 F.2d 340 (7th Cir.
10 1972), 22 ALR Fed 159, *cert. denied* 410 US 970, 35 L.Ed.2d 706,
11 93 S.Ct 1443 (1973).

12 During *voir dire* in the trial of this matter, the Court
13 abused its discretion, disregarding all notions of fairness.
14 Rather, than empaneling a jury of Mr. Rosenthal's peers, the
15 Court excluded over sixty percent of the potential jurors based
16 solely on their views of medical marijuana, which aligned with
17 the defendant's views.

18 Moreover, the Court erred in questioning the jury pool
19 regarding medical marijuana in *voir dire* because the Court had
20 previously ruled that the defense of medical marijuana, and Mr.
21 Rosenthal's state of mind thereto, was irrelevant. "[A] judge
22 may commit errors ... [b]y misleading the jury by a wrong
23 statement to them of what the evidence really is." If a judge
24 "misstates the thing to be proved, or the object for which it is
25 intended, or its legal bearing; this is error." Carver v.
26 Jackson (1830) 29 U.S. 1, 122.

27 Generally, a trial judge's conduct is not grounds for new
28 trial where anecdotes, rambling stories, and questioning of

1 witnesses complained of were supported solely by a single
2 incident relating to an issue as to which there was no factual
3 dispute. United States v. Johnson, 487 F.2d 1318 (5th Cir.
4 1974), *cert. denied* (1974) 419 U.S. 825, 42 L.Ed.2d 48, 95 S.Ct.
5 41. However, that was not the situation in the present case.
6 Here, the district court methodically questioned each juror as
7 to his or her views on medical marijuana, thereafter instructing
8 the jurors that medical marijuana was irrelevant at trial. The
9 Court's comments misled and confused the jurors, substantially
10 prejudicing the defendant from receiving a fair trial; thus
11 warranting a new trial in the interests of justice.

12 B. The Court Erred in Dissecting the Ninth Circuit Model
13 Instruction of "Knowingly," Eliminating the Absence of Mistake,
14 Ignorance or Accident.

15 The Court's modification of the Ninth Circuit Model
16 Instruction of "knowingly" deprived Mr. Rosenthal a defense in
17 the present case, which would have exonerated him of the present
18 charges.

19 Prior to trial, the defense submitted over twenty special
20 jury instructions for the Court's ruling. The government
21 similarly submitted its own set of jury instructions prior to
22 trial. At a pretrial hearing on such issues, the Court pre-
23 cluded the defense from arguing any instruction of "knowingly,"
24 other than the Ninth Circuit Model Jury Instruction.

25 The defense relied on the Court's ruling and strategically
26 shaped its defense accordingly. However, after the trial had
27 begun and prior to closing arguments, the Court *sua sponte* and
28 advised the parties that the Ninth Circuit Model Jury Instruc-

1 tion should be tailored to exclude the "absence of mistake,
2 ignorance or accident" on the grounds that there was no basis in
3 the record to substantiate such an instruction. (Trial
4 Transcript, May 25, 2005, pages 1405-1510.)

5 In United States v. Cornett, the appellate court would not
6 consider defendant's claim that the trial court erred in
7 instructions concerning the word "knowingly" where defense
8 counsel did not object to the court's instructions either at the
9 conclusion of giving instructions or following reinstruction of
10 the jury upon the jury's request for the definition of "know-
11 ingly", despite the court's invitation to counsel in each
12 instance to make objections. 484 F.2d 1365 (6th Cir. 1973).

13 In the present case, defense counsel clearly objected to
14 the Court's instruction immediately upon the Court's rewriting
15 of the the Ninth Circuit Model Instruction, which the Court
16 previously stated it would use to instruct the jury.

17 AMPARÁN:I think the Court has said it's
18 going to follow the Ninth Circuit instruc-
19 tions on the issue, and we would just ask
20 the Court continue to do so without struc-
21 turing the instructions in anticipation of
22 what the defense may do in its closing
23 argument.

24 Trial Transcript: May 25, 2007, pg 1407,
25 line 24-25; pg 1408, line 1-3.

26 First, the Court's action of dissecting and excising an
27 element of the charge against Mr. Rosenthal constitutes funda-
28 mental error, requiring a new trial.

29 The failure of a trial judge to instruct the jury as to
30 the nature and elements of defendant's alleged offenses was held
31 to constitute error so fundamental that the appellate court

1 would take note of it even though the defendant had not
2 requested instructions. United States v. Noble, 155 F.2d 315
3 (3rd Cir. 1946); see also United States v. Hutchison, 338 F.2d
4 991 (4th Cir. 1964) (Court of Appeals will not affirm conviction
5 by jury unless District Court instructs as to elements of
6 offense charged in information or indictment, whether requested
7 or not).

8 Second, the Court's action of removing specific aspects of
9 the definition of the word "knowingly," which the Court had
10 previously represented would be presented in the jury instruc-
11 tion, substantially burdened and restricted the defendant's
12 closing argument, thereby prejudicing Mr. Rosenthal.

13 Under Federal Rule of Criminal Procedure 30:

14 [C]ounsel should be informed of all
15 instructions that will be given to jury,
16 and to read Rule 30 as being applicable
17 only to instructions proposed by counsel
18 would emasculate its purpose which is in
19 part to allow counsel, knowing instructions
20 to be given, to effectively argue his case
21 to jury.

22 United States v. Bass, 425 F.2d 161 (7th Cir. 1970)

23 Moreover, a judge who, after considerable time was devoted
24 to discussing the charges to be given to the jury, and written
25 requests by all parties were received by the court, stated that
26 he "never" gave instructions in the exact language proposed by
27 counsel, substantially abandoned the concept of Rule 30 and
28 counsel was therefore burdened in presenting closing arguments.
29 United States v. Gallagher, 576 F.2d 1028 (3rd Cir. 1978), 3 Fed
30 Rules Evid Serv 218.

31 Here, the Court effectuated a last-minute limitation on

1 Mr. Rosenthal's defense in anticipation that the jury would
2 interpret "absence of mistake, ignorance or accident" as a
3 potential defense to Mr. Rosenthal's actions. The Court's
4 actions effectively eliminated an element of the charges against
5 Mr. Rosenthal and impaired defense counsel's closing argument,
6 warranting a new trial.

7 C. Judicial Error in Comments to the Jury Post-Jury
8 Deliberation.

9 The Court committed post-conviction error through its
10 judicial comments to the jury after deliberations had concluded.
11 However, defense counsel is prevented from providing further
12 information regarding either the source of this information or
13 details regarding the judicial comment because the juror-
14 declarant has not provided counsel with permission to disclose
15 further information regarding this issue at this time.

16 Therefore, defense counsel cannot further brief this
17 issue.

18 D. Edward Rosenthal Did Not Receive a Fair and Impartial
19 Trial Due to the Court's Rulings Which Unfairly Restricted Him
20 from Presenting His Defense.

21 Due to the unique nature of the present prosecution and
22 the unprecedented issues raised during trial, the Court should
23 have permitted Mr. Rosenthal to adequately present all of the
24 facts surrounding the commission of the charged offenses in
25 order to properly allow for a fair adjudication of all issues.
26 However, as delineated below, from the inception of the trial
27 the district court restricted Mr. Rosenthal from presenting his
28 state of mind, which could have vindicated him, and the preju-

1 dice which ensued resulted in his convictions.

2 1. *Unfair Restriction on Closing Argument.*

3 From the inception of defense counsel's involvement in the
4 present trial, defense counsel attacked the credibility of the
5 government's case and its witnesses. Accordingly, during
6 defense's closing argument, counsel continued to attack the
7 government's case and the credibility of the government's
8 witnesses. Although counsel's argument was proper, the Court
9 stopped the proceedings, excused the jury and admonished defense
10 counsel. Seeking to avoid further interruption, defense counsel
11 decided to preview eight areas of comment on credibility. The
12 Court excluded all areas previewed, despite the fact that such
13 argument was proper.

14 The basic purpose of a closing argument is to persuade the
15 jury to a particular view or evaluation of the evidence:
16 "persuasive summation of the facts admitted into evidence is the
17 very purpose of closing argument." United States v. Jones, 194
18 F.3d 1178, 1181 (10th Cir. 1999) (negative unrelated treatment).

19 The scope of closing argument is broad. Counsel are given
20 considerable latitude to argue their positions by emphasizing
21 their major contentions, summarizing and evaluating the evidence
22 in the light most favorable to their positions, and commenting
23 on the credibility of witnesses. United States v. Cotton, 631
24 F.2d 63, 66 (5th Cir. 1980); see United States v. Washington, 44
25 F.3d 1271, 1279 (5th Cir. 1995) (permissible to argue that
26 witness was lying in light of inconsistent facts or testimony)
27 (negative unrelated treatment regarding sentence enhancement).
28 Counsel may argue reasonable inferences from the evidence. See

1 United States v. Young (1985) 470 U.S. 1, 9 n.7, 105 S.Ct. 1038
2 (citing ABA Standard for Criminal Justice).

3 If the argument is clearly improper, the court may inter-
4 rupt the argument and admonish counsel even without objection.

5 United States v. Young (1985) 470 U.S. 1, 105 S.Ct. 1038.

6 Nonetheless, interruption of arguments by opposing counsel or
7 the presiding judge is to be approached cautiously. *Id.* at
8 10-13.

9 In the present case, defense counsel was thwarted from
10 zealously presenting argument on behalf of Mr. Rosenthal. At
11 all times, defense counsel's argument was appropriately
12 commenting on the credibility of the government case and its
13 witnesses. Counsel's argument was not improper; however, the
14 Court incautiously interrupted counsel throughout the closing
15 argument, and brought the argument to a complete halt mid-way
16 through.

17 Defense counsel submits that entire portions of the
18 argument were excised simply because the Court did not like the
19 analogies and contents of the argument, without good cause.

20 2. *Preclusion of Relevant Witnesses.*

21 The Court erred in precluding all witnesses who would
22 corroborate Mr. Rosenthal's defense. The district court ruled
23 that such witnesses were irrelevant to the proceedings.

24 One such witness was Carol Ruth Silver. Defense counsel
25 sought to examine Ms. Silver; the Court advised counsel that she
26 would not be testifying because her testimony was irrelevant.

27 However, the next day the Court admitted Exhibit 83, a document
28 authored by Ms. Silver, regarding a small claims suit. Trial

1 Transcript, May 23, 2007, page 1279; lines 1-10.

2 _____Defense submits that Ms. Silver's testimony was highly
3 relevant due to the fact that a document authored by such
4 witness was thereafter admitted. Similarly, each witness
5 excluded by the Court was relevant to Mr. Rosenthal's defense.

6 The Sixth Amendment provides, in part: "In all criminal
7 prosecutions, the accused shall enjoy the right ... to have
8 compulsory process for obtaining witnesses in his favor...."
9 Washington v. Texas (1967) 388 U.S. 14, 17-19. Moreover, the
10 Supreme Court in In re Oliver (1948) 333 U.S. 257, described
11 what it regarded as the most basic ingredients of due process of
12 law. It observed that:

13 A person's right to reasonable notice of a
14 charge against him, and an opportunity to
15 be heard in his defense -- a right to his
16 day in court -- are basic in our system of
17 jurisprudence; and these rights include, as
18 a minimum, a right to examine the witnesses
19 against him, to offer testimony, and to be
20 represented by counsel. In re Oliver, 333
21 U.S., at 273 (footnote omitted).

22 Washington v. Texas (1967) 388 U.S. 14, 18.

23 The right to offer the testimony of wit-
24 nesses, and to compel their attendance, if
25 necessary, is in plain terms the right to
26 present a defense, the right to present the
27 defendant's version of the facts as well as
28 the prosecution's to the jury so it may
29 decide where the truth lies. Just as an
30 accused has the right to confront the
31 prosecution's witnesses for the purpose of
32 challenging their testimony, he has the
33 right to present his own witnesses to
34 establish a defense. This right is a
35 fundamental element of due process of law.

36 *Id.* at 19.

37 Likewise the defense submits that Ms. Silver, Nate Miley,
38 Joe DeVries, Barbara Parker, members of the Oakland Fire

1 Department and other witnesses that the Court precluded from
2 testifying were highly relevant to Mr. Rosenthal's state of mind
3 and overall defense. Therefore, the Court's exclusion of such
4 witnesses violated Mr. Rosenthal's Sixth Amendment right to
5 produce witnesses, further warranting a new trial.

6 3. *Restriction of Defense Counsel From Challenging*
7 *Foundation.*

8 Defense counsel timely objected to the admission of
9 records that were admitted without proper foundation. In one
10 instance defense counsel sought to recall William McRrea to lay
11 the foundation and authenticate financial documents.

12 AMPARÁN: We wish to address the issue of
13 the Court's admitting the records related
14 to McCalif Growers on the grounds of lack
15 of foundation.

16 COURT: Well, the Government ought to get
17 Mr. Whatever his name is. What is the basis
18 of the objection?

19 AMPARÁN: The basis of the objection is
20 that as a CFO he has no basis to say
21 whether or not business records or any
22 other exception to the hearsay rule in the
23 terms of foundation for admissibility, how
24 -- he is not the custodian of records. He
25 can't say whether or not records are kept
26 in the usually course and scope.

27 COURT: Why can't -

28 AMPARÁN: He didn't supervise the people
doing the work.

 COURT: Why can't he say that these records
were kept in the ordinary course of
business?

 AMPARÁN: Because he has no foundation to
say that.

 Trial Transcripts, May 15, 2007, page 352, lines 17-
25; page 353, lines 1-10.

1 COURT: Fine. We'll put him back on at
2 your request, and let me see what the --
3 let me look. Business records exception; is
4 that right?

5 Trial Transcripts, May 15, 2007, page 354, lines 4-6

6 However, despite counsel's well-grounded request, the
7 Court adamantly opposed recalling the witness. After much
8 discussion and forceful admonitions from the Court, defense
9 counsel was permitted to recall the witness. Nevertheless, the
10 Court sent a clear message that it would not permit the defense
11 to challenge foundation unless the defense represented to the
12 Court that it had a "good faith belief" that the evidence was
13 not authentic.

14 COURT: Now, Mr. Amparán, I want it clear,
15 you want to bring this person back because
16 it is your belief that those are not
17 records kept in the ordinary course of
18 business.

19 AMPARÁN: That's not my statement.

20 COURT: Your statement is what? Do you
21 believe that they are records kept in the
22 ordinary course of business or not?

23 AMPARÁN: I have no belief.... It's my job
24 to challenge them.

25 COURT: No, it's not your job to challenge
26 everything that comes in. It's your job
27 when you make a representation of the Court
28 to make a representation made upon good
29 faith.

30 . . .

31 AMPARÁN: No, 1, I did not say whether or
32 not I believe these to be true and accurate
33 records or not. What I challenged was the
34 foundation of information and evidence that
35 was presented in court by this witnesses to
36 their admissibility. I do believe it is my
37 job to represent my client zealously
38 between boundaries of the law and to
39 challenge the evidence of the case as
40 presented by the Government.

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. . .

COURT: Do you or do you not believe that these documents were kept in the ordinary course of business? Yes or no?

AMPARÁN: Neither I nor the Court nor counsel has any information at this point to make a decision.

. . .

AMPARÁN: Based on this witness' testimony, I don't believe the foundation is there.

COURT: I didn't ask the question whether the foundation -- the whole question, which apparently you don't even understand, the whole question is not whether or not a foundation has been laid, because I grant you, I thought I heard foundational questions. But I could be in error. And that is why I'm bringing him back.

Trial Transcripts, May 15, 2005, pages 355-358.

Federal Rules of Evidence Rule 901(a) requires the authentication or identification of a financial document as a condition precedent to admissibility. Although this condition is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims, the district court would not allow defense counsel to proceed in ensuring such foundation was established. United States v. Coohy, 11 F.3d 97, 99 (8th Cir. 1993); United States v. Musal, 421 F.Supp.2d 1153, 1166 (D. Iowa 2006).

Rather than permitting counsel to challenge such minimal foundation requirements, the Court asserted that counsel must show a good faith belief that such documents were not authentic. The Court misstated the legal requirement, thus prejudicing the

1 defendant¹ and creating a chilling effect for the remainder of
2 the trial.

3 4. *Denial of Defendant's Jury Instructions in*
4 *Entirety and Dissecting the Ninth Circuit Model Jury*
5 *Instructions.*

6 See Section B.

7 5. *Failure of Court to Respond in Writing to the*
8 *Defense Motions*²

9 E. The Court Erred In Excluding All Evidence Regarding
10 the Scientific Value of Medical Marijuana.

11 The Court erred in excluding all evidence as to the
12 medical value of marijuana, established under scientific
13 findings, without an evidentiary hearing to further address the
14 issues. The defense submits that due to the unique nature of
15 the charges and the underlying facts relating thereto, the
16 compilation of data reflecting the scientific value of marijuana
17 was highly important in edifying the Court and the jury. More-
18 over, the defense contends that pursuant to notions of funda-
19 mental fairness, at the very least an evidentiary hearing was
20 warranted for the defense to present argument on the issue.

21
22 ¹ During the prosecution's case in chief, disparaging
23 comments by the Court were made to defense counsel, in front of
24 the jury, implying that the delay in the trial was attributable
to the defense, thereby further prejudicing Mr. Rosenthal.

25 ² Written opinions by this Court have not been issued on
26 the denials of all defense motions and *in limine* motions, which
27 contain matters which are relevant and salient to a motion for
28 new trial, including but not limited to the admission of Mr.
Rosenthal's state of mind, selective prosecution, motion for
recusal of prosecutor due to prosecutorial misconduct, ie. RICO
violations, and defense special jury instructions. During
pretrial motions hearings, the district court indicated its
intention to issue a written opinion on these denials.

1 F. Mr. Rosenthal's Motion For a New Trial Must Be Granted
2 Because He Was Denied the Fundamental Right to a Public Trial.

3 A defendant has a right to a public trial. Denial of that
4 fundamental right constitutes a structural defect because it
5 affects the framework within which the trial proceeds. United
6 States v. Gonzalez-Lopez (2006) 126 S.Ct. 2557, 2564. For
7 purposes of appellate review in criminal cases, the federal
8 constitutional errors that defy analysis by harmless-error
9 standards include: (1) the denial of counsel of choice, (2) the
10 denial of the right of self-representation, (3) the denial of
11 the right to a public trial, and (4) the denial of the right to
12 trial by jury by the giving of a defective reasonable-doubt
13 instruction. *Id.*

14 In Waller v. Georgia, the Supreme Court held that a
15 "defendant should not be required to prove specific prejudice in
16 order to obtain relief for a violation of the public-trial
17 guarantee." Waller v. Georgia (1984) 467 U.S. 39, 49. The Court
18 noted that a violation of the public-trial guarantee is not
19 subject to harmless review because "the benefits of a public
20 trial are frequently intangible, difficult to prove, or a matter
21 of chance." *Id.* at 49. n 9.

22 Here, Mr. Rosenthal's right to a public trial was violated
23 despite objection by the defense. Specifically, on May 15,
24 2007, the defense objected to showing to the jury a video which
25 could not be seen by the public. Trial Transcript, page 373,
26 lines 20-21. The screen where the video was shown was positioned
27 so that the back of the screen faced the audience, who could not
28 see what was being shown because they could only see the back of

1 the screen. This video was designated as Prosecution Exhibit 7,
2 consisting of a CD, number 3 of 3 (CD version of Exhibit 6, mini
3 DVD tapes containing video taken by DEA Agent Tuey of the search
4 at 1419 Mandela). The defense renewed the grounds for the
5 objection after the video was shown, asking that the public be
6 allowed to see it as well. Trial Transcript, page 374, lines
7 10-11.

8 Outside the presence of the jury, the defense clarified
9 for the record that the video was "not visible to members of the
10 public who are present." Trial Transcript, page 380, lines
11 12-17. Judge Breyer acknowledged that the Court was concerned:
12 "What I think we'll do is [] put in another screen. And then you
13 could advise the members of the public we will have a separate
14 showing and I'll allow them to play the video [] -- to the
15 public. If anyone is interested in watching it, they may watch
16 it. That is separately, out the presence of the jury." Trial
17 Transcript, page 380, lines 18-25.

18 However, the video was never exhibited to the public, with
19 or without the jury present.

20 Clearly, Mr. Rosenthal's fundamental right to a public
21 trial was violated, and he need not make any showing of
22 prejudice. On this ground alone, his motion for a new trial
23 must be granted.

24 G. The Court Erred in Restricting Defendant's Right to
25 Testify.

26 The Court denied Mr. Rosenthal's right to testify by
27 limiting his ability to present evidence to corroborate his
28 testimony:

1 COURT: You are permitted now to make an
2 offer of proof as to any witness you want
3 to call and as to anything that witness
4 would say. You are now permitted. All
5 previous rulings I'm setting aside subject
6 to your presenting any argument you want as
7 to why a particular defense witness should
8 testify. I don't want a record that you
9 are going to argue to the Court of Appeals
10 I precluded.

11 What I have precluded essentially is that
12 the evidence that Mr. Rosenthal was growing
13 or participating in this operation for the
14 purpose of selling or distributing mari-
15 juana for medical purposes, that that is
16 irrelevant. And if a witness would get up
17 and testify as to that, I would deem that
18 testimony to be irrelevant.

19 Trial Transcript, May 22, 2007, p. 1233, lines 12-25.

20 DEFENDANT: I would like to bring my case.
21 ... I would like to continue the case with
22 the witnesses that we have already
23 announced that we would like to have. And
24 since you have precluded those witnesses,
25 which is the main part of the case, from
26 testifying, there is no reason for anybody
27 to testify.

28 Trial Transcript, May 22, 2007, p. 1236, lines 13-24.

29 COURT: Mr. Rosenthal, do you want to
30 testify in your case?

31 DEFENDANT: No, I would like to bring the
32 witnesses that we would like to testify in
33 that case because I would be precluded from
34 testifying. You would stop me, just as you
35 have done to every other witness when it
36 hasn't -- when it hasn't been in the
37 Government's interest.

38 Trial Transcript, May 22, 2007, p. 1237, lines 19-24.

39 A defendant is guaranteed the right, under the Fifth,
40 Sixth, and Fourteenth Amendments, to testify in a criminal
41 proceeding against him. This right is so basic to a fair trial
42 that its infraction can never be treated as harmless error.

1 United States v. Butts, 630 F.Supp. 1145 (1986, DC Me);
2 (criticized in Momon v. State, 18 S.W.3d 152 (1999, Tenn)
3 (Defendant charged with mail theft of credit card, not allowed
4 to testify despite exhortations to unyielding counsel, deserved
5 new trial under Federal Rules of Criminal Procedure, Rule 33).

6 At trial, Mr. Rosenthal's hands were tied. The Court
7 effectively silenced Mr. Rosenthal from testifying by
8 restricting him from presenting witnesses to corroborate his
9 testimony. Therefore, his motion for a new trial must be
10 granted in accordance with his right to testify under the
11 Constitution.

12 CONCLUSION

13 The facts relating to this case and the transcripts in
14 this case raise unique and unprecedented issues. After review
15 of the transcripts, it is evident that the Court prevented Mr.
16 Rosenthal from adequately presenting his defense. Through
17 various means, as delineated above, the Court denied Mr.
18 Rosenthal a fair and impartial trial, in violation of his Due
19 Process rights. Mr. Rosenthal seeks a new trial, as the
20 interests of justice require.

21 Dated: June 11, 2007

22 Respectfully submitted,

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

27 _____
28 /s/ ROBERT AMPARÁN
by ROBERT AMPARÁN

