

United States District Court  
Northern District Of California

Before The Honorable Charles R. Breyer

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR 02-0053 CRB
	)	
Edward Rosenthal,	)	
	)	
Defendant.	)	Jury Trial
_____	)	
	)	San Francisco, California
	)	Tuesday, May 15, 2007

Reporter's Transcript of Proceedings

Appearances:

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Robert Amparan, Esquire  
Omar Figueroa, Esquire

(Appearances continued on next page.)

Reported By: Sahar McVickar, RPR, CSR 12963  
Official Reporter, U.S. District Court  
for the Northern District of California

(Computerized Transcription by Eclipse)

Appearances, continued:

Also Present:

Department of the Treasury  
IRS Special Agents:

Juan C. Saavedra  
David Mateer  
Justin Fletcher

Karen Jo Koonan  
Jury Consultant to the Defense

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Defendant's Exhibits:	W/Drawn	Iden.	Evid.
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None

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1 Tuesday, May 15, 2007

8:29 a.m.

2

P R O C E E D I N G S

3

(The following proceedings were heard

4

outside the presence of the jury:)

5

THE COURT: Let the record reflect that all parties  
6 are present.

7

MR. BEVAN: I propose to Ms. Greenberger that we  
8 refer to counts as 1, 2, 3, 4, 5, rather than 1, 2, 6, 7 and 8.

9

THE COURT: That's fine.

10

MS. GREENBERGER: Yes.

11

MR. BEVAN: I would like to introduce you to Noble  
12 Hughes. She is a paralegal in our office who may be here.

13

THE COURT: Great, actually running everything.

14

(Jury in at 8:35 a.m.)

15

THE COURT: Please be seated.

16

Good morning, ladies and gentlemen. Thank you for  
17 being so prompt. We are about to start. But before we do, I  
18 wanted to say a couple of things.

19

First of all, I neglected yesterday to mention the  
20 role of the alternates, you know, the two people at the end are  
21 alternate jurors. And frequently they don't know what that  
22 means. What it means, of course, is that in the event that you  
23 are called on to participate in the jury deliberations, you  
24 will join your 12 colleagues there. But it means that's at the  
25 end of the trial.

1           In terms of the course of the trial, you will hear  
2 and see and witness everything that is done and participate  
3 fully in that. I would say that it's been my experience over  
4 the years that from time to time alternates have been seated  
5 with the regular jury in the course of deliberations. So once  
6 deliberations start, you still are under the jurisdiction, as  
7 it were, of the Court and you have to sort of be at the ready.  
8 We stay in contact with you and in the event that something  
9 occurs that requires your service, you then come into the jury.

10           So that's your role. You are the last two. But  
11 don't feel slighted. And I am sure you won't.

12           So yesterday I gave some preliminary instructions.  
13 I did want to say one other thing that I'm not sure I pointed  
14 out but it's the following: As I'm sure you are aware, when  
15 you come and leave the courtroom, and approaching the building  
16 and so forth, you may from time to time encounter the parties,  
17 the lawyers, witnesses, and so forth, because you all use the  
18 same entrances and exits and so forth and elevators. And I  
19 want to tell you that I have cautioned the lawyers not to have  
20 any contact with you.

21           They -- you know, as you -- over a period of time  
22 you will sort of get to know them and you might wonder why they  
23 don't say good morning or acknowledge your presence, it's not  
24 because they are rude, it's because actually they are extremely  
25 polite and you may have noticed that, and they are very, very

1 civil to each other and to the Court, and to witnesses and so,  
2 it's not -- it's not because of a lack of manners. It's  
3 actually because they, like the Court and like you, want this  
4 case to be decided on the merits that the personalities of the  
5 parties and the lawyers really have nothing to do with it.  
6 It's based upon what happens in the courtroom in front of you  
7 by witnesses and that's what's important in the case.

8           So don't take it personally. I guess that's the way  
9 to say it. Don't take it personally if, in fact, they have no  
10 contact with you.

11           And also from time to time, inadvertently some  
12 witness, not realizing that you are in their presence, may say  
13 something about the case; indeed, you are to disregard it. It  
14 is not intentional. It's not an effort to try to influence  
15 you. But it does happen from time to time. You should ignore  
16 it. You are all capable, in my view, of being judges in this  
17 case. And judges hear things from time to time.

18           Now, you are a special kind of judge but if you hear  
19 something, if something is said in your presence that is of any  
20 concern, please tell Barbara about it and then I tell the  
21 lawyers about it and we deal with it.

22           So that line of communication is always open. And  
23 you should avail yourselves of that if that occurs in this  
24 particular case. Nevertheless, I wanted to sort of set out  
25 those ground rules for you so you have an appreciation of them

## Opening Statement / Bevan

1 as we proceed.

2 Now, this phase of the trial is really the  
3 commencement of the trial. It's called the opening statements.  
4 Each side may make an opening statement. An opening statement  
5 is not evidence, it is simply an outline to help you understand  
6 what the party expects the evidence will show.

7 A party is not required to make an opening  
8 statement. The Government will then present evidence and  
9 counsel for the defendant may cross-examine.

10 Then the defendant may present evidence and counsel  
11 for the Government may cross-examine. After the evidence is --  
12 has been presented, I will instruct you on the law that applies  
13 to this case and the attorneys will make closing arguments.  
14 After that, you will go to the jury room to deliberate on your  
15 verdict.

16 So we now start with the Government.

17 Mr. Bevan?

18 MR. BEVAN: Thank you, Your Honor.

19 OPENING STATEMENT

20 MR. BEVAN: Good morning, ladies and gentlemen. I  
21 address you three times in the trial, this morning and then  
22 twice in closing argument. Today's remarks, like any remark or  
23 any comments I make during the trial, doesn't count for  
24 anything except to assist you in evaluating the evidence and  
25 discharging your oath. And nothing I say during the trial at

## Opening Statement / Bevan

1 any time and nothing Mr. Rosenthal's lawyers may say either in  
2 a question that is sustained by the judge or this morning,  
3 counts as evidence. The only evidence is what you hear from  
4 the witness stand, what the parties may stipulate to from time  
5 to time.

6           So that's a very important concept to keep in mind  
7 because sometimes there will be questions where there is an  
8 assertion in a question and the witness will say no. The fact  
9 that there is an assertion by either myself or defense counsel  
10 in the question, if the witness doesn't acknowledge the truth  
11 of that statement or there is an objection, it's not to be  
12 considered by you as evidence. And Judge Breyer mentioned that  
13 concept yesterday, and that is very important to keep in mind  
14 throughout the trial.

15           The purpose of this morning's remarks by myself is  
16 to outline for you what I anticipate the Government's evidence  
17 will show. It's not intended to argue the case. It's just  
18 simply to give you an outline to assist you in following what  
19 the Government's evidence will show.

20           And yesterday you took an oath, and there is two  
21 components of the oath that I wanted to focus on. One is you  
22 promised, raised your right hand, and promised that when it  
23 comes time for you to deliberate and render a verdict that you  
24 will fairly judge the facts. You are the fact finders.

25           And secondly, you promised to apply the law that

## Opening Statement / Bevan

1 Judge Breyer will instruct you to apply with respect to the  
2 five charges that are at issue in this case. So those two  
3 components, fairly find the facts and to apply those facts to  
4 the law that Judge Breyer instructs you to apply and render a  
5 just verdict.

6 First, with respect to the component of finding  
7 fact. I want to outline for you what the United States expects  
8 to prove in this case.

9 Between August 1996 and February 12, 2002, the  
10 defendant, Ed Rosenthal, operated a large indoor sophisticated  
11 marijuana operation at a building in Oakland at 1419 Mandela  
12 Parkway.

13 I'm going to put up on the easel a picture of --  
14 it's Government's Exhibit 9 for identification. And it's a  
15 building with no windows on the front, no markings, and inside  
16 that building Mr. Rosenthal manufactured thousands of plants.

17 Now, between August '96 and the end of '97, perhaps  
18 into the first part of '98, Mr. Rosenthal had a partner named  
19 James or Jim Halloran. They were in partnership together at  
20 that location manufacturing plants. And the plants that they  
21 manufactured were sold as plants, and there was a second  
22 component where they dried plants that had buds on them, and  
23 there will be testimony that the bud is what gives the  
24 marijuana value in terms of harvesting.

25 You have mature plants that went to bud, were

## Opening Statement / Bevan

1 harvested, dried and sold. So during the course of the period  
2 when Mr. Halloran was Mr. Rosenthal's partner, the operation  
3 consisted of three components. You had so-called larger mother  
4 plants from which clippings were taken to make clone plants, in  
5 other words, starter plants that rooted between 10 and 12 days  
6 and then they were sold.

7           You had a second component of the operation which  
8 were plants that were allowed to bud and dried and then sold as  
9 processed or dried marijuana. And then, as I mentioned, the  
10 third components are marijuana, small marijuana plants,  
11 sometimes referred to as clone plants. That style of operation  
12 with those three components continued from August '96 to  
13 February 12, 2002.

14           The evidence will show that toward the end of 1997,  
15 Mr. Rosenthal and Mr. James Halloran had a dispute having to do  
16 with the business. And Mr. Halloran walked away from the  
17 business.

18           From that point forward, Mr. Rosenthal operated the  
19 business as his business alone. He hired employees, and he  
20 used the employees to assist him in manufacturing the plants.  
21 Now, when I say manufacturing, at times throughout this trial  
22 and in the indictment, the term manufacture is used; however,  
23 we are using it synonymously with grow or cultivate. So if you  
24 hear a witness say cultivate, translated that means  
25 manufacturing in the context of this case.

## Opening Statement / Bevan

1           Now, the plants were sold to so-called marijuana  
2 clubs throughout the Bay Area during that period. They were  
3 sold for cash, save and except for sales to one club in San  
4 Francisco located at 52 6th Street known as the Harm Reduction  
5 Center where there were some checks payable to Mr. Rosenthal  
6 for plants. However, those checks said consulting fees on  
7 them, which was not accurate. It's actually for sale of  
8 plants, not consulting fees.

9           Now, as I mentioned, during the period that  
10 Mr. Rosenthal was in partnership with Mr. Halloran, they were  
11 renting from a good friend of Mr. Halloran who owned the  
12 building named Leslie Wilmer, and Leslie Wilmer will testify in  
13 this case. They paid Mr. Wilmer cash rent, and, indeed, cash  
14 was paid to Mr. Wilmer up to the time that Mr. Rosenthal bought  
15 the building in June or July of 2000.

16           So initially the lease or the rental agreement was  
17 in Mr. Halloran's name, after Mr. Halloran stepped aside, there  
18 was a second rental agreement in the name of Mr. Rosenthal, and  
19 then June or July when Mr. Wilmer felt uncomfortable with the  
20 fact that there was marijuana growing in his building, told  
21 Mr. Rosenthal, either leave the building or buy the building.  
22 And Mr. Rosenthal elected to buy the building. And we'll have  
23 people involved in the purchase testifying in this trial to  
24 that purchase.

25           After that, Mr. Rosenthal paid the rent by way of

## Opening Statement / Bevan

1 cash -- by way of money orders purchased with cash. And  
2 circumstantially, we will prove that the cash that was used not  
3 only for rent but other expenses was derived from his cash  
4 sales of marijuana.

5           So initially it was Mr. Halloran. You have cash  
6 being used to pay expenses, and the evidence will reflect this  
7 is a cash industry. Plants are sold for cash, marijuana is  
8 sold for cash. Expenses of the operation are paid for in cash.  
9 Sometimes by credit cards for supplies by Mr. Rosenthal.  
10 Credit card bills were paid with money orders purchased with  
11 cash.

12           Now, this operation of Mr. Rosenthal which involved  
13 the cultivation and sale of thousands of plants continued to  
14 the date of February 12, 2002. It was on that day that federal  
15 agents executed a series of search warrants, one of which was  
16 at Mr. Rosenthal's residence at 1635 East 2nd Street in  
17 Oakland.

18           They also executed a search warrant on his car, on  
19 the Mandela Parkway warehouse or building and at the location  
20 of 52 6th Street at the Harm Reduction Center.

21           Inside his building on that day, agents recovered  
22 approximately 3100 plants, growing marijuana plants, in that  
23 building. And I'm going to put on the easel, one of the boards  
24 that were utilized during the trial, which is Exhibit 9, board  
25 4 of 8. This is not in evidence, this board, I'm just using it

## Opening Statement / Bevan

1 to aid in the discussion this morning.

2 On this board are three enlarged pictures, and those  
3 reflect the grown marijuana plants that were found inside  
4 Mandela Parkway that morning. They were counted and seized as  
5 evidence by the DEA.

6 Now, in addition to those mature plants, that  
7 morning the agents seized -- putting on the board Exhibit 9,  
8 board 6 of 8 -- seized so-called clone plants, marijuana  
9 clones. And these are reflected on this board, smaller plants,  
10 they have stakes which Mr. Rosenthal has a stake that's  
11 embossed with Medifarm, which is his distinct stake. And there  
12 will be reference to Medifarm stakes during the trial.

13 Now, inside his residence at 1635 East 2nd Street  
14 additional marijuana was grown or was found, including  
15 marijuana we will establish was manufactured at Mandela  
16 Parkway. So plants that -- inside the Mandela Parkway  
17 building, marijuana inside his residence, marijuana inside his  
18 car where there was 67 Baggies in his glove box packaged for  
19 distribution which is what the evidence will show.

20 So in regard to Mr. Rosenthal, that day you have  
21 marijuana discovered or recovered from Mandela Parkway, his  
22 residence and his Cougar automobile in the glove box. There  
23 will be testimony about that marijuana and that marijuana will  
24 be introduced into evidence.

25 Now, just like if you would go to Navlet's and

## Opening Statement / Bevan

1 purchase five petunias and five rhododendrons, once they die,  
2 they shrivel up. And you'll see that the marijuana, for  
3 example, the clone plants, the small plants, 2600 something  
4 clone plants seized from Mandela Parkway, once they get old and  
5 dry up they fit into one box, so that is what we are dealing  
6 with this morning in terms of evidence.

7           The marijuana -- the plants were preserved and the  
8 DEA agent will describe the process of maintaining what is  
9 known as a bulk sample and subsamples for analysis by the DEA  
10 lab. The marijuana was taken to the lab, analyzed and  
11 confirmed to be marijuana.

12           Now, I've mentioned the Harm Reduction Center, the  
13 search warrant was executed there. Some 700 plants were  
14 recovered at the Harm Reduction Center. The agent who was in  
15 charge of that search, Brian Padgett, will testify to what he  
16 recovered at that location.

17           About a month earlier at the Harm Reduction Center  
18 an undercover DEA agent had purchased in an undercover buy  
19 where he is pretending to be a buyer, he is really not, he's a  
20 Government agent, purchased 405 plants for \$3600 in cash.  
21 Included in that purchase of 405 plant were stakes of  
22 Mr. Rosenthal, Medifarm, from which the United States  
23 eventually will argue that that is evidence of the fact that  
24 Mr. Rosenthal's plants were included in that 405 plants  
25 purchased by Agent Fay.

## Opening Statement / Bevan

1           So, the United States will prove that during the  
2 five-and-a-half-year period between August '96 and February 12,  
3 2002, Mr. Rosenthal, in collaboration with people that he hired  
4 that worked at Mandela Parkway, manufactured thousands of  
5 plants. He possessed these plants and marijuana for  
6 distribution and he distributed.

7           He also used not only the Mandela Parkway location  
8 for these purposes, that is manufactured and distribution, he  
9 also used a second location for a several-month period in 1998,  
10 utilizing the service of David Lewis who will be a witness in  
11 this trial where he used the house across the street from where  
12 he lived. That house was at 1626 East 2nd Street. And he  
13 utilized David Lewis to dry marijuana inside the house and to  
14 sell it.

15           Customers came to David Lewis at that location. He  
16 sold the marijuana that he had dried for Mr. Rosenthal,  
17 collected cash and then turned the cash over to Mr. Rosenthal.

18           Now, one of the clubs that I mentioned that  
19 Mr. Rosenthal sold to was at 52 6th Street, the Harm Reduction  
20 Center. And at that location, that business was operated by  
21 Kenneth Hayes and Richard Watts. There were other people that  
22 worked there, but Kenneth Hayes, the evidence will show,  
23 started that and Richard Watts was the construction guy.  
24 Richard Watts will testify in this trial.

25           And there came a point in approximately

## Opening Statement / Bevan

1 October 2001, when Mr. Rosenthal took over the operation of the  
2 grow room in the basement of that location in exchange for  
3 paying delinquent P.G.& E. bills that had accrued at that  
4 location. By joining their operation in that sense, being  
5 involved in the manufacture of plants, Mr. Rosenthal thereby,  
6 based on the evidence we will establish, became part of a  
7 conspiracy with Richard Watts and Kenneth Hayes to cultivate  
8 marijuana and to use that location for the distribution of  
9 marijuana.

10 That is one of the charges in the indictment.

11 The evidence will also show that Mr. Rosenthal was  
12 cultivating marijuana and the Harm Club was one of the clubs  
13 that he sold marijuana to plant, in a plant form. Remember, we  
14 are talking plant form. We are talking about processed  
15 marijuana.

16 Now, to establish these facts, the United States is  
17 going to call a decent number of witnesses in terms of -- when  
18 I say decent, I mean, 30 or 40 or so witnesses, but you will  
19 soon discover that the core facts are going to come in through  
20 ten or fewer witnesses and the other witnesses are persons, for  
21 example, suppliers of different products that were used in the  
22 grow, people from the post office that analyzed and traced the  
23 money orders to see if they were purchased with cash. And the  
24 witnesses will include agents involved in the search of the  
25 premises.

## Opening Statement / Bevan

1           David Lewis will be a witness. James Halloran,  
2 Mr. Rosenthal's former partner will be a witness. He will also  
3 testify that after he split from Mr. Rosenthal, he went off and  
4 started his own grow inside another building in Oakland and  
5 came back and purchased a lot of plants on a regular basis from  
6 Mr. Rosenthal at \$7 a plant.

7           And he will testify that after he broke up, he  
8 indeed, was a substantial customer of Mr. Rosenthal. And he  
9 will describe how he came over and purchased the plants, took  
10 delivery of the plants at that location.

11           Richard Watts will be a witness from the perspective  
12 of the Harm Reduction Center. Bob Martin, who got involved  
13 with Harm Reduction Center in the weeks leading up to the date  
14 of February 12th, will also be a witness.

15           Mr. Martin, in particular, will testify to  
16 discussions he had with the defendant about payment that  
17 Mr. Rosenthal demanded for plants, approximately 1400 plants,  
18 that he had sold to Harm Reduction Center. Mr. Martin had paid  
19 in a couple of checks which he stopped payment on. And he'll  
20 explain why.

21           And he was later sued by Mr. Rosenthal in small  
22 claims court to recover the money that Mr. Rosenthal claimed he  
23 was owed which was for plants that he had sold to the Harm  
24 Reduction Center.

25           Now, that is a, I think, fair outline of what the

## Opening Statement / Bevan

1 United States intends to prove. Straightforward, we will start  
2 off with Agent Pickette who is the original DEA case agent in  
3 this case and talk about what he did. And then we'll go  
4 through and try and do it in chronological order. So that you  
5 can follow it.

6 But keep in mind in a trial like this where there  
7 are 30 or 40 or 50 witnesses, you need to keep an open mind, as  
8 Judge Breyer instructed you yesterday, and not form any  
9 conclusions, because it's like a puzzle or a portrait that is  
10 assembled in small pieces. Until all the pieces are in and you  
11 retire to deliberate, you can't and should not form any opinion  
12 as to what the facts are or what your decision will be.

13 Now, the second component of your oath is to apply  
14 the law that Judge Breyer will instruct you to apply to the  
15 facts as you honestly and fairly find them. And in that  
16 respect there are five charges in this case that you will be  
17 called upon to decide. I said charges, each charge is known as  
18 a count. And each count describes a separate crime.

19 **Count 1 is a conspiracy count against Mr. Rosenthal**  
20 **and it alleges that Mr. Rosenthal conspired with Kenneth Hayes**  
21 **and Richard Watts to use the space at 52 6th Street for the**  
22 **purpose of manufacturing marijuana and distributing marijuana.**

23 Now, conspiracy, as Judge Breyer will tell you, is  
24 an agreement between two or more persons and they have an  
25 agreement to do something that is alleged in the conspiracy

## Opening Statement / Bevan

1 which is a crime.

2 In this case, Mr. Rosenthal in count 1 is accused of  
3 agreeing, conspiring with Kenneth Hayes and Richard Watts to  
4 use 52 6th Street for that purpose.

5 Judge Breyer will instruct you that it is a federal  
6 crime to use a location for the purpose of manufacturing or  
7 distributing marijuana. That is in essence what is charged in  
8 count 1 is a conspiracy to do those two things. Use that  
9 location to manufacturer marijuana and distribute the  
10 marijuana.

11 **Count 2, similar charge, but the so-called**  
12 **substantive offense, that is Mr. Rosenthal is actually accused**  
13 **with Mr. Hayes and Mr. Watts of using 52 6th Street for that**  
14 **purpose.**

15 So count 1 is the conspiracy to do that, and count 2  
16 is the allegation that that is what he did, knowingly and  
17 intentionally.

18 **Count 3 alleges that between at or about June 1998**  
19 **and February 2002, Mr. Rosenthal conspired with others to**  
20 **manufacture marijuana, possess marijuana with intent to**  
21 **distribute and distribute marijuana and to use the location**  
22 **that I have mentioned in my opening remarks to you, 1419**  
23 **Mandela Parkway and 1626 East 2nd Street for the purpose of**  
24 **manufacturing and distributing marijuana.**

25 Count 3, like count 1, is a conspiracy count. Judge

## Opening Statement / Bevan

1 Breyer will instruct you on the elements of conspiracy when it  
2 comes time to do that.

3           But count 3, in terms of Mandela Parkway, embodies  
4 the essence of what the United States will prove in this case,  
5 which is that beginning in June of '98 after Mr. Rosenthal had  
6 broken away from Jimmy Halloran or James Halloran, he, in  
7 collaboration with people that he hired to work at the grow,  
8 including Brian Lundeen, Etienne Fontan, Douglas Church, were  
9 the primary workers, he conspired with them to use the Mandela  
10 Parkway facility, the building that I showed you, for those  
11 illegal purposes.

12           And Judge Breyer, like count 1, will instruct you  
13 that a conspiracy to do the things that are alleged is a  
14 federal crime for which the United States bears the burden to  
15 prove beyond a reasonable doubt each and every element that  
16 Judge Breyer will instruct on.

17           And that is one thing that Judge Breyer mentioned  
18 yesterday that is preeminent in our system of justice, and you  
19 have got to keep it in mind at all times, the total point in  
20 time, including up to the point you return a verdict, which is  
21 the burden remains on the United States to prove each and every  
22 element of each offense charged, in this case five, beyond a  
23 reasonable doubt.

24           If you are satisfied that the United States has  
25 carried its burden, your duty per your oath is to find the

## Opening Statement / Bevan

1 defendant guilty. If the United States has not satisfied its  
2 burden in your judgment, your duty and my expectation for you  
3 would be to find Mr. Rosenthal not guilty as to that offense.  
4 That's what it means to have the presumption of innocence and  
5 for the Government to bear the burden of proof.

6 Now, count 4 and count 5 are so-called substantive  
7 counts, and they essentially -- **count 4 alleges that**  
8 **Mr. Rosenthal knowingly and intentionally manufactured**  
9 **marijuana, possessed marijuana with intent to distribute and**  
10 **distributed marijuana in the City of Oakland.**

11 What that references is the fact that Mr. Rosenthal  
12 used the Mandela Parkway facility for that purpose. And  
13 thereafter, after growing the marijuana, he sold the marijuana  
14 and he possessed it between the time he manufactured it  
15 because -- he possessed it with the intent to distribute it.

16 Finally, **the last count alleges that Mr. Rosenthal**  
17 **utilized the Mandela Parkway building for the purpose of**  
18 **manufacturing and distributing marijuana.**

19 Now, as I mentioned, that is the -- what I just  
20 mentioned about the charges in this case, they are simply  
21 charges, they are not evidence of anything. And the Judge will  
22 instruct you what the law is that you are obligated by your  
23 oath to apply.

24 So at the conclusion of the case, we submit, ladies  
25 and gentlemen, that the United States will have proven each and

## Opening Statement / Greenberger

1 every element of those five charges beyond a reasonable doubt.

2 Thank you very much.

3 THE COURT: Ms. Greenberger?

4 MS. GREENBERGER: Thank you, Your Honor.

5 **OPENING STATEMENT**

6 **MS. GREENBERGER: Good morning, ladies and**  
7 **gentlemen, fellow Californians and welcome.** My name is Shari  
8 Greenberger and I'm one of the attorneys for Mr. Rosenthal.

9 I want to take this opportunity, first of all, to  
10 thank you for your time in coming here and participating in  
11 this trial. As Judge Breyer mentioned yesterday, this is a  
12 very important case where very important issues will be  
13 discussed. And over the next several weeks, you will have an  
14 opportunity to hear the evidence. And I want you to pay  
15 careful attention to what is being said.

16 **The reason why we are here today is because this is**  
17 **an attempt by the U.S. Government, the federal Government, to**  
18 **censure[censor] Mr. Rosenthal PC.**

19 MR. BEVAN: Your Honor, that's an improper  
20 statement. It's argument.

21 THE COURT: Well, it's, of course, argument.  
22 Sustained.

23 MS. GREENBERGER: Thank you, Your Honor.

24 **The evidence will show that Mr. Rosenthal is a**  
25 **scientist and the Government will attempt to suppress his**

## Opening Statement / Greenberger

1 ideas. That is why we are here.

2 Mr. Rosenthal has been a scientist, a researcher, a  
3 publisher for the last 30 years. He has earned a reputation of  
4 international prominence. He is a member of international  
5 scientific societies. And the evidence will show that the  
6 reason why we are here --

7 MR. BEVAN: Objection, Your Honor.

8 That necessarily is going to be an argument.

9 THE COURT: Well, let's hear the statement first.

10 MS. GREENBERGER: Mr. Rosenthal has been a proponent  
11 of marijuana.

12 MR. BEVAN: Your Honor, I would request an  
13 out-of-the-presence session at this point. I've never asked  
14 for that, but I'm asking for it.

15 THE COURT: I don't think that is necessary.

16 Let's deal with it. I think Counsel can make her  
17 statement, and then I'll rule on it.

18 It can't be argument, but it has to be a statement  
19 of what the evidence -- ladies and gentlemen, the opening  
20 statement on both sides is a statement by counsel as to what  
21 they believe the evidence would show and what the evidence will  
22 show, what it won't show, is a matter at least in the first  
23 instance, a matter of what I permit the jury to consider.

24 I don't mean that I dictate your role in a narrow  
25 way, what I try to do is I look at the evidence and see whether

## Opening Statement / Greenberger

1 it is probative, that is useful for a decision that you must  
2 come to based upon the law.

3 So I don't know what the evidence will show from the  
4 defendant's point of view. But this is counsel's expectation  
5 of what I would permit into evidence.

6 I've defined some guidelines to counsel on both  
7 sides as to what I believe to be the relevant issues in this  
8 case, and one would expect that when counsel on both sides make  
9 their argument -- excuse me, make their opening statements,  
10 can't be argument, make their opening statements, it is with  
11 the knowledge as to what the Court is -- has already ruled to  
12 be relevant and what the Court has already ruled to be not  
13 relevant.

14 Okay. Ms. Greenberger, you may continue.

15 MS. GREENBERGER: Thank you, Your Honor.

16 **As you all know, this is a federal trial. We are in**  
17 **the federal building. This is a federal case brought by**  
18 **federal agents. And as indicated by the Court yesterday, there**  
19 **are certain areas we cannot go. But what I can tell you is**  
20 **that the evidence will show that for over the last 40 years, my**  
21 **client, Ed Rosenthal, has been a proponent of marijuana**  
22 **advocacy and reform. And that is why we are here.**

23 MR. BEVAN: Your Honor, I have to object to that.  
24 That has been ruled on by Your Honor.

25 THE COURT: Well, let's -- you will be asked to

## Opening Statement / Greenberger

1 determine whether or not the Government has established the  
2 guilt of the defendant based upon the evidence and based upon  
3 the charges. You will not be asked nor are you to consider  
4 what motivated the Government in bringing these charges.  
5 That's not an issue for you to determine.

6           **The Government is entitled to bring charges where**  
7 **they believe the evidence meets a certain standard involving**  
8 **violation of the federal laws. That is a decision that the**  
9 **Government is entitled to make. It's not a decision where you,**  
10 **the jury, or me, the judge, pass judgment on. That's a**  
11 **decision of the Executive Branch of our Government and that**  
12 **they are entitled as a matter of law to make that kind of**  
13 **decision.**

14           Therefore, the motivation of the Government in  
15 bringing particular charges would not be a matter for either  
16 you or I to consider under these circumstances.

17           And I think that is clear, Ms. Greenberger. So they  
18 will not be asked to determine what the motivation is.

19           MS. GREENBERGER: Thank you, Your Honor.

20           As indicated by the federal prosecutor, he will  
21 present this case through witnesses. **And it is very important**  
22 **that when you evaluate the credibility of these witnesses that**  
23 **you inquire into their motives for being here. I want you to**  
24 **pay careful attention to what these witnesses have to say**  
25 **because the evidence will show the witnesses, the four central**

## Opening Statement / Greenberger

1 witnesses of the prosecution's case, are convicted felons,  
2 liars, drug addicts and thieves.

3           Let's start with the first Government witness,  
4 James Halloran. I would like to tell you a little something  
5 about him. James Halloran is a convicted felon, recovering  
6 heroin junky whose home was raided by the Federal Government in  
7 2002. There, they discovered a .22-caliber pistol, a shotgun,  
8 and seized \$50,000 in cash. Well, at his home they also  
9 discovered over 4000 marijuana plants and clones.

10           With this man's criminal history, he was facing 50  
11 years to life in prison. In exchange for his testimony, this  
12 federal prosecutor gave him a sentence of home detention, the  
13 ankle bracelet.

14           MR. BEVAN: That misstates the evidence.

15           THE COURT: Well --

16           MR. BEVAN: The expected evidence.

17           THE COURT: Ladies and gentlemen, again, I would  
18 simply caution you that a statement made by counsel at opening  
19 statement is not evidence. I don't know what the evidence will  
20 show. We'll all eagerly await and see what the evidence  
21 actually shows in this case.

22           MS. GREENBERGER: In addition, this federal  
23 prosecutor helped this convicted felon obtain his real estate  
24 license. Furthermore, this prosecutor had his federal  
25 probation terminated early. Why, you ask? In exchange for his

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1 testimony against my client, Mr. Rosenthal. That will be a  
2 sample of some of the credibility that you are going to judge  
3 this evidence by. And I submit to you, ladies and gentlemen,  
4 when you hear all of the evidence, you will find these  
5 witnesses carry no credibility.

6 Let's move on to the next witness the Government  
7 mentioned in their opening, Richard Watts, also a convicted  
8 felon.

9 MR. BEVAN: That misstates the evidence, Your Honor.  
10 He is not a convicted felon.

11 THE COURT: Okay.

12 Again, I don't want to get into an argument. I  
13 simply caution the jury that we'll have to await and see  
14 whether Ms. Greenberger has stated accurately what the evidence  
15 will show or not.

16 MS. GREENBERGER: According to the evidence that I  
17 have reviewed, he has multiple convictions in State Court for  
18 infliction of corporal injury --

19 THE COURT: Well, Counsel, it's not a question of  
20 what you reviewed and what you haven't reviewed. That is an  
21 improper statement. The question is -- because, obviously,  
22 every lawyer who gets up tells the jury what they believe the  
23 evidence will show and that has the obvious basis that that is  
24 what they think the evidence would show based upon their review  
25 of the evidence.

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1           So it's not a question of whether what you are  
2 saying to the jury is good faith or not, it's simply a question  
3 of what the evidence will show, what you think it will show.

4           MS. GREENBERGER: Thank you, Judge.

5           THE COURT: Sure.

6           MS. GREENBERGER: The evidence will show this man  
7 has convictions for possessing dangerous drugs without a  
8 prescription, inflicting corporal injury on a woman, and also  
9 has drug possession and convictions.

10           **He was facing a ten to life sentence for the**  
11 **cultivation of over 1000 plants of marijuana. He also is a**  
12 **drug addict suffering from addiction to OxyContin, which is a**  
13 **synthetic form of heroin.**

14           **This man was given credit for time served in**  
15 **exchange for his testimony against my client, Mr. Rosenthal.**  
16 **In addition, his federal supervision was terminated early as**  
17 **the result of his participation and testimony against my**  
18 **client, Mr. Rosenthal.**

19           A theme is starting to emerge in the presentation of  
20 the Government witnesses that brings us to the next witness,  
21 Bob Martin.

22           **Bob Martin really illustrates the outrageousness and**  
23 **hypocrisy of the Federal Government.**

24           THE COURT: Well, Counsel, I mean, that is improper.  
25 That is an improper statement, and you know it is. That is

## Opening Statement / Greenberger

1 pure argument, so please, don't argue your case, just tell the  
2 jury what you believe the evidence will show. All right?

3 MS. GREENBERGER: Thank you, Judge.

4 THE COURT: Sure.

5 MS. GREENBERGER: Bob Martin is from Georgia. He  
6 made his living as a professional ticket scalper. In fact, I  
7 hear he is a ticket scalper for the Giants. He parlayed his  
8 income from a ticket scalper into a marijuana dispensary. And  
9 over the last six years, under the same Federal Government's  
10 nose, he has continued to operate, not one, but two marijuana  
11 dispensaries. In fact, with this Federal Government's  
12 immunity, he has been able to expand his marijuana dispensary  
13 operations and has never been charged with any offense.

14 The evidence will further show that this gentleman,  
15 Bob Martin, also is a marijuana cultivator. In 2004, federal  
16 agents raided a property he was renting in Sonoma County and  
17 seized thousands of marijuana plants. This was a federal raid.  
18 And in exchange for his testimony against my client,  
19 Mr. Rosenthal, this man has been given immunity and not subject  
20 to any form of federal prosecution.

21 Keep in mind for the offenses that he has committed,  
22 he, too, is facing ten years to life in federal prison.

23 The next witness that the Government will present is  
24 named David Lewis. David Lewis is quite a character.

25 THE COURT: Counsel, you say "he, too, is facing" --

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1 what did you say?

2 MS. GREENBERGER: With regard to Bob Martin --

3 THE COURT: Yeah.

4 MS. GREENBERGER: -- I said that for the offenses  
5 which he has committed which involves the distribution and  
6 manufacture of thousands of plants he would be facing --

7 THE COURT: He?

8 MS. GREENBERGER: Ten years in prison --

9 THE COURT: He alone?

10 MS. GREENBERGER: Correct.

11 THE COURT: You don't mean he, too, you mean he,  
12 alone. You mean he would be facing.

13 MS. GREENBERGER: Just like Mr. Watts and  
14 Mr. Halloran who were also involved.

15 THE COURT: I see, the "too" means Mr. Watts and  
16 Mr. Halloran. That is what you mean by the "too"?

17 MS. GREENBERGER: Correct.

18 THE COURT: Thank you, okay.

19 MS. GREENBERGER: Dave Lewis was a man who lived  
20 across the street from Mr. Rosenthal and his wife. He was the  
21 boyfriend of their neighbor, a man named Vern Anderson. The  
22 evidence will show that when Vern Anderson passed away, he  
23 asked Mr. and Mrs. Rosenthal to take care of his friend,  
24 Dave Lewis. For any of you that have had experiences with drug  
25 addicts and addiction, you will see how his speed addiction has

## Opening Statement / Greenberger

1     wreaked havoc on his life.

2             During the relevant time periods in question which  
3     he will testify about, he was overcome and in the throes of  
4     methamphetamine addiction. This caused him to go to prison and  
5     to lose his home. He became a speed freak. He also had  
6     battles with cocaine addiction. He, too, has a record for  
7     corporal injury on a spouse. He, too, is a convicted felon.  
8     Ultimately, his methamphetamine addiction cost him his  
9     business.

10            He chose his methamphetamine addiction over his  
11    shelter, he chose his methamphetamine addiction over his job.  
12    And the evidence will show that he, too, had a marijuana  
13    operation going on within the confines of his house across the  
14    street from Mr. Rosenthal.

15            This is just a sampling of the credibility of the  
16    witnesses that our Federal Government is going to present to  
17    you to try to prove an offense against my client,  
18    Mr. Rosenthal. And the judge will instruct you in evaluating  
19    the evidence you should consider the extent to which immunity,  
20    leniency, benefits have been given to these witnesses in  
21    exchange for their cooperation.

22            **You will see, and the evidence will show, that these**  
23    **witnesses are self-interested witnesses and put their own**  
24    **self-interests ahead of the truth.**

25            You will hear testimony from a number of federal

## Opening Statement / Greenberger

1 agents. Keep in mind these agents get paid for their  
2 testimony. One agent in particular, Chris Fay, who the  
3 Government mentioned in its opening, went into a marijuana  
4 dispensary under federal -- excuse me, under false pretenses to  
5 purchase marijuana that was intended for patients. This is the  
6 quality of evidence that is going to be presented in this case.

7 I want to contrast the character of this evidence  
8 with my client, Ed Rosenthal. As I mentioned earlier -- I'm  
9 going to put the microphone down for a second and talk loud.

10 He has spent over the last 40 years writing and  
11 publishing books about marijuana advocacy and reform. And I  
12 brought today a sample for you to see some of the publications  
13 that he has been working on over the last 40 years.

14 As indicated from the titles, you can see that he  
15 has devoted his career to marijuana advocacy and reform. As a  
16 publisher and a writer and a scientist, he developed a  
17 reputation for being an expert in the field of cannabis. This  
18 expertise led him to earn a reputation of national and  
19 international prominence.

20 In addition to writing and publishing, I also  
21 brought a new product with me to show you what he developed  
22 called Zero -- Zero Tolerance, which is a natural herbal  
23 pesticide. And as you can see, this is a product for marijuana  
24 plants. So in addition to being a scientist, he has also  
25 invented this product.

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1           In 1986 -- he published his first book in 1974 and  
2 continues to publish today. The evidence will show he owns a  
3 company called Quick Trade, which he started in the '70s, first  
4 as a distribution company, and later expanded it into a  
5 publishing company.

6           **In 1986, he began testifying in state and federal**  
7 **courts throughout California.**

8           MR. BEVAN: That's irrelevant, Your Honor.

9           THE COURT: I don't know what you are going to say  
10 about testifying.

11          MS. GREENBERGER: That's it.

12          THE COURT: You mean he testified.

13          MS. GREENBERGER: **As an expert witness based on his**  
14 **knowledge and expertise in the field of cannabis, he testified.**

15          THE COURT: Well, I think his -- I think his  
16 knowledge of cannabis is relevant to the charge of whether or  
17 not he grew marijuana. I mean, it seems to me if he would say  
18 -- No. 1, I didn't grow it, or I grew it, but I didn't know  
19 what it was, then you would come in, Mr. Bevan, and you would  
20 say, isn't it a fact you are an expert on marijuana.

21          So, you know, you may argue, Mr. Bevan, that this is  
22 evidence that the Government would introduce, but I don't know  
23 that the defendant can't introduce it. That is their decision.

24          Go ahead, Ms. Greenberger.

25          MS. GREENBERGER: Thank you.

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1           **As you can imagine, his testimony for the defense on**  
2 **medical cannabis did not endear him to the Federal Government.**

3           Mr. Rosenthal, in pursuing his marijuana advocacy  
4 and reform and science, was invited to Holland, Switzerland,  
5 and Amsterdam to consult and share his knowledge and expertise.

6           **In addition to that, he shares the honored**  
7 **distinction of being a member of the International Cannabinoid**  
8 **Research Institute, which is an institute of international**  
9 **prominence. Its membership is limited to Ph.D. students and**  
10 **scientists who are studying cannabinoids, the active ingredient**  
11 **in marijuana. And Mr. Rosenthal, based on his knowledge and**  
12 **expertise, was admitted to that organization despite the fact**  
13 **he does not have a Ph.D.**

14           You will also hear testimony from Mr. Rosenthal's  
15 wife, Jane Klein. Ms. Klein is an NYU graduate from 1970, came  
16 out to get her Master's degree in Berkeley and is a successful  
17 businesswoman. In fact, she became a publisher of Ed's book  
18 company in the year 2000, where she handles all aspects of  
19 personnel, administration, publication and is currently there  
20 today.

21           Neither Mr. Rosenthal nor his wife have any criminal  
22 history. But for the charges brought against Mr. Rosenthal by  
23 the Federal Government, they have had no entanglement with the  
24 criminal justice system.

25           I ask you to consider these distinctions.

## Opening Statement / Greenberger

1           Without sharing my client's age, you can see that  
2   having been a publisher for the last 40 years that that is a  
3   significant time period to not have any entanglement in the  
4   criminal justice system. And I ask you, ladies and gentlemen,  
5   to contrast their unblemished records with the witnesses that  
6   the Government is going to bring in support of their case.

7           You'll also be hearing testimony from  
8   Mr. Rosenthal's business partner, John Stewart. John Stewart  
9   used to be in business with a Government witness, Dave Lewis.  
10   He will share with you and embellish the extent of Mr. Lewis'  
11   methamphetamine addiction and how that led to the ultimate  
12   destruction of the business, destruction of their relationship.

13           Ladies and gentlemen, when this trial concludes, you  
14   and only you will be the sole triers of fact in this case. You  
15   and only you will return to the jury deliberation room. **You**  
16   **have the opportunity to participate in rendering a verdict in**  
17   **this case, and you and only you have the opportunity to reject**  
18   **this evidence, to reject this prosecution, to reject these**  
19   **witnesses and tell the Government, no, not on these facts, not**  
20   **on these witnesses.**

21           And I am confident and comfortable that after you  
22   hear all of the evidence, you will find my client not guilty.

23           THE COURT: Okay. Thank you.

24           Mr. Bevan, you want to proceed?

25           MR. BEVAN: Yes, Your Honor.

Pickette - Direct / Bevan

1                   The United States would call DEA Special Agent Jon  
2 Pickette as its first witness, Your Honor.

3                                   JON PICKETTE,  
4 called as a witness for the plaintiff, having been duly sworn,  
5 was examined and testified as follows:

6                   THE CLERK: State your full name, spell your last  
7 name.

8                   THE WITNESS: My name is Jon Pickette,  
9 P-i-c-k-e-t-t-e.

10                   THE COURT: Could you move a bit forward.

11                   Ladies and gentlemen of the jury, if you can't hear  
12 a witness, just raise your hand. Something you can't hear,  
13 raise your hand.

14                   Sorry. It's a bit like school. I don't know how  
15 else to do it.

16                                   DIRECT EXAMINATION

17 BY MR. BEVAN:

18 Q. Good morning, sir.

19 A. Good morning.

20 Q. Are you employed by the Drug Enforcement Administration  
21 sometimes known as the DEA?

22 A. Yes, I am.

23 Q. And what is your current title or position?

24 A. My current role is the supervisory special agent.

25 Q. Okay.

Pickette - Direct / Bevan

1                   And are you assigned to a particular -- to the Bay  
2 Area in some way or outside the area?

3 A. I'm assigned to the San Francisco field division in the  
4 Central Valley.

5 Q. Okay.

6                   Can you tell the Court and the jury what is your --  
7 what have been your assignments within DEA?

8 A. Prior to my current assignment, I was assigned to the  
9 Albuquerque district office in New Mexico as a special agent.  
10 Prior to that, I was assigned to the San Francisco field  
11 division as a special agent.

12 Q. Now, was there a point in time, Agent Pickette, when you  
13 were the so-called case agent for this -- for this case,  
14 underlying this investigation, underlying this case?

15 A. Yes, I was.

16 Q. Okay.

17                   And focusing your attention to the period of 2001,  
18 do you have that date in mind or that period in mind?

19 A. Yes, I do.

20 Q. Did you and other agents conduct surveillance or  
21 surveillance in the area of 1419 Mandela Parkway?

22                   MR. AMPARAN: Your Honor, object as vague.

23                   THE COURT: Overruled.

24 BY MR. BEVAN:

25 Q. Did you conduct surveillance in the area of 1419 Mandela

Pickette - Direct / Bevan

1 Parkway?

2 A. Yes, we did.

3 Q. I want to focus your attention first to the date in  
4 November 2001. Did you have occasion to conduct surveillance  
5 and see any vehicles in front of the location at 1419 Mandela  
6 Parkway?

7 A. Yes, I did.

8 Q. And do you recall the approximate date when you saw  
9 vehicles in front of that building?

10 A. I believe one particular date was November 26, 2001.

11 Q. Okay.

12 And do you recall whether that surveillance was in  
13 the afternoon or the morning?

14 A. I can't recall the time frame. I can refer to a report.

15 Q. Okay.

16 Go ahead, if you need to refresh your recollection.

17 A. It was in the afternoon.

18 Q. Okay.

19 At approximately what time?

20 A. Approximately 5:30 p.m.

21 MR. AMPARAN: I'm going to object.

22 It appears that the agent is reading from the report  
23 when he gave the time. I would ask that if he needs his  
24 recollection refreshed that he use the appropriate reading  
25 material for that purpose.

Pickette - Direct / Bevan

1 THE COURT: Okay. After you have read the report,  
2 just turn it back over.

3 By the way, ladies and gentlemen, I notice that you  
4 are taking notes, which is fine. I just want to say that if  
5 you do take notes, please keep them to yourself until you and  
6 your fellow jurors go to the jury room to decide the case. Do  
7 not let notetaking distract you so that you do not hear other  
8 answers by witnesses.

9 When you leave at the end of the day, your notes  
10 should be left in the jury room. Whether or not you take  
11 notes, you should rely on your personal memory of what was  
12 said. Notes are only to assist your memory. You should not be  
13 overly influenced by the notes.

14 I recall when I was taking notes myself in school,  
15 and otherwise, when you write down something, you tend not to  
16 listen to whatever is being said at the time because you are --  
17 that voice in your mind is repeating what you are writing down  
18 on your paper.

19 That is not to be discouraged, but it's just that I  
20 want you to make sure you are aware of this phenomenon. And  
21 sometimes you might miss something by virtue of taking notes.  
22 On the other hand, notetaking can be very helpful, so be your  
23 own judge.

24 BY MR. BEVAN:

25 Q. Now, did you see a vehicle parked in front of the building?

Pickette - Direct / Bevan

1 A. Yes, I did.

2 Q. Do you recall the color and make or model of the vehicle?

3 A. It was a brown Mercury sedan.

4 Q. Okay.

5 Do you recall who the registered owner was?

6 A. Yes, I do.

7 Q. Who was that?

8 A. Gary Schwartz.

9 Q. And did you see any other vehicle parked in front of  
10 building at that point in your surveillance?

11 A. No, I did not.

12 Q. Now, directing your attention to approximately ten days or  
13 so later on the date of December 6, 2001, did you again conduct  
14 surveillance in the area of 1419 Mandela Parkway?

15 A. Yes, I did.

16 Q. And on that occasion did you see any vehicles parked  
17 directly in front of the building?

18 A. Yes, I did.

19 Q. And do you recall the vehicle as you sit there that you saw  
20 parked?

21 A. There was a red Geo, a white BMW, and then again, the brown  
22 Mercury.

23 Q. Okay.

24 First, with respect to the brown Mercury, was that  
25 the same brown Mercury that you had seen on November 26?

Pickette - Direct / Bevan

1 A. Yes, it was.

2 Q. Registered to Gary Schwartz?

3 A. Correct.

4 Q. With respect to the red Geo, did you or someone else run  
5 the license plate on that vehicle to determine the registered  
6 owner?

7 A. Yes.

8 Q. Who was that?

9 A. The registered owner was Brian Lundeen.

10 Q. And with respect to the white BMW, did you run the  
11 registration on that, you or someone else --

12 A. Yes.

13 Q. -- to determine the registered owner?

14 A. Yes. And the registered owner was Douglass Church.

15 Q. Douglass Church?

16 A. Yes.

17 Q. Now, what time did you, if you recall, conduct that  
18 surveillance or initiate surveillance the day?

19 A. Initially on that day it was in the mid morning hours.

20 Q. Okay.

21 Now, in addition to the vehicle, did you see anyone  
22 else come out of the building?

23 A. Yes.

24 Q. Describe what you saw.

25 A. A saw a subject exit the building talking on a cell phone,

Pickette - Direct / Bevan

1 stayed outside for a couple of minutes and then returned  
2 inside.

3 Q. Do you recall a description of that individual?

4 A. That was a white male, probably in his early 20's, mid 20's  
5 at the oldest.

6 Q. Okay.

7 Now, did you terminate that surveillance at that  
8 point and reinitiate surveillance the same day?

9 A. Yes.

10 Q. Okay.

11 What time did you terminate the surveillance and  
12 what time did you reinitiate the surveillance, if you recall?

13 A. The termination was probably prior to lunchtime and  
14 reinitiated around 3:00, 3:15.

15 Q. Okay.

16 When you reinitiated the surveillance, what was the  
17 car situation out in front of the building to your observation?

18 A. That the white BMW that had been registered to Church was  
19 gone. The other two vehicles, the red Geo and the brown  
20 Mercury were still present, and in addition, there was a silver  
21 BMW present and a silver Mercury that was present.

22 Q. Okay.

23 This silver BMW, did you or someone else run the  
24 registration to determine who the registered owner of the  
25 silver BMW was?

## Pickette - Direct / Bevan

- 1 A. Yes.
- 2 Q. Who was that?
- 3 A. Etienne Fontan.
- 4 Q. Is that E-t-i-e-n-n-e Fontan?
- 5 A. Yes.
- 6 Q. Do you know if that is spelled, Agent Pickette,  
7 E-t-i-e-n-n-e, and Fontan, F-o-n-t-a-n?
- 8 A. Yes, I believe so.
- 9 Q. Okay.
- 10 What about the silver Mercury, did you or someone  
11 else run the license plate to determine the registered owner?
- 12 A. Yes.
- 13 Q. Who was that?
- 14 A. The registered owner of that vehicle was Ed Rosenthal.
- 15 Q. So you described then these multiple vehicles in front of  
16 the building that afternoon, including a car registered to  
17 Mr. Rosenthal; is that correct?
- 18 A. Correct.
- 19 Q. Now, what, if anything, did you observe on your  
20 surveillance besides the cars? What happened next?
- 21 A. During the time frame that we were at the location, myself  
22 and another agent observed two subjects exit the building and  
23 one of them walked toward the silver BMW and the other to the  
24 silver Mercury. The person that walked toward the silver  
25 Mercury was carrying a white bag, opened the door and put it

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1 towards the backseat, either on the floor or on the backseat.

2 Q. Did you come to determine who the person that was carrying  
3 the bag over to the silver Mercury, who that person was?

4 A. Yes, it was Edward Rosenthal.

5 Q. And how would you describe the bag?

6 A. It was a white like grocery bag that you would get from  
7 Wal-Mart or Safeway.

8 Q. Okay.

9                   Could you tell -- you couldn't see in it from your  
10 position; is that correct?

11 A. No.

12 Q. So you have no idea, would it be fair to say, whether it  
13 was empty or had something in it?

14 A. The way that it was hanging would appear there was  
15 something in it. But I don't know if there was or what was in  
16 it.

17 Q. Now, what happened next in the sequence of your  
18 observation?

19 A. Mr. Rosenthal got into the driver's seat of the vehicle and  
20 the other individual got into the passenger's side, and they  
21 left the area and drove into San Francisco. Once in San  
22 Francisco, we temporarily lost surveillance on them due to  
23 traffic and limited resources at the time and reestablished  
24 surveillance as we observed Mr. Rosenthal and the other  
25 individual walking across the street towards 52 6th Street.

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1 Q. And 52 6th Street, do you know that to be the location of  
2 the Harm Reduction Center?

3 A. Yes.

4 Q. And did you -- could you observe -- were you in a position  
5 to observe, rather, where Mr. Rosenthal went in relation to the  
6 Harm Reduction Center?

7 A. He crossed the street and they entered the front door, both  
8 of them, of the Harm Reduction Center.

9 Q. And do you recall, without reference to your report,  
10 approximately what time you saw Mr. Rosenthal go into 52 6th  
11 Street?

12 A. It would have been later afternoon, probably 4:30. Give or  
13 take. It was a right before rush hour traffic.

14 Q. Okay.

15 And were you in a position to observe whether or not  
16 Mr. Rosenthal at some point left -- before I ask that, did  
17 Mr. Rosenthal enter the building in the company of a person  
18 that you saw get into the passenger's seat?

19 A. Yes. And he was carrying the white bag that I had seen him  
20 put into the vehicle as well.

21 Q. Mr. Rosenthal was?

22 A. Correct.

23 Q. And did you observe him carrying that bag into 52 6th  
24 Street?

25 A. Yes.

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1 Q. And did there come a point where you saw Mr. Rosenthal  
2 leave from the building?

3 A. They exited and returned to the vehicle.

4 MR. AMPARAN: Objection. Non-responsive.

5 THE COURT: I'll allow it.

6 BY MR. BEVAN:

7 Q. Did you see Mr. Rosenthal leave the building?

8 A. Yes.

9 Q. And approximately how long was he in the building?

10 A. Approximately 30 minutes.

11 Q. And when he came out of the building, did he have the white  
12 bag?

13 A. No, he did not.

14 Q. And when he came out of the building, was he with the other  
15 person that he had come there with?

16 A. Yes, I believe so.

17 Q. And what happened next?

18 A. They returned to their vehicle and started to leave the  
19 area. Again surveillance was lost in city traffic. And the  
20 vehicle was located parked on the street near the Harm  
21 Reduction Center empty.

22 At that point, we are unsure if both or one of them  
23 had ran into the Harm. We didn't see where they went at that  
24 point.

25 MR. AMPARAN: I'm going to object. Speculation.

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1 MR. BEVAN: I'll rephrase it.

2 MR. AMPARAN: Move to strike.

3 THE COURT: Yeah. It may be stricken.

4 The jury is instructed to disregard it.

5 BY MR. BEVAN:

6 Q. The last part, Agent Pickette, that you were just  
7 describing, you say you testified you lost Mr. Rosenthal in  
8 traffic after he had left the Harm Reduction Center; is that  
9 correct?

10 MR. AMPARAN: Objection. Vague as to time.

11 THE COURT: Clarify.

12 BY MR. BEVAN:

13 Q. The first time that you saw Mr. Rosenthal leaving the Harm  
14 Reduction Center, I think you testified that that was  
15 approximately 30 minutes after he had gone in; is that correct?

16 A. Correct.

17 Q. When he came out, according to your testimony, he was not  
18 carrying the bag?

19 A. Correct.

20 Q. Was he in the company of the other person that you had seen  
21 get in the passenger's seat?

22 A. Yes.

23 Q. At what point did you lose Mr. Rosenthal and the other  
24 individual?

25 A. After they had reentered his vehicle and departed the area.

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1 Q. Okay.

2 And did you lose them once they started up the car  
3 and drove off?

4 A. Yes.

5 Q. What, if anything, did you do once you realized that they  
6 had been lost in traffic?

7 A. Agents were looking in the area to attempt to locate him.  
8 One of the agents did locate the vehicle parked on the side of  
9 the road. And due to the location of the car, a constant, I  
10 guess would be called an eye, a view of the vehicle was not  
11 maintained and vehicles would circle around and check to see if  
12 the vehicle was still there. At one point, the vehicle was  
13 seen with both subjects in the vehicle driving.

14 MR. AMPARAN: Your Honor, I would object. Move to  
15 strike. It lacks foundation. Multiple --

16 THE COURT: Sustained. He didn't see it.

17 MR. BEVAN: Okay.

18 BY MR. BEVAN:

19 Q. What part -- limiting your testimony, Agent Pickette, to  
20 what you saw, did you actually -- at what point did you lose  
21 the car that Mr. Rosenthal was in?

22 A. After he left the Harm Reduction Center, the first time,  
23 got in the vehicle and left.

24 Q. Okay.

25 Did you receive reports, however, from other agents

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1 that were participating in this surveillance?

2 A. Yes.

3 Q. And based on those reports, did you make a decision to go  
4 to another location to see if Mr. Rosenthal would return there?

5 A. Yes, I did.

6 Q. What location was that?

7 A. I returned, along with Special Agent Baker, to 1419 Mandela  
8 Parkway.

9 Q. Did there come a point that afternoon where you saw  
10 Mr. Rosenthal returning to the Mandela Parkway building?

11 A. Yes.

12 Q. And approximately how long did you see him come back after  
13 you had seen him leave the Harm Reduction Center?

14 A. From the time that we lost sight of him, the time after he  
15 left the Harm Reduction Center was within 20 to 30 minutes that  
16 he returned to 1419 Mandela Parkway.

17 Q. Okay.

18 Do you know if he went inside the building?

19 A. No, he did not.

20 Q. Where did he go?

21 A. He pulled up in front of the bidding, the passenger got out  
22 of the vehicle and entered the silver BMW and both of them left  
23 the area.

24 Q. Okay.

25 Now, Agent Pickette, do you recall that during the

Pickette - Direct / Bevan

1 time that you were the so-called lead case agent with respect  
2 to this investigation, that there came a point where you  
3 participated in what is known as an undercover buy of marijuana  
4 plants at the Harm Reduction Center?

5 A. Yes.

6 Q. And do you recall the date that the buy was actually  
7 completed?

8 A. It was in January, I believe, but I would have to refer to  
9 a report for the exact --

10 Q. Go ahead, if you need to refresh your recollection.

11 A. Would have been January 9th, 2002.

12 Q. And was there a DEA agent playing a role or pretending to  
13 have the role of a buyer of marijuana?

14 A. Yes.

15 Q. And who was that?

16 A. Special Agent Chris Fay.

17 Q. At that time, Chris Fay was an agent assigned, his post of  
18 duty was in this building; is that correct?

19 A. Yes, it was.

20 Q. Okay.

21 And what was your role, if any, in relation to this  
22 undercover buy?

23 A. As I previously stated, I was a case agent as well as part  
24 of the surveillance on this particular purchase.

25 Q. Okay.

Pickette - Direct / Bevan

1                   Did there come a point after the buy where you took  
2 custody of marijuana?

3 A. Yes.

4 Q. And did there come a point where you took custody of the  
5 marijuana plants and counted the plants?

6 A. Yes.

7 Q. And how many plants did you count?

8                   MR. AMPARAN: I would object. Issues related to --  
9 never mind. I withdraw it.

10 BY MR. BEVAN:

11 Q. How many plants did you count?

12 A. I counted 405 marijuana plants.

13 Q. Where were you when you counted them?

14 A. In our office space in the federal building.

15 Q. Okay.

16                   MR. BEVAN: 74A.

17 BY MR. BEVAN:

18 Q. Agent Pickette, I'm going to put on the witness stand in  
19 front of you Exhibit 74A. And if you take -- you can stand up,  
20 if you would.

21                   There is an evidence tag on this box; is that  
22 correct?

23 A. Yes, there is.

24 Q. And does that contain your name in any way on that box?

25 A. Yes, it does. It indicates that I sealed the box.

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1 Q. Okay.

2 MR. AMPARAN: Your Honor, I'm going to object to  
3 this item of evidence. It lacks chain of custody.

4 THE COURT: Well --

5 MR. BEVAN: I'm not offering it into evidence at  
6 this point, Your Honor.

7 THE COURT: Fine.

8 BY MR. BEVAN:

9 Q. Agent Pickette, would you take those scissors and open up  
10 that box.

11 A. Yes.

12 Q. What is in the box?

13 A. Inside the box are several bags that contain green leafy  
14 substance, the marijuana plants from the day.

15 Q. Okay.

16 MR. AMPARAN: Your Honor, I'm going to object and  
17 move to strike, lacks foundation and multi-hearsay.

18 THE COURT: Well, it appears to you to be marijuana.

19 THE WITNESS: It appears to be marijuana and appears  
20 to be the one from that day.

21 BY MR. BEVAN:

22 Q. Take everything out of the box, Agent Pickette.

23 A. There is two bags of marijuana and three telephone books in  
24 there.

25 Q. Okay.

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1           So could you describe for the record, Agent  
2 Pickette, all the items that you have removed from this box  
3 containing Government's Exhibit 74A.

4   A.   Yes.  There are two DEA evidence bags that contain  
5 marijuana, what appears to be the marijuana from that day.  And  
6 three telephone books.  They have been repackaged prior to -- a  
7 different way than what I had packaged them ordinarily.

8           MR. AMPARAN:  Your Honor, I object.  Move to strike,  
9 lacks foundation, multiple levels of hearsay.

10          THE COURT:  Well, I don't know -- he is not offering  
11 it.

12          MR. AMPARAN:  Your Honor --

13          THE COURT:  He is testifying as to what it appears  
14 to him to be.  The Government, if it becomes an issue, will  
15 have to establish the chain of custody and to establish what it  
16 is.

17          MR. AMPARAN:  My objection goes to if he is saying  
18 it's been repackaged, how does he identify --

19          THE COURT:  Well, that is cross-examination,  
20 Counsel.  If you don't accept his testimony, you cross-examine  
21 him on it.

22                 Go ahead.

23   BY MR. BEVAN:

24   Q.  Now, Agent Pickette, let's talk about the telephone books.

25   A.  Yes.

Pickette - Direct / Bevan

1 Q. Were you involved in utilizing the telephone books for some  
2 purpose in connection with the plants?

3 A. Yes, I was.

4 Q. And what was that?

5 A. It was a technique that I had been taught to preserve wet  
6 plant material. It's essentially the same as pressing a flower  
7 or rose. It will help withdraw the water and preserve the  
8 plant material in the best shape that we can. If we were to  
9 take them and bunch them up together without something to  
10 absorb the water, it would just essentially turn to mush and  
11 not be recognizable.

12 Q. Okay.

13                   And based on -- take a look at one of those  
14 telephone books.

15                   Can you tell whether or not the plants -- how many  
16 plants did you put in each telephone book?

17 A. I don't remember how many per telephone book. I put all  
18 405 plants that day into one of these three books.

19 Q. Okay.

20                   Where did you get the telephone books?

21 A. From the DEA office.

22 Q. Now, can you tell whether or not the plants are still in  
23 the telephone books?

24 A. It appears that they are not in the telephone books.

25 Q. They are not in the telephone books?

Pickette - Direct / Bevan

1 A. No.

2 Q. Okay.

3                   And would it be fair to say that with respect to the  
4 packaging of what appears to be a green leafy substance,  
5 perhaps plants, that someone else's signature is on the  
6 evidence tag; is that correct?

7 A. Yes, there is.

8 Q. Yours is not on it?

9 A. No, mine is not.

10 Q. Similar with respect to this other exhibit that contain  
11 a -- what you've described has another person's signature; is  
12 that correct?

13 A. Correct. It does.

14 Q. Okay.

15                   Do you recognize, nonetheless, that those are the  
16 three telephone books that you put the plants inside of?

17 A. Yes.

18                   THE COURT: Ladies and gentlemen, we are about to  
19 take our first break during the trial, and I want to remind you  
20 of the instruction I gave you earlier. Until this trial is  
21 over, you are not to discuss the case with anyone, including  
22 your fellow jurors, members of your family, people involved in  
23 the trial or anyone else, nor are you allowed to permit others  
24 to discuss the case with you. If anyone approaches you and  
25 tries to talk to you about the case, please, let me know about

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1 it immediately.

2 Do not read or listen to any news reports of the  
3 trial.

4 Finally, you are reminded to keep an open mind until  
5 all the evidence has been received and you have heard the  
6 arguments of counsel, the instructions of the Court and the  
7 views of your fellow jurors.

8 If you need to speak with me about anything, simply  
9 give a signed note to Barbara and she will give it to me.

10 I will not repeat these admonitions each time we  
11 recess or adjourn, but you will be reminded of them on such  
12 occasions.

13 We will be in recess until 10:15.

14 (Jury out at 9:58 a.m.)

15 (Proceedings resumed/jury in at 10:16 a.m.)

16 THE COURT: Please be seated.

17 When you come out here, you can just sit down,  
18 assuming everybody is there.

19 Let the record reflect that all parties are present,  
20 all jurors are present.

21 Mr. Bevan, you may continue.

22 DIRECT EXAMINATION, CONTINUED

23 BY MR. BEVAN:

24 Q. Agent Pickette, at the break we were talking about the  
25 telephone books and the plants, when you received the plants,

Pickette - Direct / Bevan

1 that you have described receiving which you counted to be at  
2 405 plants --

3 A. Yes.

4 Q. -- did you receive them directly from Agent Fay?

5 A. Yes, I did.

6 Q. And did you lay out the plants and photograph them?

7 A. Yes, I did.

8 MR. BEVAN: Board -- Exhibit 101, Your Honor, board  
9 2 of 2.

10 May I ask the witness to step down from the witness  
11 stand for this purpose?

12 THE COURT: Yeah. Sure.

13 BY MR. BEVAN:

14 Q. Agent Pickette, in reference to this board, Government's  
15 Exhibit 101, could you kindly explain for the Court and jury  
16 what those pictures reflect, starting with picture A and going  
17 through alphabetically.

18 A. Okay. When I received the plants, they were all contained  
19 in like plastic -- I received them in plastic horticultural  
20 trays, like you would see at a nursery. I removed all the  
21 plants and laid them out on cardboard boxes that I had  
22 unfolded. So picture A would show a portion of these plants,  
23 as well as the remainder of the pictures. Some are close-ups,  
24 would be able to show root structure. And others are just  
25 general photos of those plants.

Pickette - Direct / Bevan

1 Q. Okay.

2 Now, that board reflects what appear to be stakes in  
3 some of the plants; is that correct?

4 A. Yes, there are stakes in some of the plants.

5 Q. There weren't stakes in every plant; is that correct?

6 A. No, there were not.

7 Q. Okay.

8 Did you -- did you retain the stakes?

9 A. Yes.

10 Q. And showing you, sir, Exhibit 74C, a bag containing stakes,  
11 is there an evidence tag the bears your name there?

12 A. Yes, there is.

13 Q. Can you tell us whether or not those are the stakes that  
14 you retained from the 405 plants that you have testified about?

15 A. Yes, they are.

16 MR. BEVAN: I would offer 74C in evidence, Your  
17 Honor.

18 THE COURT: Admitted.

19 (Plaintiff's Exhibit 74C was received in  
20 evidence.)

21 BY MR. BEVAN:

22 Q. Now, within the stakes, Agent Pickette, were there any  
23 stakes that said Medifarm on the stakes.

24 A. Yes.

25 Q. And showing you a group of stakes that are rubber banded,

Pickette - Direct / Bevan

1 do you know how many so-called Medifarm stakes there were?

2 A. There are approximately 43 stakes that state Medifarm on  
3 them.

4 MR. AMPARAN: Sorry. Couldn't hear that.

5 THE WITNESS: Forty-three.

6 BY MR. BEVAN:

7 Q. And on the stakes, it's a --

8 MR. BEVAN: May the record reflect, Your Honor, that  
9 I removed a group of stakes that the witness has now said say  
10 Medifarm.

11 THE COURT: From 74C, yes.

12 BY MR. BEVAN:

13 Q. Could you verify, Agent Pickette, that every one of those  
14 stakes said Medifarm on it. I would like you to look at each  
15 one individually and then I'll ask you a question.

16 MR. AMPARAN: Your Honor, we didn't have a chance to  
17 see them individually. May we?

18 THE COURT: You can under cross, okay?

19 THE WITNESS: Yes. Each one of these stakes say  
20 Medifarm on it.

21 BY MR. BEVAN:

22 Q. Okay.

23 Now, in addition to the word Medifarm, is there any  
24 other writing or printing on those stakes?

25 A. Yes, there is.

Pickette - Direct / Bevan

1 Q. And, for example, the stake that is the first one in that  
2 stack, what does it say on it?

3 A. It says J-2.

4 Q. J-2.

5 Do you know what the reference to J-2 is?

6 A. It would be my belief that it is a strain of marijuana.

7 Q. And based on your training and experience, is it accurate  
8 that different marijuana plants, for example, sometimes have  
9 different strain names?

10 A. Correct.

11 Q. Okay.

12 Are there different strains in those stakes or are  
13 they all J-2?

14 A. No, there are different names on these stakes.

15 Q. Okay.

16 Now, Agent Pickette, I want to show you a second  
17 board, Government's Exhibit 101, board 1 of 2.

18 Does this board depict the same plants that are laid  
19 out?

20 A. Yes, it does.

21 MR. BEVAN: I would offer these two board in  
22 evidence, Your Honor.

23 THE COURT: Admitted.

24 (Plaintiff's Exhibit 101 was received in  
25 evidence.)

Pickette - Direct / Bevan

1 BY MR. BEVAN:

2 Q. You can have a seat, Agent Pickette.

3 Now, did Agent Fay in connection with this  
4 undercover purchase of plants, hand you or give to you any sort  
5 of document in connection with this transaction?

6 A. Yes, he did.

7 Q. Showing you, sir, Exhibit 74D, as in David, could you pull  
8 out what's in this exhibit.

9 A. Yes.

10 Q. And do you recognize what that is?

11 A. Yes, I do.

12 Q. And what is it?

13 MR. AMPARAN: Well, Your Honor, I'm going to object.  
14 Lacks foundation.

15 THE COURT: He can say what it appears to him to be.

16 THE WITNESS: It appears to be a computer-generated  
17 receipt for 400 clones of mixed variety at \$9 each. The title  
18 is 6th Street Harm Reduction Center.

19 The other sheet appears to be some sort of list of  
20 the different strains that were on the stakes with a count next  
21 to them. And then some very vague descriptions of what are  
22 like a pH and vegetative and bloom, nutrients and water.

23 MR. BEVAN: I believe that exhibit for now, is  
24 identified only.

25 BY MR. BEVAN:

Pickette - Direct / Bevan

1 Q. Now, Agent Pickette, in connection with the -- are you  
2 aware that Mr. Rosenthal's residence at 1635 East 22nd Street  
3 in Oakland was searched at or about February 12th, 2002?

4 A. Yes.

5 MR. AMPARAN: Objection, leading.

6 THE COURT: Overruled.

7 BY MR. BEVAN:

8 Q. In connection with that search, did you actually  
9 participate in the search?

10 A. No, I did not.

11 Q. Nonetheless, did you write a report and document certain  
12 items of evidence that were obtained during that search?

13 A. Yes, I did.

14 Q. In reference to a sum of money, did your report reflect a  
15 sum of money --

16 A. Yes, it did.

17 Q. -- that you documented?

18 A. Yes, it did.

19 Q. And how much was that money?

20 MR. AMPARAN: Your Honor, I'm going to object,  
21 multi-level of hearsay, lacks foundation, calls for  
22 speculation.

23 THE COURT: Well, calls for speculation.

24 MR. BEVAN: I'll rephrase.

25 BY MR. BEVAN:

## Pickette - Direct / Bevan

1 Q. In connection with that search, you wrote a report?

2 A. Yes.

3 Q. And your report lists various items that you accounted for  
4 in that report; is that correct?

5 A. Correct.

6 Q. And did you receive evidence that was at least represented  
7 to you as having come from that location?

8 A. Yes.

9 Q. And was there cash among the items that you accounted for?

10 MR. AMPARAN: Objection, Your Honor, calls for  
11 hearsay, lacks personal knowledge.

12 THE COURT: Well, no, he has personal knowledge of  
13 what he received. He didn't participate in the search, but he  
14 has personal knowledge of what he received, and so he can  
15 testify as to what he received and who gave it to him. As to  
16 where it came from, that would have to be a different witness.

17 MR. BEVAN: Yes, Your Honor.

18 BY MR. BEVAN:

19 Q. What was the amount of money that you accounted for in your  
20 report?

21 A. I would have to refer to the report for the exact amount.

22 Q. Go ahead.

23 A. It was \$1463.

24 Q. In cash?

25 A. In cash.

## Pickette - Cross / Amparan

1 MR. BEVAN: That's all I have of this witness at  
2 this time, Your Honor.

3 THE COURT: Thank you.  
4 Cross?

5 MR. AMPARAN: Could I just have a moment?

6 THE COURT: Well, Counsel, of course, you can have a  
7 moment, but all of these items were supplied to the defense, my  
8 understanding.

9 MR. AMPARAN: No.

10 THE COURT: Okay. I don't want to get into  
11 discovery matter, Counsel, and I don't want anything said in  
12 front of the jury suggesting that you have not had the  
13 opportunity to review these things. So that is the end of that  
14 discussion. All right?

15 Take your time, go look at it.

16 MR. AMPARAN: Thank you.

17 (Counsel reviews.)

18 CROSS-EXAMINATION

19 BY MR. AMPARAN:

20 Q. Good morning, Agent Pickette.

21 A. Good morning.

22 Q. You said that you are employed by the DEA?

23 A. Yes, I am.

24 Q. Is that the Federal Justice Department?

25 A. United States Department of Justice.

## Pickette - Cross / Amparan

1 Q. And you said that you are the supervising agent in this  
2 matter?

3 A. I was the case agent in this matter. My current title is  
4 supervisory special agent.

5 Q. Supervisory special agent.

6 And you testified that at the time relevant to this  
7 investigation, I would assume '98 to 2002, that you were simply  
8 a special agent?

9 A. Correct.

10 Q. Is there a designation in the DEA that separates an agent  
11 from a special agent?

12 A. No. For nomenclature purposes, it's often referred to as  
13 an agent but the official title is special agent.

14 Q. So when you come on board to the DEA, you immediately  
15 become special agent?

16 A. Correct.

17 Q. Without having to do anything special?

18 A. You have to attend the academy and pass the academy, but  
19 when you get hired, you are hired as a special agent.

20 Q. Okay.

21 And as this -- as the case agent in this  
22 investigation, you were the hub, basically, the one who is in  
23 control or maintaining supervision over the entire  
24 investigation?

25 A. Generally. There were several federal agencies involved,

## Pickette - Cross / Amparan

1 each one had a designated case agent and I was the one for DEA  
2 and the lead on the investigation.

3 Q. Okay.

4 MR. AMPARAN: I apologize for my handwriting in  
5 advance.

6 BY MR. AMPARAN:

7 Q. So in terms of the DEA, federal jurisdiction, you were the  
8 supervisor?

9 A. I was the case agent.

10 Q. Case agent which -- is that --

11 A. It was --

12 Q. In lay speak, were you head of the investigation?

13 A. I was the head of the investigation, but I did not have a  
14 supervisory role within DEA at that time.

15 Q. Okay.

16 So we have -- with an E, right?

17 A. Correct.

18 Q. So we have Special Agent Pickette. What other DEA agents  
19 were working with you in this investigation?

20 A. There were several. And eventually our entire office had  
21 some role in it. But in our immediate was a group supervisor,  
22 Michael Delaney.

23 Q. Michael?

24 A. Michael Delaney.

25 Q. Can you please spell Michael's last name.

## Pickette - Cross / Amparan

- 1 A. D-e-l-a-n-e-y.
- 2 Q. D-e-l-a- --
- 3 A. -- n-e-y.
- 4 Q. N-e-y. Mike Delaney?
- 5 A. Yes, that's his name.
- 6 Q. Who else was working as a DEA agent?
- 7 A. There was Brian Padgett.
- 8 Q. P-a-d-g-e- --
- 9 A. T-t.
- 10 Q. And?
- 11 A. Chris Fay.
- 12 Q. Chris Fay.
- 13 Is there an E on that?
- 14 A. No.
- 15 Q. Okay.
- 16 A. Let me see. Who else was -- Mark Nelson. Who else would
- 17 have been -- Dan Tuey.
- 18 Q. T-u-e-y?
- 19 A. T-u-e-y.
- 20 Q. Okay.
- 21 A. Rob Eller had some participation in it.
- 22 Q. Rob Eller.
- 23 A. E-l-l-e-r.
- 24 And then there was others. I would have to refer to
- 25 reports. Those are the ones off the top of my head.

## Pickette - Cross / Amparan

1 Q. I'm going to ask you to do that possibly over the lunch  
2 hour.

3 You mentioned that there were other U.S. Government  
4 agencies, I believe?

5 MR. BEVAN: Your Honor, I object.

6 THE COURT: Sustained. Sustained.

7 Next question.

8 MR. AMPARAN: The Court is not going to allow me to  
9 ask which customs agents are involved.

10 THE COURT: It's irrelevant. Not proper  
11 cross-examination and it may be irrelevant. It's time  
12 consuming and so I'm sustaining the objection.

13 MR. AMPARAN: Okay.

14 BY MR. AMPARAN:

15 Q. Without listing any, other federal Government agencies  
16 assisted you in this investigation?

17 A. Yes.

18 Q. Customs?

19 A. Yes. At the time it was called Customs.

20 Q. What is it called now?

21 A. ICE, Immigration Customs Enforcement.

22 Q. Okay.

23 IRS?

24 THE COURT: This line of questioning is -- as I've  
25 just indicated is irrelevant. You may cross-examine this

## Pickette - Cross / Amparan

1 witness on what he did, what he saw, what he testified to, that  
2 is all relevant. The fact that other agencies were involved in  
3 this investigation is not appropriate questioning of this  
4 witness. And that's the ruling of the Court.

5 MR. AMPARAN: Okay.

6 BY MR. AMPARAN:

7 Q. You said that you were involved in certain aspects of this  
8 investigation, personally?

9 A. Correct.

10 Q. So you would know, for example, whether or not the  
11 investigation included use -- well, let's start with you've  
12 testified as to an undercover buy?

13 A. Yes.

14 Q. And in those situations, someone, such as yourself, would  
15 pretend to be a medical patient and go into a medical  
16 dispensary under the guise of procuring medicine?

17 A. We would go into an establishment and purchase marijuana.

18 (Juror coughing repeatedly.)

19 THE COURT: Barbara.

20 Would you like a glass of water?

21 Would you get her a glass of water, Barbara.

22 Thank you.

23 BY MR. AMPARAN:

24 Q. You said you personally did not engage in the undercover  
25 buy, correct?

## Pickette - Cross / Amparan

1 A. Correct. I was not the undercover agent. I was on scene,  
2 but I was not the person making the purchase.

3 Q. Okay.

4 In conducting the investigation and surveillance,  
5 did you use federal dollars to purchase these undercover buys?

6 A. Yes, we did.

7 Q. And did you use any video cameras in this investigation?

8 A. Yes.

9 Q. Did you use or employ wireless transmitters to record  
10 conversations?

11 A. Yes.

12 Q. Did you use -- how many vehicles, how many DEA vehicles  
13 would have been used in these periods of times where automobile  
14 surveillance was occurring?

15 A. It depended on any given day. It could be one, could have  
16 been five or six.

17 Q. Five or six different vehicles?

18 A. Yes.

19 Q. And when you have a DEA agent in a vehicle, is it custom to  
20 have solo officers or are they tandem, like partnered?

21 A. It depends on the situation and the day of the activity.  
22 Sometimes we are solo, sometimes we will have two individuals.  
23 Sometimes I have seen as many as four in one vehicle.

24 Q. Okay.

25 You said that your investigation in this matter --

## Pickette - Cross / Amparan

1 well, you didn't. Let me apologize.

2           You said that you were in surveillance at 1419  
3 Mandela Parkway in the City of Oakland, California on  
4 November 26th of 2001?

5 A. Correct.

6 Q. Now, do you recall the events of that day clearly as you  
7 sit here or did you read your report before taking the stand?

8 A. I have reviewed my report.

9 Q. How many times have you read your report, Agent Pickette,  
10 between, say, November of 2001 and today, May 15th, 2007?

11 A. I would have no recollection of the exact number of times.  
12 I can say no more than ten times.

13 Q. No more than ten times?

14 A. Right.

15 Q. And do you recall how many times you have testified against  
16 Mr. Rosenthal?

17           MR. BEVAN: Your Honor, that is objectionable.

18           THE COURT: Sustained.

19           The jury is admonished to disregard the question.  
20 As you know, any question as to which an objection has been  
21 raised and the objection is sustained is a question that you  
22 should not consider for any purpose at all.

23 BY MR. AMPARAN:

24 Q. Now, you stated you were in surveillance on November 26th  
25 of 2001 in the afternoon. Is that when your assignment began

## Pickette - Cross / Amparan

1 related to Mr. Rosenthal?

2 A. No. It probably would have been prior to that. I'm a  
3 little confused by your question. The assignment for the day?

4 Q. No, no, no, no, no. The assignment as to the investigation  
5 to Mr. Rosenthal.

6 A. No, that would not have been the first time that I would  
7 have heard of Mr. Rosenthal doing some sort of activity at that  
8 location.

9 Q. Okay.

10 When did you begin your investigation of  
11 Mr. Rosenthal?

12 MR. BEVAN: Irrelevant.

13 THE COURT: Sustained.

14 BY MR. AMPARAN:

15 Q. You said that on November 26, 2001 you were doing  
16 surveillance on Mandela Parkway?

17 A. Yes.

18 Q. Were you alone or with a partner?

19 A. I believe I was alone at that time.

20 Q. Did you videotape that surveillance?

21 A. No, I did not.

22 Q. You said that you saw a brown Mercury sedan parked in front  
23 of Mandela Parkway?

24 A. Correct.

25 Q. Have you ever been to 1419 Mandela Parkway personally?

## Pickette - Cross / Amparan

1 A. I have been on the outside of 1419 Mandela Parkway  
2 personally.

3 Q. Have you ever been inside 1419 Mandela Parkway?

4 A. No, I have not.

5 Q. Okay.

6 Looking at what's been marked as Exhibit 9, board 1  
7 of 8, Agent Pickette, does this board show where you observed  
8 that Mercury, the brown Mercury?

9 A. From where I observed it or where it was parked?

10 Q. Where the Mercury was parked.

11 A. It represents an approximate location. It was  
12 approximately at the telephone pole similar to where the blue  
13 Honda is.

14 Q. So that would be depicted in photograph C of this board?

15 A. Correct. That's approximate.

16 Q. Okay.

17 And had you been to the outside of 1419 Mandela  
18 Parkway prior to November 26 of 2001?

19 A. I believe I had driven by there prior to that, but had not  
20 conducted surveillance or observed anything there.

21 Q. Okay.

22 Do you, as part of your investigation, do you have  
23 any knowledge as to whether or not James Halloran ever did  
24 anything to modify the outside of this building?

25 A. To the outside?

## Pickette - Cross / Amparan

1 Q. Correct.

2 A. Not to my recollection, no.

3 Q. And do you have any personal knowledge based on your  
4 investigation, Agent Pickette, of whether Ed Rosenthal did  
5 anything to modify the outside of this building?

6 A. No, I do not.

7 Q. You said that the Mercury that was parked outside is -- the  
8 Government asked you whether or not you or someone ran that and  
9 you said it was run, did you personally run the license plate?

10 A. I believe I did, yes.

11 Q. And that license plate came back to a Mr. Gary Schwartz?

12 A. Correct.

13 Q. Based on that license plate, you began an investigation of  
14 Mr. Schwartz as well?

15 A. We began to believe that he was involved in that location.  
16 And so in the aspect of that, yes.

17 Q. So you would naturally assume that he was somehow involved  
18 in what was going on inside?

19 A. Correct.

20 Q. And you naturally included him in your investigation?

21 A. To some extent, yes.

22 Q. Okay.

23 You did not enter on November 26, 2001?

24 A. No, I did not.

25 Q. What was the period of time that you remained in

## Pickette - Cross / Amparan

1 surveillance on that address that day?

2 A. I would say probably 20 to 30 minutes, I could refer and  
3 give you a better --

4 Q. Please do.

5 A. -- time frame.

6 That was November 26, correct?

7 Q. November 26 in the afternoon, I believe you testified.

8 A. Would have been 45 minutes according to my report.

9 Q. And during those 45 minutes you were paying attention to  
10 all activity relevant to 1419 Mandela Parkway, Oakland,  
11 California, correct?

12 A. Correct, to the best of my ability.

13 Q. You were on the job?

14 A. Yes.

15 Q. You are taking notice of anybody who enters, correct?

16 A. Correct.

17 Q. Anybody who exits?

18 A. Correct.

19 Q. And anybody that arrives or parks out front?

20 A. Correct.

21 Q. For the 45 minutes, you didn't notice anybody arrive to  
22 1419 Mandela Parkway?

23 A. No.

24 Q. 45 minutes you didn't see anyone leave?

25 A. No, I did not.

## Pickette - Cross / Amparan

1 Q. What happened after 45 minutes that caused you to leave  
2 your surveillance?

3 A. Because I hadn't seen any activity and the person  
4 associated with the vehicle was not observed, no other vehicles  
5 arrived, I terminated surveillance.

6 Q. You said that you returned on December 6th of 2001 to 1419  
7 Mandela Parkway, Oakland, California?

8 A. Yes.

9 Q. And at that time, I believe you testified that you saw a  
10 red Geo?

11 A. Correct.

12 Q. A white BMW?

13 A. Correct.

14 Q. And a brown Mercury?

15 A. Correct, the same brown Mercury.

16 Q. The same brown Mercury?

17 A. Correct.

18 Q. Was the brown Mercury parked in the same spot you had seen  
19 it before?

20 A. No.

21 Q. Did you make note of that in your report?

22 A. No, it was parked in front of the building. They were all  
23 in front of the building.

24 Q. So all three vehicles would have been parked in front of,  
25 as depicted in like C, where the truck and the Honda are now?

## Pickette - Cross / Amparan

1 A. From there, maybe back to the edge of the fence line  
2 between the white building and the building with the blue  
3 garage door on it.

4 Q. As you sit here today some six years later, do you remember  
5 the order of the cars?

6 A. No, I do not.

7 Q. And as you sit here today, can you honestly say that the  
8 brown Mercury was not in the same place on December 6th as it  
9 was on November 26th?

10 A. It could have been parked in the same spot, but it doesn't  
11 ring a bell that it was like stationary or abandoned there.

12 Q. Did you go back to 1419 Mandela Parkway, Oakland,  
13 California, any time between November 26 and December 6?

14 A. Potentially. There was -- if there was, I don't have a  
15 report in front of me. And I had other duties at the time as  
16 well, so there could be a gap in surveillance or driving by.

17 Q. And as being the case agent on this case, would it have  
18 been your responsibility to file a report had you maintained  
19 surveillance at any time between November 26 and December 6?

20 A. Yes, if something was noted.

21 Q. Do you have a report that you generated based on your  
22 duties as case agent relative to 1419 Mandela Parkway, Oakland,  
23 California, between November 26 and December 6?

24 A. Not in front of me. I would have to refer to a case file  
25 to determine that.

## Pickette - Cross / Amparan

1 Q. Could you do so?

2 THE COURT: Well, we're not going to do that.

3 Go ahead.

4 BY MR. AMPARAN:

5 Q. Between November 26 and December 6, what had you done to  
6 investigate or interview the registered owner of the brown  
7 Mercury?

8 A. Usually in an investigation it's not conducive to interview  
9 somebody that could be a target prior to determining  
10 involvement.

11 Q. Okay.

12 And on -- so you did nothing?

13 A. We did not interview or do surveillance on this individual  
14 other than what occurred in front of 1419 Mandela Parkway.

15 Q. The registered owner of the brown Mercury, Gary Schwartz,  
16 did you go to his house?

17 A. Correct. I did not know.

18 Q. Did anyone under your direction or supervision go to his  
19 house?

20 A. At some point, somebody went to his residence, and I do not  
21 know if it was prior to the execution of the search warrants on  
22 February 12th or after.

23 Q. And you said at that time, December 6, 2001, you also  
24 observed for the -- let me ask you this: Is that the first  
25 time you had observed the red Geo?

## Pickette - Cross / Amparan

- 1 A. Yes, I believe so.
- 2 Q. And the first time you had observed the white BMW?
- 3 A. Yes, I believe so.
- 4 Q. And was it you or someone at your direction who ran the red
- 5 Geo?
- 6 A. I did.
- 7 Q. Was it you or someone at your direction who ran the white
- 8 BMW?
- 9 A. I did.
- 10 Q. When you ran the red Geo and came up with the name of Brian
- 11 Lundeen, is it fair to say that Mr. Lundeen then became a
- 12 subject of your investigation?
- 13 A. The registered owner did, yes. Oftentimes in narcotics
- 14 investigations, the registered owner is not the true driver.
- 15 Therefore, that is one of the reasons why not to interview
- 16 somebody or tip our hand, so to speak.
- 17 Q. Back to my question, was it at that time Brian Lundeen
- 18 became the subject of your investigation?
- 19 A. Correct, the same capacity as the other registered owners
- 20 of all the vehicles.
- 21 Q. And at that time you ran the white BMW and came back with
- 22 the registered owner of Douglass Church --
- 23 A. Yes.
- 24 Q. -- and is it fair to say also that at that time Mr. Church
- 25 became the subject of your investigation?

## Pickette - Cross / Amparan

1 A. Yes.

2 Q. And on December 6, I believe you testified that you split  
3 up your surveillance into two separate sessions?

4 A. Correct.

5 Q. You said one began in the mid morning and ended prior to  
6 lunch?

7 A. Correct.

8 Q. Do you recall what caused you to end your surveillance  
9 prior to lunch?

10 A. A prior engagement in the city that had to be attended to  
11 for work.

12 Q. Okay.

13 How long during this first morning session on  
14 December 6, 2001 were you conducting surveillance at 1419  
15 Mandela Parkway, Oakland, California?

16 A. I would have to refer to my report --

17 Q. Please.

18 A. -- and I'll tell you.

19 In the morning. It was approximately 35 minutes.

20 Q. And at the time you arrived, all three vehicles were  
21 already there?

22 A. Correct.

23 Q. And parked?

24 A. Correct.

25 Q. Unoccupied?

## Pickette - Cross / Amparan

- 1 A. Correct.
- 2 Q. And for the 35 minutes you were there, the mid morning up  
3 until prior to lunch when you left, you did not see anybody  
4 enter 1419 Mandela Parkway?
- 5 A. I did not -- well, I did see somebody re-enter 1419 Mandela  
6 Parkway.
- 7 Q. Well, let me ask you this, then, first: You testified that  
8 you saw at some point somebody exit 1419 Mandela Parkway?
- 9 A. I had not --
- 10 Q. In the morning session -- in the morning session of your  
11 surveillance, you testified you saw a subject exit on a cell  
12 phone?
- 13 A. Correct.
- 14 Q. You said that was a white male in his 20's?
- 15 A. Correct.
- 16 Q. Could you identify that individual?
- 17 A. I did -- could not identify that individual.
- 18 Q. You saw that individual re-enter 1419 Mandela Parkway?
- 19 A. Correct.
- 20 Q. How long was that individual outside?
- 21 A. A few minutes.
- 22 Q. Did the individual smoke?
- 23 A. Can I refer --
- 24 Q. Sure.
- 25 A. I did not make reference to it, so if he was, I didn't make

## Pickette - Cross / Amparan

1 note of it or observe it. It is possible that he was smoking  
2 and I could not see it.

3 Q. Well, let me ask you this: If you are conducting  
4 surveillance, someone steps out of a building and smokes a  
5 cigarette, for example, is that something that would have been  
6 important for you to note on a report?

7 A. Depends. But not necessarily. I have noted that he was  
8 talking on the cell phone because that is what caught my  
9 attention. If he was smoking at the same time, I did not  
10 notice it.

11 Q. Okay.

12 Did you notice whether or not he was on the phone  
13 when he exited?

14 A. It appeared that it was in his hand already at that time to  
15 his ear.

16 Q. Was it at his ear the entire time you observed him?

17 A. Yes. Until he returned inside. He closed it and went  
18 inside.

19 Q. Okay.

20 So at the time he re-entered, it was not at his ear?

21 A. It was not at his ear.

22 Q. And how long before you left did the -- did that incident  
23 occur with the cell phone?

24 A. I can refer and tell you.

25 Q. Sure, please.

## Pickette - Cross / Amparan

- 1 A. He was outside for approximately two minutes, approximately  
2 eight minutes after that I left.
- 3 Q. And during that two-minute time, did anybody come up to  
4 him?
- 5 A. No.
- 6 Q. Did he make contact with anybody?
- 7 A. Not that I observed.
- 8 Q. And you would have observed that had it happened?
- 9 A. Correct.
- 10 Q. And you would have noted that in the report had it  
11 happened?
- 12 A. Yes.
- 13 Q. How long were you gone when you said you had business in  
14 the city to attend to?
- 15 A. About three and a half hours, give or take.
- 16 Q. And you said you returned to the -- to the Oakland site,  
17 Mandela Parkway at approximately, 3:00, 3:15 on December 6?
- 18 A. Correct.
- 19 Q. And when you returned, you noticed that the white BMW had  
20 left?
- 21 A. Correct.
- 22 Q. But the red Geo was still there?
- 23 A. Correct.
- 24 Q. And the brown Mercury was still there?
- 25 A. Yes.

## Pickette - Cross / Amparan

- 1 Q. And now there was a silver Mercury there as well?
- 2 A. A silver Mercury and a silver BMW.
- 3 Q. Silver BMW, silver Mercury, red Geo and a white BMW -- the  
4 white BMW was gone?
- 5 A. Right.
- 6 Q. So silver Mercury -- silver Mercury, brown Mercury, red  
7 Geo, I'm missing one. Brown Mercury, silver Mercury, red  
8 Geo --
- 9 A. Silver BMW.
- 10 Q. Silver BMW.
- 11 You hadn't seen the silver Mercury before?
- 12 A. No, I had not.
- 13 Q. And you hadn't seen the silver BMW before?
- 14 A. No, I had not.
- 15 Q. You ran the silver Mercury's license plate to find out the  
16 registered owner of that vehicle?
- 17 A. Yes.
- 18 Q. And you confirmed that it was a vehicle registered to Ed  
19 Rosenthal?
- 20 A. Correct.
- 21 Q. You ran the silver BMW's license plate and you discovered  
22 the registered owner to be Etienne Fontan?
- 23 A. Correct.
- 24 Q. Etienne Fontan became a subject of your investigation?
- 25 A. Yes.

## Pickette - Cross / Amparan

1 Q. And Ed Rosenthal continued to be a subject of your  
2 investigation?

3 A. Correct.

4 Q. You ran the license plate of the red Geo -- I already asked  
5 you that one.

6 How long after you had been there from 3:00, 3:15 in  
7 the afternoon, until such time as you saw somebody exit 1419  
8 Mandela Parkway with what you say was a white grocery bag?

9 A. Can I refer to my report?

10 Q. Sure.

11 A. Approximately 16 minutes.

12 Q. About 16 minutes?

13 So during that initial 16 minutes, is it fair to say  
14 that nobody entered?

15 A. Correct.

16 Q. Nobody exited?

17 A. Correct.

18 Q. Until such time as you saw two individuals coming out?

19 A. Correct.

20 Q. And you said one had a white bag?

21 A. Yes.

22 Q. In terms of this white bag, you said it's like a grocery  
23 bag?

24 A. Yes, that's what it appeared to be.

25 Q. So it comes on the big roll as you check out and it's got

## Pickette - Cross / Amparan

1 like handles on?

2 A. It would be similar to a Wal-Mart bag, plastic, two  
3 handles.

4 Q. And as you testified earlier, you couldn't tell if it was  
5 empty or had anything in it?

6 A. Correct.

7 Q. And you noted the white bag because you felt it was  
8 important?

9 A. Observing somebody coming out of a structure carrying a bag  
10 of any type and putting it into a vehicle in a narcotics  
11 investigation would be important.

12 Q. Okay.

13 And ascertaining whether or not the bag was empty or  
14 contained contraband in a narcotics investigation would be  
15 something of interest to you as well?

16 A. It could be, but it would also maybe inhibit the  
17 investigation by stopping that person at that time.

18 Q. And as you sit -- well, back then and as you sit here  
19 today, you don't know if that -- you don't know if the bag that  
20 you say Mr. Rosenthal was carrying contained his lunch?

21 A. Correct.

22 Q. How many DEA officers besides yourself were located at 1419  
23 Mandela Parkway about 3:15, 3:30 now, when you observed two  
24 individuals get in a car in a silver Mercury and leave?

25 A. At that time, there was no other DEA at 1419. There was an

## Pickette - Cross / Amparan

1 IRS agent present. And then once the vehicle moved, I  
2 telephoned our office and had additional people come out.

3 Q. Okay.

4 So as the vehicle with two individuals, the silver  
5 Mercury, drives away from Mandela Parkway in Oakland, there is  
6 an IRS agent in pursuit and yourself in pursuit?

7 A. We were not in pursuit. We were both in one car following  
8 the vehicle.

9 Q. Okay.

10 So you are in the same car following the vehicle?

11 A. Correct.

12 Q. Are you trained -- is that part of training to be an agent,  
13 does that -- does your training in academy work include  
14 surveillance in trailing vehicles?

15 A. Yes.

16 Q. And does that -- does the training include working in  
17 tandem and organizing the surveillance and trailing of a moving  
18 vehicle in such a way as to not give away the fact that it's  
19 being trailed?

20 A. Yes.

21 Q. And you have radios and such to be in communication with  
22 other agents so as to facilitate your surveillance?

23 A. Correct.

24 Q. And despite the training and equipment and everything else  
25 at your disposal, you say that you lost the silver Mercury?

## Pickette - Cross / Amparan

- 1 A. At times it happens and there is various reasons why that  
2 would happen.
- 3 Q. How far did you get from Mandela Parkway before you lost  
4 observation of the silver Mercury?
- 5 A. I'll refer to my report, but I believe it was into the  
6 City, being San Francisco. So that would be correct that was  
7 within the city limits of San Francisco that was lost.
- 8 Q. Does your report indicate exactly what point you were at  
9 when you identify where you lost visual?
- 10 A. Where we lost visual was 7th and Stevenson.
- 11 Q. 7th and Stevenson?
- 12 A. Correct.
- 13 Q. And from the time you lost visual at 7th and Stevenson  
14 until you observed Mr. Rosenthal and the other individual  
15 entering the Harm Reduction Center on 6th Street, how much time  
16 went by?
- 17 A. May I refer to my report?
- 18 Q. Please.
- 19 A. I would say no more than five minutes.
- 20 Q. And you have -- during that five-minute period of time, you  
21 have no idea whether or not Mr. Rosenthal and the passenger  
22 made any stops, correct?
- 23 A. Correct, during that time frame.
- 24 Q. No idea if they met anybody?
- 25 A. No idea if they met anybody during that time frame.

## Pickette - Cross / Amparan

1 Q. And you said, you testified that you next saw  
2 Mr. Rosenthal, again, as he was carrying a white bag into the  
3 Harm Reduction Center at 52 6th Street?

4 A. Correct. We initially observed him coming across the  
5 street, and by "we," I mean, myself and Special Agent Baker.  
6 Along with the second individual, and then entered the 52 6th  
7 Street address.

8 Q. Okay.

9 And, again, you said that at this time  
10 Mr. Rosenthal, again, had this white grocery bag?

11 A. Correct.

12 Q. And you still at this point have no idea whether that bag  
13 is empty or has anything in it?

14 A. Correct.

15 Q. No indication that Mr. Rosenthal is trying to hide the  
16 white bag?

17 A. No, indication of that.

18 Q. Got it out, plain view?

19 A. Carrying it in his hand, yes.

20 Q. Now, when you went to 52 6th Street, did you identify the  
21 owner of the property?

22 A. At that time? On that date?

23 Q. Well, not necessarily on that date. As part of your  
24 investigation did you -- once you went to 52 6th Street, is it  
25 fair to say that you expanded your investigation to find out

## Pickette - Cross / Amparan

1 who the owner of that property was?

2 A. Correct.

3 Q. Had you ever been to the Harm Reduction Center at 52 6th  
4 Street before?

5 A. Yes. I had never been in it, but I had been to that  
6 location, yes.

7 Q. Okay.

8 Had you been to the Harm Reduction Center before it  
9 was located at this particular location at its previous  
10 location?

11 A. No, it had already moved prior to my involvement.

12 Q. Okay.

13 And you said that both Mr. Rosenthal and his  
14 passenger had entered the Harm Reduction Center at about  
15 4:30 p.m. and you commented that it was right before rush hour?

16 A. Yeah, right before rush hour. I can give you the exact  
17 time. I didn't refer to my report previously, it was a  
18 ballpark.

19 Q. Let me ask you this, do you consider to be 4:30 right  
20 before rush hour in San Francisco?

21 A. I would consider rush hour in San Francisco just about any  
22 time. But that is San Francisco traffic. I can tell you the  
23 exact times that it was, 3:55 when he entered and 4:26 when he  
24 exited.

25 Q. And at that time, you said that there -- let me ask you

## Pickette - Cross / Amparan

- 1 this, the passenger that had been with Mr. Rosenthal, did he  
2 have anything in his hands?
- 3 A. No, he did not.
- 4 Q. No cartons?
- 5 A. No.
- 6 Q. No bags?
- 7 A. No.
- 8 Q. No boxes?
- 9 A. No.
- 10 Q. Mr. Rosenthal, did he have anything in his hands?
- 11 A. When he left?
- 12 Q. When he left.
- 13 A. No.
- 14 Q. No boxes?
- 15 A. No.
- 16 Q. No bags?
- 17 A. Nothing.
- 18 Q. When Mr. Rosenthal and his passenger walked across from  
19 where they were parked and entered the Harm Reduction Center,  
20 did they do so in any clandestine fashion?
- 21 A. No.
- 22 Q. Did you think that they were trying to hide?
- 23 A. No, they crossed at the earliest convenience they could, I  
24 guess.
- 25 Q. But if they were acting strangely or surreptitiously in

## Pickette - Cross / Amparan

1 some fashion, you would have noted that in your report,  
2 correct?

3 A. Correct.

4 Q. You said that after Mr. Rosenthal and his passenger  
5 re-entered the silver Mercury -- well, let me ask you this: At  
6 the time Mr. Rosenthal and his passenger left the Harm  
7 Reduction Center, was it your -- was it your intention on  
8 following that vehicle?

9 A. Yes.

10 Q. How many other agents besides yourself, whether they are  
11 IRS customs or whatever, how many other law enforcement agents  
12 were following Mr. Rosenthal when he left the Harm Reduction  
13 Center?

14 A. I will count them.

15 There was seven, including myself.

16 Q. How far from 52 6th Street did Mr. Rosenthal's vehicle  
17 travel before you lost observation or before --

18 A. He was parked at another location because that's probably  
19 where he could find parking and traveled -- I'm referring to my  
20 report again to give you the distance -- so it would have been  
21 about -- drove around a little bit downtown and then  
22 approximately Howard and 6th Street, and it was temporarily  
23 lost again, and the vehicle was found across the street from  
24 Harm as we were attempting to locate it.

25 Q. Okay.

## Pickette - Cross / Amparan

1                   So the observation, the Government observation and  
2 surveillance of the Rosenthal vehicle, was lost within a matter  
3 of blocks?

4 A. A few blocks. And then -- and then reestablished within  
5 minutes and within the block.

6 Q. Well, when it was reestablished, it was reestablished with  
7 a vacate unoccupied vehicle, correct?

8 A. Correct.

9 Q. How long before you observed Mr. Rosenthal in the -- and  
10 the passenger again, between the time you lost observation and  
11 not when you found the car --

12 A. Okay.

13 Q. -- but when you again observed Mr. Rosenthal?

14 A. It would have been when he was observed coming back to 1419  
15 that it was actually observed that it was, in fact,  
16 Mr. Rosenthal and the other passenger.

17 Q. So it was all the way from 6th and Howard or so --

18 A. Give or --

19 Q. -- to 1419 Mandela Parkway, Oakland, California?

20 A. Correct.

21 Q. No idea what happened in between -- during that time?

22 A. No.

23 Q. With seven agents in tow?

24 A. Correct. They were attempting to locate and we had made  
25 the decision to go back to 1419 to see if it had returned

## Pickette - Cross / Amparan

1 there.

2 Q. And that is how you discovered the car?

3 A. We were already at the location and it arrived.

4 Q. How long were you there before it arrived?

5 A. A few minutes.

6 Q. When you saw him again at 1419 Mandela Parkway, you said  
7 that this passenger got out and then got into the silver BMW  
8 and left?

9 A. Correct.

10 Q. Did you observe Mr. Rosenthal at that time with any bag?

11 A. No. He was seated in his vehicle.

12 Q. Did you -- well, did you observe any crates?

13 A. Not that I could see, no.

14 Q. Any boxes?

15 A. Not that I could see, no.

16 Q. Did it look like his pockets were expanded out full of  
17 something?

18 A. No, like I said, he was seated in his vehicle.

19 Q. Well, let me ask you this: When he left Harm Reduction  
20 Center and didn't have the white bag in his hand anymore, were  
21 his pockets stuffed out?

22 A. Not noticeable, no.

23 Q. And if, in fact, you would have seen him leaving this  
24 medical marijuana dispensary and his pockets or his -- you  
25 know, his clothing or something indicated that he was loaded

## Pickette - Cross / Amparan

1 with something, that would have been something you would have  
2 noted in your --

3 A. If I'd noticed that he left a location I know to distribute  
4 narcotics, I would have made note of that.

5 MR. BEVAN: Your Honor, I move to strike the  
6 reference to the so-called dispensary. The adjectives in  
7 there.

8 THE COURT: Granted. The jury is admonished to  
9 disregard it.

10 BY MR. AMPARAN:

11 Q. You testified that under your supervision or you are the  
12 case agent, another agent had engaged in an undercover buy at  
13 the Harm Reduction Center?

14 A. Correct.

15 Q. And you said that's Agent Chris Fay?

16 A. Correct.

17 Q. And did you in order to -- for Agent Fay to gain access to  
18 the Harm Reduction Center, he misled them to make them believe  
19 that he was a medical patient?

20 A. No, he didn't.

21 Q. Was he with a Government snitch or informant that assisted  
22 his entrance into the club?

23 A. Yes.

24 Q. When Mr. Fay went into the club, was Ed Rosenthal there?

25 A. I don't know. I was not in there and I don't recall him

## Pickette - Cross / Amparan

1 telling me that he was there.

2 Q. Do you have any report that indicates Mr. Rosenthal was  
3 present at the Harm Reduction Center at the time Agent Fay made  
4 his purchase?

5 A. I don't believe so. No.

6 Q. And at the time Agent Fay made his purchase that would have  
7 necessarily added individuals to your investigation that were  
8 part of the activity of Agent Fay?

9 A. Correct.

10 Q. So you expanded your investigation into Ken Hayes?

11 A. Ken Hayes had already been a subject of the investigation  
12 prior to that. But, in fact, there was employees that we knew  
13 were employees that maybe were unidentified or known by a first  
14 name, for instance, that sign that piece of paper.

15 Q. Okay.

16 And James Halloran?

17 A. It had already prior to that time.

18 Q. Richard Watts?

19 A. Prior to that time already.

20 Q. Bob Martin?

21 A. I don't believe that at that time Bob Martin had been a  
22 subject or even known at the time of the purchase of these.

23 Q. Okay. Henry Karnilowitz?

24 A. The name is ringing a bell, but I believe that he was the  
25 owner of the property.

## Pickette - Cross / Amparan

1 Q. So you --

2 A. I knew who he was, yes.

3 Q. Okay.

4                   You said that you took custody of 405 clones from  
5 Agent Fay?

6 A. Correct.

7 Q. Where did you receive custody of these clones?

8 A. I believe that the actual transfer of those items took  
9 place at a parking lot within the City of San Francisco.

10 Q. Did you observe Agent Fay leave the Harm Reduction Center  
11 carrying these clones?

12 A. I have to refer to my report, but it's my recollection that  
13 he assisted carrying them along with others.

14 Q. I'm asking if you --

15 A. Oh, refer to the surveillance report and I will let you  
16 know.

17 Q. Okay.

18 A. No, I did not.

19 Q. Do you know how long Agent Fay had the clones in his  
20 possession?

21 A. I can refer to the report and give you a time frame.

22 Q. Please.

23 A. Approximately 10 minutes.

24 Q. When Agent Fay delivered those clones to you at this  
25 parking lot, was anyone with him?

## Pickette - Cross / Amparan

- 1 A. Yes.
- 2 Q. Who was that?
- 3 A. There was somebody I believe with me as well. It would  
4 have been a confidential source.
- 5 Q. Okay.
- 6 And you say there was somebody with you as well?
- 7 A. I believe so.
- 8 Q. Okay.
- 9 A. And that would have been Special Agent Baker.
- 10 Q. We missed Special Agent Baker.
- 11 A. Because he's not with DEA.
- 12 Q. Oh, okay.
- 13 So you -- how many -- Mr. Bevan had said that the  
14 plants had been reduced to this box?
- 15 A. Correct.
- 16 Q. How many boxes did Agent Fay give you?
- 17 A. Would have been 50 plants per box, so eight boxes.
- 18 Q. That size?
- 19 A. A little bit larger to allow for the tray to fit into the  
20 bottom of it. I can give you -- I think that there was  
21 measurements, approximate at one point.
- 22 Q. So we're talking --
- 23 A. Eighteen by 30 by 12.
- 24 Q. Was there any covering on these boxes?
- 25 A. No. The lids were just shut, not sealed but closed.

## Pickette - Cross / Amparan

1 Q. Okay.

2 And is it fair to say that it would take several  
3 trips to move these eight boxes?

4 A. Correct.

5 Q. And is it fair to say that if you are carrying one of these  
6 eight boxes that it would be open to everybody that is  
7 watching? You couldn't carry one of these --

8 A. Somebody would see you with the box. They may not know the  
9 contents, but they could see you with the box.

10 Q. And you testified that you recognized the contents of these  
11 bags?

12 A. I recognize the entire product, not only the green leafy  
13 plant material but also the phone books that I had put the  
14 plants into and the binding strap, so yes.

15 Q. That's not my question, Special Agent.

16 THE COURT: Ask a question.

17 BY MR. AMPARAN:

18 Q. The Government specifically asked you do you recognize this  
19 material --

20 THE COURT: He has answered that question.

21 BY MR. AMPARAN

22 Q. -- and you said yes.

23 THE COURT: Wait. No. 1, don't argue with the  
24 witness. Don't argue when you say that is not your question,  
25 that is argument.

## Pickette - Cross / Amparan

1                   No. 2, he did answer the question. So proceed to  
2 the next question.

3 BY MR. AMPARAN:

4 Q. You testified that you recognized these materials, correct?

5 A. Correct.

6 Q. You have also testified that this is not the packaging that  
7 you last observed these items to be contained within?

8 A. That's not what I testified to. What I said was that it  
9 was not what I originally packaged them in.

10 Q. Okay.

11                   It is not what you originally packaged them to be?

12 A. Correct.

13 Q. So you -- so how do you know that this is the same  
14 material -- what is so special or specific about this  
15 vegetative matter that allows you to say since the packaging  
16 has been changed that this is the exact same material?

17 A. Based upon the chain of custody, which is noted on this, as  
18 well as my initials on the box, that is how I base that that is  
19 the material and it is the same approximate size, the same  
20 approximate amount, after being dried to be representative of  
21 what I took.

22 Q. Are you --

23 A. So based on the fact that I sealed that box, I'm saying  
24 that that is what I sealed into that box.

25 Q. Okay.

## Pickette - Cross / Amparan

1 Even though the packaging is changed?

2 A. Right.

3 Q. Even though it's been touched by other people during the  
4 intervening period of time?

5 A. Right. And I recognize the signature on those and know  
6 what occurred.

7 Q. And what is your training and experience and education that  
8 would allow you to testify as to how much shrinkage one might  
9 expect in the drying of a clone?

10 A. There is no training and experience -- my experience is  
11 what I have observed in plants that have dried and the  
12 shrinkage, but there is no science as far as I have been  
13 trained on to say that this plant had X amount of water so  
14 therefore will shrink to this size, but it is based on the  
15 general observations I have made in seizing over 100,000  
16 marijuana plants.

17 Q. And this jury should just believe that this is the same  
18 stuff that --

19 THE COURT: Counsel.

20 MR. BEVAN: Asked and answered.

21 THE COURT: Well, first of all, that is argument.  
22 The jury should believe whatever that jury feels they should  
23 believe, and you shouldn't tell them what they believe in your  
24 questions. Okay? Don't argue with the witness.

25 MR. AMPARAN: Thank you.

## Pickette - Cross / Amparan

1 BY MR. AMPARAN:

2 Q. You testified that there were 405 clones?

3 A. Correct.

4 Q. And I believe you testified in response to the Federal  
5 Government's question, that these were 405 plants?

6 A. Correct.

7 Q. The jury -- well, let me ask you this: Do you know what  
8 the difference between a cutting, a clone and a plant is?

9 A. To some degree, yes. A cutting would be the initial  
10 cutting from the, quote/unquote, mother plant. The clone is  
11 once the plant or the material begins to propagate itself and  
12 be able to sustain its own life based with water and nutrients  
13 whether from an artificial or natural source, and then the  
14 plant would be something that would have a root structure,  
15 according to my training.

16 Q. Okay.

17 And so a cutting is maybe just a leaf or a bit of a  
18 plant that is shoved into a medium and hopes that it grows?

19 A. Correct.

20 Q. And that cut, once roots start to come out of the bottom of  
21 the stem, that is considered to be a clone?

22 A. By the way we judge it for our plant counts with DEA is if  
23 it has root structure, it is considered a plant because it has  
24 root structure and it has viability.

25 Q. Okay.

## Pickette - Cross / Amparan

1                   And these are the 405 clones?

2    A.   Correct.

3    Q.   And you testified that -- you testified that there were  
4    some stakes?

5    A.   Correct.

6                   MR. AMPARAN: Do you know where those went?

7    BY MR. AMPARAN:

8    Q.   Now, looking at -- what did we call this, 73C? 74C. 74C.

9    As to 74C when Mr. Bevan was asking you questions about this  
10   exhibit, he pulled out this group in the bag and there was a  
11   group separated with a rubber band. And he asked you to look  
12   through each of the rubber band connected plant marker stakes?

13   A.   Correct.

14   Q.   And there is some more plant marker stakes that were not  
15   asked to be looked at?

16   A.   Correct.

17   Q.   Is it fair to say that only the ones that are bound in the  
18   rubber band came from the plants that are the clones that you  
19   got from Agent Fay?

20   A.   No. All of the stakes came from there. Those just have  
21   distinct markings.

22   Q.   Why were these -- were these separated?

23   A.   Yes.

24   Q.   And why were these separated?

25   A.   Because they have the same distinct marking of Medifarm.

## Pickette - Cross / Amparan

1 Q. These don't?

2 A. Those ones do not. I don't believe. Unless this was one  
3 that was missed, but I believe all the ones that have Medifarm  
4 have been straighted and rubber banded.

5 Q. How many of these stacks had Medifarm on them?

6 A. Forty-three.

7 Q. Forty-three out of 405?

8 A. Correct.

9 Q. And how many more stakes were in the clones other than ones  
10 marked Medifarm?

11 A. I don't know. We can -- I can count them. There was not  
12 405 stakes. In other words, there wasn't a stake per plant.  
13 But there was absolutely more than 43.

14 Q. And is it fair to say based on your training and experience  
15 that Medifarm is kind of like a brand name?

16 A. It could be, yes.

17 Q. And that J-2, and what are the other ones in here, names  
18 like J-2, J-27, Ultra, Skunk, Max 49, would be like -- if  
19 Medifarm is like a brand name, these would be different strains  
20 or different varieties?

21 A. Correct.

22 Q. Whose brand name are the rest of these?

23 A. I don't know.

24 Q. How many other stakes, not Medifarm, were seized when Agent  
25 Fay made his undercover purchase?

## Pickette - Cross / Amparan

1 A. I would have to count them in there.

2 MR. AMPARAN: May I approach?

3 THE COURT: We are not going to count. They are  
4 visible to the jury. We can see them.

5 MR. AMPARAN: Your Honor, you said I could do this  
6 on cross-examination.

7 THE COURT: I said you could cross-examine him on  
8 cross-examination, but I'm not going to have him sit here and  
9 count each one of the stakes.

10 MR. AMPARAN: You let him look at 43.

11 THE COURT: Counsel, I tell you what, if you don't  
12 appreciate my ruling, that's your right. You can say the vast  
13 majority are not Medifarm. There are a lot of ways to ask him  
14 the question without requiring him to sit here on the stand and  
15 count each one.

16 MR. AMPARAN: I didn't ask him to look at 42, either  
17 and the Court allowed that.

18 THE COURT: Excuse me.

19 MR. AMPARAN: The Court allowed him to look at 42.

20 THE COURT: Mr. Amparan.

21 Ladies and gentlemen of the jury, we are going to  
22 take a brief recess. Remember the admonition given to you.  
23 Don't discuss the case, allow anyone to discuss it with you,  
24 form or express any opinion.

25 (Jury out at 11:30 a.m.)

## Pickette - Cross / Amparan

1           THE COURT: Okay. Let the record reflect that the  
2 jurors have retired.

3           Mr. Amparan, you have not tried a case in front of  
4 me before, so I want to explain what the ground rules are as  
5 far as I'm concerned.

6           I have several rules, one rule is that if you don't  
7 like a ruling that the Court has made, you can, you can  
8 certainly be permitted to make an objection about that ruling  
9 outside the presence of the jury to have your record.

10           One thing you are not permitted to do is to argue  
11 with the ruling in front of the jury. That is something that  
12 is absolutely forbidden.

13           No. 2, if you think I'm being unfair, again, you can  
14 make your argument outside the presence of the jury. You  
15 should not suggest in any questions you ask, any comment you  
16 make, any body language, express a view that you believe the  
17 Court is unfair. You may very well believe that the Court is  
18 unfair, and that may be -- that is -- can be a belief that you  
19 can entertain, but if you do so, do not convey that impression  
20 in front of jury. That is improper.

21           Lawyers by their questions -- and No. 3, lawyers by  
22 their questioning should not be permitted to argue their case.  
23 They can present the questions, the evidence, but they cannot  
24 argue their case through questioning if, in fact, the question  
25 is argumentative. That is a third rule that I have.

## Pickette - Cross / Amparan

1           So I don't want to admonish you in front of the jury  
2 and I haven't, or at least I've tried not to, but when we start  
3 to get into these extended discussions in front of the jury, it  
4 seems to me that it's appropriate at least for me to warn you  
5 about it.

6           And I will also say this, Mr. Amparan, based upon  
7 my -- and that it's that as a general case when the lawyers  
8 start to argue with the judge, the lawyers lose and they lose  
9 in front of the jury because the jury has a sense, whether  
10 again right or wrong that, the judge is trying to be fair. And  
11 therefore, when you engage in an argument in front of the jury  
12 with me, I think it redounds to the detriment of your client  
13 not to the benefit of your client. But that is a matter of  
14 strategy.

15           All I'm telling you is that we are going to follow a  
16 series of rules. The case is going to be, obviously, an  
17 extended case. I think I have given you, and will continue to  
18 give you, latitude, in what I think is rather a meticulous  
19 questioning of the witness. And I'm inclined in the beginning  
20 of a case, because I don't know quite what the defenses are to  
21 the case, I listened to the opening statement and I don't know  
22 based upon the opening statement whether or not you are  
23 contesting these facts. You might, might not.

24           Your approach in the opening statement was that the  
25 Government witnesses are liars. That was it. So I assume you

## Pickette - Cross / Amparan

1 are contesting at least some, if not all, of whatever any  
2 witness says.

3           That is appropriate cross-examination. I'll give  
4 you that latitude, but again, I will tell you that at some  
5 point it becomes, in my view, time consuming, redundant and  
6 even irrelevant matters.

7           For example, the fact that a number of agencies was  
8 involved in this investigation, that, in my view, may be  
9 irrelevant. You can certainly make an offer of proof outside  
10 the presence of the jury why you think it's necessary for the  
11 witness to list all the DEA agents or all the IRS agents or all  
12 the ICE agents or all the chemical agents and so forth that  
13 worked on the case. You can do so outside the presence of the  
14 jury.

15           You cannot question the witness on that subject  
16 unless, of course, we are talking about as we were in this  
17 case, an individual surveillance. They lost him during the  
18 course of the surveillance, how many people did they have? I  
19 understand that line of questioning.

20           But, again, I want to try to set out some ground  
21 rules at the beginning so that we don't get involved in these  
22 confrontations. I don't want to have to send the jury out  
23 continually because it is so time consuming and they form an  
24 impression, and the impression generally is adverse to the  
25 defendant or adverse to the lawyer who is becoming

## Pickette - Cross / Amparan

1 argumentative with the Court. Could be the prosecution. I  
2 have a had cases where it has been the prosecution.

3 So at any rate, I just want to express my views on  
4 that subject. And now I have and I'll bring the jury back and  
5 we'll proceed.

6 MR. AMPARAN: Thank you, Your Honor, and I apologize  
7 for the argument. I was concerned. I thought the Court told  
8 me that I would have an opportunity --

9 THE COURT: You certainly can ask them about it but  
10 to have him sit here and count what I think through the plastic  
11 bag is apparent that the vast majority of the stakes, the  
12 majority of the stakes, were not with a listing of Medifarm.

13 And, of course, the jury will have the stakes. In  
14 closing argument you can argue that point. But to question  
15 something about what I think is obvious in a way that would be  
16 very time consuming in the Court's view, is not appropriate.  
17 And I have to -- I have to be concerned about the jury's time.  
18 Be concerned about the Court's time, all right? Okay. Thank  
19 you.

20 Bring in the jury.

21 (Jury in at 11:38 a.m.)

22 THE COURT: Okay. Let the record reflect all jurors  
23 are present.

24 You may proceed.

25 ///

## Pickette - Cross / Amparan

1 BY MR. AMPARAN:

2 Q. Agent Pickette, I'm going to hand you what has been marked  
3 as 74C. Other than Medifarm, other than Medifarm, can you tell  
4 me how many other brand names stakes, what other producers, how  
5 many of the producers are identified?

6 A. I would have to look at each and every one of them, and  
7 from my general observation right now, is that -- I don't see  
8 another so-called brand name. But I do see several different  
9 variations. Of different strains, some which may be the same  
10 as the strains that are labeled Medifarm, but they do not have  
11 the Medifarm sticker on it. For instance, this one J-27 has  
12 nothing else on it other than a date; this one has J-27 with  
13 Medifarm on it.

14 Q. So it's possible that someone has taken a Medifarm J-27  
15 clone and grown their own clone and made their own J-27?

16 MR. BEVAN: Calls for speculation.

17 THE COURT: Well, I'll permit it.

18 THE WITNESS: Or vice-versa, yes.

19 BY MR. AMPARAN:

20 Q. Okay.

21 You testified that the -- well, let me ask you this:  
22 Do you have any knowledge or training as to the strains?

23 A. No.

24 Q. Do you know why different strains would be identified with  
25 plant markers?

## Pickette - Cross / Amparan

1 A. The only reason is to label what those specific plants are.

2 Q. Do you know why that would be important to somebody at a  
3 dispensary?

4 A. I don't know why it would be -- the importance of it is  
5 that it would be whatever that individual liked.

6 May I rebag these?

7 Q. Yes, please, I'm sorry.

8 Did I give you an envelope that says 74D on there?

9 A. No, sir, I have 74C.

10 Q. Oh, I'm sorry.

11 MR. AMPARAN: May I approach?

12 THE COURT: You don't have to ask, just do it.

13 MR. AMPARAN: Okay.

14 BY MR. AMPARAN:

15 Q. I'll let you put that away first so we don't get them mixed  
16 up.

17 Okay.

18 A. Yes, sir.

19 Q. All right.

20 And have you looked at what's been marked as 74D?

21 A. Yes.

22 Q. When did you first see the contents of 74D?

23 A. When it was returned to me at the same time as the plants.

24 Q. So as eight boxes of clones were being given to you, at the  
25 same time these two documents were given to you?

## Pickette - Cross / Amparan

1 A. Yes.

2 Q. Okay.

3 Were they given to you in an envelope or just handed  
4 to you?

5 A. Handed to me, it appears that they were folded as is. I  
6 would not have folded them like this, so they were handed to me  
7 as two pieces of paper like this.

8 Q. As to this, what you have described as a computer-generated  
9 printout?

10 A. Correct.

11 Q. Do you know who printed that out?

12 A. No.

13 Q. Did the DEA or any other federal agency seize the computers  
14 from the Harm Reduction Center?

15 MR. BEVAN: Beyond the scope of direct, Your Honor.

16 THE COURT: I'll allow it.

17 THE WITNESS: There was some computers seized. I'm  
18 not specific on whether there was any from 52 6th Street that  
19 were functioning at the time of the search warrants.

20 BY MR. AMPARAN:

21 Q. Okay.

22 A. So I would have to refer to that specific report.

23 Q. Do you know whose signature is contained on the first page  
24 of that computer receipt?

25 A. I can make out a letter, but I cannot tell you whose

## Pickette - Cross / Amparan

1 signature it is. I recognize an S, a T and then the last name  
2 with a capital B.

3 Q. Do you know who drafted the second page? I believe you  
4 said it's kind of like the inventory of the purchase?

5 A. Based on what Agent Fay told me.

6 Q. I guess we'll wait for Agent Fay.

7 Is that Agent Fay's writing, do you know?

8 A. I do not know.

9 Q. Okay.

10 Other than Medifarm being located on the stakes that  
11 you found -- sorry, how many -- 43, other than the 43 stakes  
12 that say Medifarm on them -- let me ask you this: Are those  
13 like commercially printed produced stakes?

14 A. They appear to be, yes.

15 Q. That is not handwriting?

16 A. No.

17 Q. Somebody sitting down at a table scribbling these out label  
18 after label?

19 A. No.

20 Q. Okay.

21 Have you seen Medifarm anywhere else?

22 A. I vaguely recall from a search of Mandela Parkway where  
23 I've seen photographs of those, but I was not there and I'm not  
24 the case agent on that particular aspect of this case.

25 Q. Good enough.

## Pickette - Cross / Amparan

- 1                   And you then -- well, let me ask you this: Is it  
2 fair -- is it fair to say that as a result of your  
3 investigation that warrants were executed at 1419 Mandela  
4 Parkway, 52 6th Street, and Ed Rosenthal's residence? You gave  
5 me that address, what was that again?
- 6 A. It was the East 22nd Street. 1635, I would have to refer  
7 to be exact and there was other locations as well.
- 8 Q. Can you give me the location where the searches -- we have  
9 1419 Mandela Parkway, in Oakland?
- 10 A. Correct.
- 11 Q. We have 52 6th Street --
- 12 A. Correct.
- 13 Q. -- in San Francisco?
- 14                   We have East 22nd Street?
- 15 A. In Oakland. 1635 East 22nd.
- 16 Q. East 22nd Street in Oakland?
- 17 A. 582 Bowdoin, B-o-w-d-o-i-n.
- 18 Q. What city?
- 19 A. San Francisco. 275, I believe, King in Petaluma. As well  
20 as several vehicles, which would include the Mercury, a white  
21 pickup, that belongs to Mr. Watts, and a couple other --
- 22 Q. Okay.
- 23 A. -- vehicles.
- 24 Q. And --
- 25 A. I'm sorry. There was also additional -- there was the 12th

## Pickette - Cross / Amparan

1 Street address.

2 Q. 12th Street?

3 A. Right.

4 Q. Is that in Oakland?

5 A. Oakland. And then another residence and I cannot recall  
6 the street or the --

7 Q. Can you recall the city?

8 A. It was in Oakland.

9 Q. Whose house was it?

10 A. It was James Halloran.

11 Q. James Halloran's house.

12 You were not personally present at the execution of  
13 the search warrant at 1419 Mandela Parkway in Oakland?

14 A. I was not personally present at any of the search warrants.

15 Q. Any of the search warrants, okay.

16 And at the search of 1635 East 22nd Street in  
17 Oakland you said that you are the agent listed as recovering  
18 \$1463?

19 A. I'm sorry. What was the amount you gave?

20 Q. I thought you said 1,463.

21 A. Correct. I just didn't understand. So 1463, yes.

22 Q. Do you know what denominations those were?

23 A. I do not know the breakdown based on my report.

24 Q. Would the breakdown of denominations be important to you in  
25 terms of a narcotics investigation?

## Pickette - Cross / Amparan

1 A. It could be.

2 Q. I'm sorry?

3 A. It could be noted in another location. I could refer to  
4 that. But I would have to do that out of the case file.

5 Q. Could you explain to the jury why as part of your narcotics  
6 investigation the denominations would be important?

7 A. Oftentimes people that traffic narcotics will deal in  
8 similar currencies, \$20 bills, depending on their level of  
9 trafficking. Common currencies, \$20 bills, some if you are  
10 talking a lot larger scale, saying it's being smuggled back  
11 into Mexico, they would mostly be \$100 bills. It's easier to  
12 get \$10,000 in \$100 bills back to Mexico than it would be to  
13 get \$10,000 worth of \$5 bills or \$20 bills.

14 Q. So this \$1463 --

15 A. Correct.

16 Q. -- do you know where that was seized?

17 A. I know it was seized from the residence, but I do not know  
18 where the exact location was, I did not seize it from there.

19 Q. So you don't know if it was in somebody's wallet, purse,  
20 safe?

21 A. Correct. I do not know.

22 Q. What about the raid on James Halloran -- well, let me ask  
23 you this: I think I want to confirm with you this was a search  
24 warrant executed on Mr. Rosenthal's house or 1419 Mandela  
25 Parkway. There were no guns found; is that correct?

## Pickette - Cross / Amparan

1 A. To the best of my recollection, no.

2 Q. And you would know that if, in fact, there were weapons  
3 found?

4 A. Correct.

5 Q. And when you went -- and the search on Mr. Halloran's  
6 house --

7 MR. BEVAN: Objection, beyond the scope of direct as  
8 to the search of James Halloran's residence.

9 MR. AMPARAN: He is the case agent.

10 THE COURT: Okay. Well, beyond the scope. I'll  
11 sustain the objection subject to an offer of proof which I'll  
12 hear later.

13 MR. AMPARAN: Okay.

14 BY MR. AMPARAN:

15 Q. There is no indication that \$50,000 was seized at  
16 Mr. Rosenthal's house, correct?

17 A. No, there wasn't.

18 Q. No Lamborghini?

19 A. No.

20 Q. No Rolls Royce?

21 A. No.

22 Q. No Porsches?

23 A. No.

24 Q. You said you were not involved in any of the searches?

25 A. I was not at any of the locations.

## Pickette - Cross / Amparan

1 Q. And is it fair to say that there were no California Bureau  
2 of Narcotic officers at any of these searches?

3 A. I cannot recall if there was. There was 12 locations  
4 searched or 12 search warrants so there may have been a Bureau  
5 of Narcotics agent at some of them, but I would have to refer  
6 to each individual report to tell you yes or no.

7 Q. As you sit here today, do you recall any?

8 THE COURT: This is beyond the scope. So it would  
9 be subject to offer of proof.

10 MR. AMPARAN: Would that be same as my questions  
11 about Alameda?

12 THE COURT: As they relate to any of the searches  
13 other than the search of Mr. Rosenthal's house. He has some  
14 information on that particular subject and it's been gone into  
15 in this direct examination.

16 MR. AMPARAN: Okay.

17 BY MR. AMPARAN:

18 Q. Then as to the search at Mandela Parkway, which we have  
19 talked about a little bit --

20 A. I've --

21 Q. -- that you were present, Agent, I believe you said, Tuey?

22 A. Correct, he was the head investigator on that location.

23 Q. Okay.

24 Did that raid include any state Bureau of Narcotic  
25 enforcement officers?

## Pickette - Cross / Amparan

- 1 A. To the best of my knowledge, all of the personnel involved  
2 in that search were federal agents of some entity.
- 3 Q. And no Alameda County sheriffs?
- 4 A. To the best of my knowledge, they were all federal agents  
5 of some entity.
- 6 Q. No Oakland Police?
- 7 A. No.
- 8 Q. No California franchise tax board agents?
- 9 A. Not that I recall, no.
- 10 Q. What about as to the search on Mr. Rosenthal's home, no  
11 California Bureau of Narcotic Enforcement Officers?
- 12 A. No.
- 13 Q. No Alameda County sheriff's officers?
- 14 A. No.
- 15 Q. No Oakland police?
- 16 A. Not that I recall.
- 17 Q. No California Franchise Tax Board agents?
- 18 A. No.
- 19 Q. After the undercover purchase -- after the undercover  
20 purchase by Agent Tuey, did you expand your investigation to  
21 include James Kind?
- 22 MR. BEVAN: You mean --
- 23 THE WITNESS: Agent Tuey was never there.
- 24 MR. BEVAN: Do you mean Agent Fay?
- 25 MR. AMPARAN: I'm sorry, I misspoke. My special

## Pickette - Cross / Amparan

1 agents are confused.

2 BY MR. AMPARAN:

3 Q. Special Agent Fay.

4 A. Correct.

5 Q. After the undercover purchase by Special Agent Fay, did the  
6 investigation expand to include James Kind?

7 A. I don't believe it did at that time.

8 Q. Later time?

9 A. At some time it did include him.

10 Q. What about Andrew Thompson?

11 MR. BEVAN: Objection, irrelevant.

12 THE COURT: Sustained.

13 BY MR. AMPARAN:

14 Q. Other than the controlled buy by Agent Fay that we  
15 discussed on January 9th of 2002 from the Harm Reduction  
16 Center, did your investigation include any other controlled  
17 buys?

18 MR. BEVAN: Beyond the scope of direct.

19 THE COURT: Well, I will allow the question.

20 Were there other controlled buys is your question?

21 MR. AMPARAN: Yes.

22 THE COURT: I don't know where it's going, but I  
23 will allow the first question and we'll see where it's going.

24 BY MR. AMPARAN

25 Q. When was the second buy?

## Pickette - Cross / Amparan

1 THE COURT: Let's find out.

2 You where was it?

3 THE WITNESS: There was additional purchases. One  
4 was from Harm Reduction Center.

5 BY MR. AMPARAN:

6 Q. When did that occur?

7 A. I would have to refer to the case file to see the exact  
8 date about what special agent went in and purchased marijuana  
9 from there.

10 Q. Do you know whether or not that special agent had a  
11 medicinal recommendation?

12 A. He had obtained one.

13 Q. And did he really have a medical issue, or did he lie to  
14 obtain that card?

15 A. He acted in undercover capacity to obtain that card.

16 Q. So he was dishonest in obtaining that card?

17 MR. BEVAN: Objection, irrelevant, Your Honor.

18 THE COURT: Well, take a moment.

19 There is a particular instruction about the use of  
20 undercover agents.

21 Okay, ladies and gentlemen, the testimony you have  
22 just heard elicited involved the use of a Government agent  
23 potential and possibly informants one way or the other, and the  
24 Government's investigation in this case. Law enforcement  
25 officials are not precluded from engaging in stealth and

## Pickette - Cross / Amparan

1 deception such as the use of informants and undercover agents  
2 in order to apprehend persons engaged in criminal activities.

3 Undercover agents and informants may properly make  
4 use of false names and appearance and they properly assume the  
5 roles of members in criminal organization.

6 The Government may utilize a broad range of schemes  
7 and ploys to ferret out criminal activity, that is what the law  
8 is.

9 Okay. You may continue.

10 BY MR. AMPARAN:

11 Q. So that the special agent involved in the second buy  
12 engaged in deception in order to accomplish that?

13 A. Correct. Any undercover purchase would be some form of  
14 deception.

15 Q. And do you have the date of that?

16 A. I do not have the date.

17 Q. And was there only one other subsequent purchase from the  
18 Harm Reduction Center?

19 A. There was that purchase and then a secondary purchase that  
20 was attempted. And then Rick Watts moved it to his residence  
21 for the sale of the narcotics.

22 Q. As part of your investigation, did you find any  
23 documentation that Mr. Rosenthal had any ownership interest in  
24 the Harm Reduction Center?

25 A. I did not.

## Pickette - Cross / Amparan

1 Q. Anyone acting in your behalf?

2 A. From the time that I left San Francisco, I do not know, but  
3 prior to, I do not believe that there was anything indicating  
4 that he had proprietary interest at that time.

5 Q. Is it fair to say that at some point your investigation  
6 expanded to include David Lewis?

7 MR. BEVAN: Objection, irrelevant.

8 THE COURT: Sustained.

9 BY MR. AMPARAN:

10 Q. Is it fair to say that at some point your investigation  
11 expanded to include Leslie Wilmer?

12 MR. BEVAN: Your Honor, I object. It's trying to  
13 accomplish the same thing.

14 THE COURT: Okay. Sustained.

15 I'll listen to an offer of proof outside the  
16 presence of the jury to make a determination of whether it's  
17 relevant or not along the lines as the others.

18 BY MR. AMPARAN:

19 Q. I asked you about some expensive automobiles related to  
20 search of Mr. Rosenthal's home, is it fair to say there this  
21 that was no expensive artwork? You didn't see signs of wealth?

22 A. I was not there.

23 Q. Any indication in the documents that this was any kind of  
24 fast wealth?

25 A. There was several like brokerage accounts that were some in

## Pickette - Cross / Amparan

1 his name and some other names.

2 Q. You mean, his wife's name?

3 A. His wife and I believe there is even one other name that  
4 might have been a relative. But I don't remember the amounts  
5 in those accounts. But nothing to my recollection of  
6 overwhelming wealth.

7 Q. And no Rolexes, no expensive jewelry?

8 MR. BEVAN: Your Honor, I object to this line of  
9 questioning.

10 THE COURT: Well, I guess the question is -- I'll  
11 allow it, go ahead. I mean, you are introducing the subject of  
12 the defendant's worth, and that is -- that's introduced, okay.

13 MR. AMPARAN: If I can just have one moment.

14 BY MR. AMPARAN:

15 Q. When you normally conduct a search warrant, when you  
16 normally execute search warrants, is it typical that you  
17 exclude local and state law enforcement from participation?

18 A. At times, it depends on the scenario. If we have enough  
19 DEA or federal agents, then we don't include them. Oftentimes  
20 their only involvement would be having the uniformed car in  
21 front and then leave immediately after the residence is  
22 secured. So it was determined in this case by individuals  
23 above me not to include other agencies, other than the federal  
24 agencies involved in the investigation.

25 Q. Was that person who made that decision Mr. Bevan?

## Pickette - Cross / Amparan

1 A. No, it was not.

2 Q. Do you know -- can you identify who that person was?

3 A. It would have been DEA management.

4 Q. Do you know who that person, the DEA manager was?

5 MR. BEVAN: Objection, irrelevant.

6 THE COURT: Irrelevant. Sustained.

7 BY MR. AMPARAN:

8 Q. Is it fair to say that you have no idea and never found out  
9 what was in that white bag?

10 MR. BEVAN: That's been asked and answered.

11 THE COURT: Well, do you have any idea what was in  
12 that white bag?

13 THE WITNESS: No, I do not.

14 THE COURT: Next question.

15 MR. AMPARAN: I have no further questions, thank  
16 you.

17 MR. BEVAN: No redirect.

18 THE COURT: Okay. Ladies and gentlemen, we are  
19 going to take our noon recess, however, it's going to go a bit  
20 longer to 1:15. Remember the admonition given to you. Don't  
21 discuss the case or allow anyone to discuss it with you, form  
22 or express any opinion.

23 See you at 1:15. Leave your notebooks inside the  
24 jury room.

25 (Jury out at 12:01 p.m.)

1           THE COURT: Okay, let the record reflect the jurors  
2 have retired.

3           Is there anything in terms of an offer of proof,  
4 Mr. Amparan, that you want to make?

5           MR. AMPARAN: Yeah, the reason that I was asking  
6 those questions --

7           THE COURT: Now, which questions are we talking  
8 about?

9           MR. AMPARAN: The questions about the investigation  
10 expanding relative -- about the -- goes to the charges of  
11 conspiracy. And I'm trying to find out who the Government  
12 believes is in this conspiracy.

13          THE COURT: The Government hadn't advised you who  
14 they believe to be members of the conspiracy.

15          MR. AMPARAN: I'm finding out from this officer.

16          MR. BEVAN: That's not the real -- the purpose is  
17 selective prosecution, Your Honor. I mean, that is just not  
18 even genuine to suggest that they are trying to inquire into  
19 co-conspirators. I mean, the message is -- that is being given  
20 to the jury is Mr. Rosenthal was singled out amongst all the  
21 various people that could have been charged, and I think that  
22 has been the purpose from the get-go. And I object to it.

23           I also object they have introduced the idea of  
24 wealth by --

25          THE COURT: They certainly have.

1           MR. BEVAN: -- by excluding what was not seized and  
2 things were said during the opening, for example --

3           THE COURT: We are going to deal with one thing at a  
4 time.

5           As to asking about the --

6           MR. AMPARAN: -- extent of the investigation.

7           THE COURT: -- extent of the investigation. And  
8 based upon the offer of proof, the objection is sustained.

9           Now --

10          MR. BEVAN: There were --

11          THE COURT: -- as to wealth, yes, indeed that  
12 question is -- has been introduced. I don't know where it's  
13 going to go from there, but at any rate it's been introduced by  
14 the defense.

15          MR. AMPARAN: It wasn't introduced by the defense.  
16 It was introduced by Mr. Bevan when he testified that people  
17 were making, in his opening, that people were making sales of  
18 3- to \$4000 in cash of marijuana and turning the proceeds over  
19 to Mr. Rosenthal.

20          THE COURT: Fine. If the point that you are making  
21 is he doesn't have wealth consistent with the allegations of  
22 the Government, that is fine. That means that wealth has been  
23 introduced.

24          I'm not saying who is introducing it. I think that  
25 the argument can be made to make any argument. The question is

1 is it now relevant, and it may be relevant. At the beginning  
2 it wasn't, it may be relevant now.

3 Okay.

4 MR. BEVAN: There were some statements that I  
5 believe were totally objectionable in the --

6 THE COURT: People can sit. They don't have to  
7 stand.

8 MR. BEVAN: -- opening statement of Counsel that --

9 THE COURT: Actually, I prefer if people in the  
10 courtroom, please be seated.

11 The attorneys can stand, I would like the audience  
12 to be seated.

13 MR. BEVAN: I just want to put my objection on the  
14 record.

15 THE COURT: Sure.

16 MR. BEVAN: First of all, to suggest that Richard  
17 Watts is going to testify as part of a deal with the  
18 Government, which is what Mr. -- what Counsel said. He pled  
19 guilty and was subpoenaed outside the courtroom. I've turned  
20 over the plea agreement. It's not a cooperation plea  
21 agreement. Counsel knows exactly the circumstance of Richard  
22 Watts and that was an inappropriate statement and not based on  
23 what they anticipate being able to prove.

24 THE COURT: The answer to that is, No. 1, I  
25 actually, sitting here, don't know who is right and who is

1 wrong in that dispute, though, I guess I can figure it out.

2 But, anyway, that is why opening statements are not  
3 evidence. If, in fact, Ms. Greenberger said something that you  
4 think the evidence will contradict, you may be entitled to,  
5 depending on what it was, to demonstrate that and to remark  
6 upon that comment during your argument.

7 MR. BEVAN: Yes, Your Honor.

8 THE COURT: That happens all the time.

9 MR. BEVAN: Okay.

10 The second point I think more serious is that -- the  
11 reference that Mr. Rosenthal doesn't have a criminal record.

12 THE COURT: I was a bit surprised to hear that.  
13 That is not evidence, is it?

14 MR. BEVAN: Well, and the point --

15 THE COURT: Wouldn't be admissible.

16 MR. BEVAN: The point is he does have a prior  
17 criminal record. He is arrested. He has a prior drug arrest  
18 for marijuana. So in that respect, it's a misrepresentation.

19 But second of all, the only way to get that sort of  
20 information in is to have Mr. Rosenthal take the stand.

21 THE COURT: I don't know whether that is the only  
22 way to get it in or not. I'll review the opening statement,  
23 and if, in fact -- and I think much was made of the fact that  
24 he has lived an unblemished life. Until this, I don't know  
25 whether that is correct or not. But if, in fact, the

1 argument -- there is evidence to the contrary, I will consider  
2 that evidence.

3 MR. BEVAN: Your Honor --

4 THE COURT: Do whatever you are going to do.

5 MR. BEVAN: I'm going to get the Pre-Sentence  
6 Report.

7 THE COURT: You can get whatever you want. I'm not  
8 here to run how things are done in that respect.

9 I guess I'm more troubled of all the things by the  
10 questioning -- the opening statement in which it was suggested,  
11 at least my listening to it, it was suggested that  
12 Mr. Rosenthal faces a 10- or 15- or 20-year sentence. Now,  
13 everybody in this courtroom knows that that is not true.  
14 Nobody knows it better than the defense. And for  
15 Ms. Greenberger to suggest by saying that this witness too,  
16 faces a sentence, and that is why I asked what "too" meant.

17 But it left in my mind a clear impression that if  
18 there is a conviction in this case, Mr. Rosenthal faces a  
19 substantial period of confinement. That is how I heard the  
20 testimony -- excuse me, the opening statement.

21 And I have to give some thought as to correcting  
22 that false impression, in fact, it certainly is a false  
23 impression. The question is whether it's been suggested.

24 Usually, in my experience, in cases, what witnesses  
25 who testify and testify under deals and so forth, they are

1 asked questions by counsel when the deal becomes known, weren't  
2 you facing a 10-year sentence, weren't you facing a 15- or  
3 20-year sentence and didn't you get that deal, all that is  
4 entirely proper. And I don't want to suggest that it isn't.  
5 What is improper is for any inference to be drawn in this case,  
6 that this defendant faces any of that is in jeopardy at all.

7           So the Court is considering and I would like some  
8 thought being given to advising the jury that not just that  
9 they cannot consider punishment but that the defendant is in no  
10 jeopardy of serving any jail time because as we know that is  
11 the truth.

12           And as Ms. Greenberger loves to point out to the  
13 Court, it's important to have the truth be given to the jury.  
14 Certain things are true and are inadmissible. Certain things  
15 are true and irrelevant, but when the defense counsel gets up  
16 and gives that type of opening statement, from which any  
17 intelligent juror could come to a conclusion that Mr. Rosenthal  
18 is in that type of jeopardy, we know that is untrue. And  
19 therefore --

20           MR. AMPARAN: But --

21           THE COURT: Counsel, just wait until I finish.

22           And I think it's a serious matter. And I'm not  
23 ruling now and I'll hear from counsel during the course of  
24 these proceedings as to the type of that instruction should be  
25 given, if any, on this subject. But I want you to think about

1 that, all right? Okay.

2 We'll resume at 1:15.

3 MS. GREENBERGER: I need to make a record of  
4 something unrelated.

5 THE COURT: Sure.

6 MS. GREENBERGER: We have never been provided  
7 discovery on this second controlled purchase at Harm Reduction  
8 Center.

9 MR. BEVAN: That's not true. The reports -- all the  
10 reports having to do with controlled buys.

11 THE COURT: Here is what I suggest. When you  
12 believe that something hasn't been provided to you and you can  
13 certainly have that belief for a variety of reasons, you  
14 simply, during the recess, ask Mr. Bevan, I didn't get this, do  
15 you know why, and you work it out. If it turns out that one  
16 side says yes and the other side says no, after you have had  
17 this discussion and it turns out that the Government is saying  
18 yes, they give it to you, they can certainly give it to you  
19 again.

20 I would like to resolve these things attorney to  
21 attorney, rather than giving it to the Court. I sit up here, I  
22 don't know. That is why I was so quick on Counsel when he  
23 started talking about that he hasn't received it. May be true,  
24 may not be true. I don't know. I don't have a record in front  
25 of me which makes me in a position to decide whether or not

1 these representations are true. I have found -- in my  
2 experience that the attorneys can get together and try to  
3 straighten these things out. It's not something at all for the  
4 jury to consider.

5 MS. GREENBERGER: Right.

6 THE COURT: That is no jury issue. And I know you  
7 are not taking it up as a jury issue, you are taking it outside  
8 their presence. But I'm suggesting that that is a procedure  
9 you can follow. And you have now an hour -- an hour. Try to  
10 work that out.

11 Thank you. We are in recess.

12 (Lunch recess taken at 12:12 p.m.)

13 (Proceedings resumed at 1:20 p.m.)

14 THE COURT: Okay. Let the record reflect all  
15 parties are present.

16 Ready to proceed.

17 MR. BEVAN: Yes, Your Honor.

18 THE COURT: Bring in the jury.

19 (Jury in at 1:20 p.m.)

20 THE COURT: Please be seated. Let the record  
21 reflect all jurors are present.

22 Mr. Bevan, you may call your next witness.

23 MR. BEVAN: The United States would call, Your  
24 Honor, Mr. Gary Schwartz, S-c-h-w-a-r-t-z.

25 THE COURT: Mr. Schwartz, would you come forward.

Schwartz - Direct / Bevan

1                                   GARY SCHWARTZ,  
2 called as a witness for the plaintiff, having been duly sworn,  
3 was examined and testified as follows:

4                   THE CLERK: State your full name, spell your last  
5 name for the record.

6                   THE WITNESS: Gary Schwartz.

7                   THE COURT: Mr. Schwartz, could you move your chair  
8 close to that microphone.

9                                   DIRECT EXAMINATION

10 BY MR. BEVAN:

11 Q. Good afternoon, sir.

12 A. Yes.

13 Q. Were you subpoenaed by the United States to be here today?

14 A. Yes.

15 Q. And do you have a son named Evan Schwartz?

16 A. Yes.

17 Q. And focusing your attention, Mr. Schwartz on the period of  
18 2001, did you own a brown Mercury?

19 A. Yes.

20 Q. License plate 2M, as in Mary, E, as in echo, Y, as in  
21 yellow, 425. Do you recognize that?

22 A. I'm not sure, but probably.

23 Q. Okay.

24                   Do you still own that car?

25 A. No.

Schwartz - Direct / Bevan

1 Q. Back in 2001, did you make that car available to Evan to  
2 drive for a period of time?

3 A. Yes.

4 Q. And that -- would he -- was he living with you at the time?

5 A. Yes.

6 Q. Okay.

7 So did you see him come and go in that car?

8 A. Yes.

9 Q. To your knowledge, was anybody else driving it?

10 A. Well, he was the primary driver. Who he loaned it to, I  
11 have no idea, but he was the driver.

12 Q. You insured it?

13 A. Yes.

14 Q. And you notified the insurance company that he would be  
15 driving it?

16 A. I -- I believe so.

17 Q. Okay.

18 Showing you, sir, Exhibit 25S, with reference to a  
19 Polaroid picture there, do you recognize your son, Evan, in  
20 that picture?

21 A. Yes.

22 Q. And would it be fair to say, sir, that he is wearing a blue  
23 cap and a gray shirt of some kind?

24 A. Yes.

25 Q. Okay.

## Schwartz - Cross / Figueroa

1                   And can you estimate how old Evan would have been in  
2 that picture, approximately?

3 A. Approximately 20 years old, might be.

4 Q. Okay. Let me ask you this: How old is he today?

5 A. Twenty-five.

6 Q. Twenty-five?

7                   Do you know his date of birth?

8 A. March 8th, 1982, I believe or March 6 -- March 8th, I  
9 believe.

10 Q. Do you know the individual that is standing next to him?

11 A. No.

12                   MR. BEVAN: That's all I have, Your Honor.

13                   No further questions.

14                   THE COURT: Cross?

15                   CROSS-EXAMINATION

16 BY MR. FIGUEROA:

17 Q. Good afternoon, Mr. Schwartz.

18 A. Good afternoon.

19 Q. You trusted your son Evan with your car because he is  
20 fairly responsible, right?

21 A. Yes.

22 Q. And who paid for the gas for the car?

23 A. Who paid for the gas for the car? I believe his mother.

24 Q. And you paid for the insurance?

25 A. Yes.

## Schwartz - Cross / Figueroa

1 Q. Was he an authorized driver with insurance?

2 A. Yes.

3 Q. And who paid for the maintenance of the vehicle?

4 A. I believe his mother.

5 Q. And what was your son doing with the car?

6 A. It was his means of transportation.

7 Q. And you knew that Evan was working in medical marijuana,  
8 right?

9 MR. BEVAN: Objection, Your Honor.

10 THE COURT: I'll allow it.

11 THE WITNESS: No.

12 BY MR. FIGUEROA:

13 Q. Did you know if Evan was involved at a marijuana nursery on  
14 Mandela?

15 A. No.

16 Q. Were you driving the brown Mercury with license plate  
17 2MEY425 on November 26, 2001?

18 A. I probably only drove the car once in my life when we  
19 bought it.

20 Q. So you were not driving that car also on December 6, 2001?

21 A. No.

22 Q. And did you later learn of your son's involvement with a  
23 marijuana nursery on Mandela?

24 A. Did I later learn?

25 MR. BEVAN: Objection, hearsay, Your Honor.

## Schwartz - Cross / Figueroa

1 THE COURT: Sustained.

2 BY MR. FIGUEROA:

3 Q. Well, Evan was involved in research at a marijuana nursery,  
4 correct?

5 MR. BEVAN: That misstates his testimony.

6 THE COURT: Sustained.

7 BY MR. FIGUEROA:

8 Q. Do you know if Evan used your vehicle to deliver baby  
9 marijuana plants to dispensaries?

10 A. No.

11 Q. Let me ask you about that photo that you were shown. Did  
12 you take that photo?

13 A. No.

14 Q. Do you know where that photo was taken?

15 A. No.

16 Q. You don't know when the photo was taken, do you?

17 A. No.

18 Q. Let me ask you about Mr. Rosenthal. Have you ever seen  
19 Mr. Rosenthal distribute marijuana to anyone?

20 MR. BEVAN: Beyond the scope of direct.

21 THE COURT: I'll allow it.

22 Go ahead.

23 THE WITNESS: I've never met Mr. Rosenthal.

24 BY MR. FIGUEROA:

25 Q. In fact, you've never seen him until today, right?

## Schwartz - Redirect / Bevan

1 A. I saw him leave the Court during the last trial. It was  
2 also possible he was going to be called as a witness.

3 Q. And you've never seen Mr. Rosenthal growing marijuana,  
4 right?

5 A. No.

6 Q. You've never seen him possess marijuana, correct?

7 A. No.

8 MR. BEVAN: One question, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. BEVAN:

11 Q. Showing you, Mr. Schwartz, board 9 -- or Exhibit 9, board 1  
12 of 8. Do you see the building that is reflected in that  
13 picture?

14 A. The white building? Could you bring it a little closer,  
15 please.

16 Q. Sorry, the white building.

17 A. I see the building.

18 Q. Have you ever been there?

19 A. No.

20 Q. Did -- can you tell me what street that is?

21 A. No.

22 MR. BEVAN: Nothing further, Your Honor.

23 THE COURT: Thank you. You are excused.

24 Call your next witness.

25 MR. BEVAN: The United States would call

McRea - Direct / Bevan

1 Mr. William McRea, M-c-R-e-a.

2 THE COURT: Would you come forward, please,

3 Mr. McRea.

4 WILLIAM MCREA,

5 called as a witness for the plaintiff, having been duly sworn,

6 was examined and testified as follows:

7 THE CLERK: State your full name, spell your last  
8 name for the record.

9 THE WITNESS: William McRea. Last name is spelled  
10 M-c, capital r-e-a.

11 DIRECT EXAMINATION

12 BY MR. BEVAN:

13 Q. Good afternoon, sir.

14 A. Thank you.

15 Q. Were you -- were you subpoenaed by the United States to  
16 come here today?

17 A. No. I was asked to be here. I don't believe I received a  
18 subpoena though.

19 Q. Okay.

20 Anyways, what is your current occupation?

21 A. Currently I'm the chief financial officer of Lang  
22 Thermotech, which is a company in San Diego.

23 Q. Okay.

24 And prior to your occupation with that company, were  
25 you associated with a company called McCalif Growers?

McRea - Direct / Bevan

1 A. Yes, I was.

2 Q. And could you give us the -- I'll withdraw that.

3 Is McCalif Growers still in business?

4 A. No, they are not.

5 Q. And what is the history of McCalif Growers in terms of your  
6 involvement?

7 A. McCalif was a family-owned business. My dad and I started  
8 it in 1976. We sold the business in 1995. I was retained to  
9 be the president, CEO, for the company until it was closed in  
10 2002.

11 Q. Okay.

12 When in 2002 did it close?

13 A. Would be June 2002.

14 Q. Okay.

15 Do you have a college degree?

16 A. Yes, I do.

17 Q. And what was your field of study in college?

18 A. I have a degree in agricultural science from the University  
19 of California at Davis. And I also have a degree in business  
20 administration.

21 Q. And did your degree in -- you say agricultural science?

22 A. Correct.

23 Q. Did that come in play in terms of your work?

24 A. Yes, it did.

25 Q. In the McCalif Growers?

McRea - Direct / Bevan

1 A. Yes, it did.

2 Q. In what ways?

3 A. Our business was a horticultural supply business. I had  
4 horticultural sciences.

5 Q. What did McCalif Growers sell, Mr. McRea?

6 A. We sold primarily growing supplies to over 10,000 customers  
7 throughout the United States. Containers, propagation  
8 materials, fertilizers, pesticides. Things of those sorts.

9 Q. Okay.

10 By the way, the name McCalif Growers, what is the  
11 derivation of that?

12 A. It derived from McRea, my last name, and California.

13 Q. Okay.

14 Now, to your knowledge, was Mr. Rosenthal a customer  
15 of McCalif Growers?

16 A. I wouldn't have been personally aware of that. Evidently  
17 he was, but I didn't know him personally. So...

18 Q. Okay.

19 MR. FIGUEROA: I would move to strike the last  
20 response, based on hearsay. He said he personally did not know  
21 him.

22 THE COURT: He said he didn't. Isn't that the end  
23 of the matter? He said he didn't.

24 BY MR. BEVAN:

25 Q. Showing you, Mr. McRea, Exhibit 42B, which is a McCalif

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1 catalogue, did you provide that to the Government?

2 A. Yes, I did.

3 Q. And is that a catalogue of things that McCalif Growers  
4 offered for sale?

5 A. Yes, it is.

6 Q. And does that include grow things like trays and stakes,  
7 that sort of thing.

8 A. Yes, it does.

9 MR. BEVAN: I would offer into evidence 42B, Your  
10 Honor.

11 THE COURT: Admitted.

12 (Plaintiff's Exhibit 42B was received in  
13 evidence.)

14 MR. BEVAN: Just keep that right there for reference  
15 if need be.

16 BY MR. BEVAN:

17 Q. I'm going to show you, sir, Exhibit 42A, taken out of the  
18 green folder. And it's a series of four manila envelopes  
19 containing documents from McCalif Growers.

20 THE COURT: Sorry, what number is that?

21 MR. BEVAN: 42A.

22 THE COURT: 42A?

23 MR. BEVAN: Yes, Your Honor.

24 MS. GREENBERGER: Can you give us a Bates Number,  
25 Counsel?

McRea - Direct / Bevan

1 MR. BEVAN: 20,318 to 20,673.

2 MS. GREENBERGER: Thank you.

3 BY MR. BEVAN:

4 Q. Have you had a chance to look at those manila folders?

5 A. I have seen them one time prior to this.

6 Q. Okay.

7 Would it be fair to say, Mr. McRea, that those are  
8 customer folders of McCalif Growers?

9 A. That would be correct. Yes.

10 Q. Do each of those folders contain documents pertaining to Ed  
11 Rosenthal?

12 A. Yes, they do.

13 Q. Did you look at all four to make sure that's right?

14 A. They do.

15 Q. Okay.

16 And were all those records, those are -- appear to  
17 be original records; is that correct?

18 A. Yes, they are.

19 Q. And were those records maintained in the ordinary course of  
20 business of McCalif Growers?

21 A. Yes, they would be.

22 MR. BEVAN: I would offer Exhibit 42A in evidence,  
23 Your Honor.

24 THE COURT: Admitted.

25 ///

McRea - Direct / Bevan

1 (Plaintiff's Exhibit 42A was received in  
2 evidence.)

3 BY MR. BEVAN

4 Q. What I would like to do, Mr. McRea, if we could, is go  
5 through folder by folder if you can tell me by looking at the  
6 document in the front of the folder and the document at the end  
7 of the folder, tell me what period of time is covered by the  
8 documents in that particular folder and then we are going to --  
9 I'm going to establish through you the invoices in there and  
10 what was purchased.

11 A. Okay.

12 Q. So with respect to folder No. 1 of 4, what period of time  
13 is covered by the invoices there?

14 A. Looks like March 4th of 1999, through -- actually, I don't  
15 know if these are sorted in date order or not. There is also  
16 an invoice here for April of 1998.

17 Q. Okay.

18 So it appears that it encompasses the time frame of  
19 approximately April '98 to April '99?

20 A. That would be correct, yeah.

21 Q. If you could, sir, open that folder up and identify are  
22 there invoices in there for purchases of materials by  
23 Mr. Rosenthal?

24 A. Yes, there are.

25 Q. And do those invoices identify the shipping address? If

McRea - Direct / Bevan

1 you recall on things that he bought from McCalif Growers were  
2 those shipped to him at a certain location?

3 A. Yes, they were.

4 Q. And do those records reflect where the items were shipped  
5 to?

6 A. Yes, they do.

7 Q. What address was that?

8 A. 1635 East 22nd Street in Oakland, 94606.

9 Q. Is there any indication in that folder there that anything  
10 was every shipped to the location of 1419 Mandela Parkway?

11 A. I do not see anything in these documents to the effect.

12 Q. Okay.

13 With respect then to the first folder, could you  
14 identify the invoice date and what was purchased by  
15 Mr. Rosenthal?

16 A. Okay. The first invoice is dated March 4th, '98. Do you  
17 require invoice number or something like that? Yes?

18 Q. Just a second.

19 A. Okay.

20 Q. What was your question?

21 A. Do you want me to give you the invoice number on each  
22 document?

23 Q. No. Just give me, if you would, identify the date and what  
24 was -- what was purchased.

25 A. Okay. The first invoice would be March 4th, 1999.

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1 MR. AMPARAN: Your Honor, I hate to object, we don't  
2 know which document -- there is a huge stack of documents, we  
3 don't know which particular document the witness is utilizing.

4 THE COURT: I thought he identified it by number.

5 MR. AMPARAN: He -- each section --

6 THE COURT: But a date. Doesn't he have a date.

7 MR. BEVAN: I'll clear that up.

8 THE COURT: Okay.

9 BY MR. BEVAN:

10 Q. Mr. McRea, each one of those pages has a label on it with a  
11 number in the lower right-hand corner?

12 A. Yes, I see.

13 Q. When you come across and talk about an invoice, would you  
14 read aloud that number?

15 A. Okay.

16 Q. That is a Bates Number for discovery control.

17 With respect to the invoice, what is the Bates  
18 number?

19 A. It would be 020339. Consist of three cases of flats and a  
20 case of domes.

21 Q. One case of what?

22 A. Of what I will -- are called domes, plastic clear humidity  
23 domes that go over the plants.

24 Q. Okay.

25 Anything else?

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1 A. Just a charge for freight, so no.

2 Q. The acoustics are bad maybe it is that machine.

3 What was that last thing you said?

4 A. There is a charge for freight on here but nothing else.

5 Q. Okay.

6 Now, if you could just because we are talking about  
7 the first invoice, you say three cases of flats, could you look  
8 to the catalogue and see if there is a picture of a flat.

9 A. Yes, there is.

10 Q. What page are you looking at on the catalogue?

11 A. Sixty-seven.

12 MR. BEVAN: May I put this on the ELMO?

13 THE COURT: Yes, certainly.

14 BY MR. BEVAN:

15 Q. Which --

16 A. It's the upper right-hand corner. There you go.

17 Q. Okay.

18 So three cases of flats. Are you saying it's this  
19 style?

20 A. Yes.

21 Q. Which one is it?

22 A. This is actually two different styles of flats. Some of  
23 them are -- those are injection molded flats, and they also  
24 bought vacuum form flats. So the ones on this invoice are  
25 vacuum, the next photo down, yeah, would be the black part of

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1 that would be a vacuum form flat. The top part is the dome

2 that we discussed.

3 Q. Okay.

4 A. And they were purchasing -- buying both the vacuum form and

5 the injection molded flats.

6 Q. How many flats are there in a case?

7 A. Depending on the variety there is usually 100.

8 Q. Okay.

9 So that would be three cases would be 300 of those,

10 right?

11 A. Yes.

12 Q. What is the next invoice?

13 A. It would be dated March 5th, 1999. It's number 020343. It

14 consists of, if I can read my own invoice, here, looks like one

15 case of flats. This would be a flat that was packaged 50 per

16 case.

17 Q. That's it?

18 A. That would be it, yes.

19 Q. Okay.

20 What's the next invoice?

21 A. The next invoice is dated 02/17/1999, the document number

22 is 020351. It consists of oasis root cubes. Two cartons of

23 that, 1000 per case. It also consists of small

24 three-and-a-half inch white push-on label are a thousand per

25 box.

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1 Q. How many boxes were purchased?

2 A. Pardon?

3 Q. How many boxes?

4 A. I'm sorry. One box.

5                   The fourth item was for four bags of coarse  
6 vermiculite. They are four cubic foot. And the third and  
7 final item on this -- I'm on -- sorry, fourth and final item on  
8 this invoice was three bags of core. It's a coconut material  
9 used for propagation.

10 Q. You mentioned oasis root cubes, are those in your  
11 catalogue?

12 A. Yes, they are.

13 Q. What page are those? Is this what you are referring to,  
14 sir?

15 A. Yes, it is.

16 Q. And what are these used for?

17 A. They are used for propagating vegetative cuttings.

18 Q. What do you mean by propagating?

19 A. They are used for -- if you take a pinch or a cutting off  
20 of a mother stock plant, you can use that to grow the roots  
21 onto the cuttings so it can be planted into a larger container.  
22 Just a media used for propagation.

23 Q. Okay.

24                   And how many -- this is pictured as -- is that one  
25 in the picture?

McRea - Direct / Bevan

1 A. It's -- yeah, these would be -- that long strip there would  
2 be made up of several little sections.

3 Q. Okay.

4 A. Those would be considered one for each section.

5 Q. And how many of those were purchased?

6 A. There is 1000 in a carton of this variety that he  
7 purchased.

8 Q. 1000 in a carton?

9 A. He purchased two cartons.

10 Q. So that's 2000 of those?

11 A. Correct.

12 Q. You said there were a thousand labels purchased, correct?

13 A. That would be correct, yeah.

14 Q. Are those in the catalogue?

15 A. They should be, yeah.

16 Q. These are plant stakes, correct?

17 A. Yes.

18 Q. And you use the term labels. Why don't you call it a plant  
19 stake? Are they used for different things?

20 A. Yeah. We call them labels as opposed to plant stakes.  
21 Labels are usually used to identify specific divisions within a  
22 crop, different cultivars, different varieties, different  
23 plants, whatever.

24 They are small. You write on them with a Sharpie.

25 A plant stake is typically something you use to support the

McRea - Direct / Bevan

1 plant.

2 Q. So in your terminology if I went to Navlet's and there is a  
3 little stake in the plant, that tells me what it is?

4 A. That would be a label.

5 Q. That's a label.

6 Now, when you sold those to Mr. Rosenthal, did you  
7 emboss them with any sort of writing or were they sold blank or  
8 plain?

9 A. They are sold blank.

10 Q. Okay.

11 And those are up on the easel, those colored things?

12 A. Yeah. They are both -- we had them available in just a  
13 white color as well.

14 Q. What color -- he bought white?

15 A. He purchased white.

16 Q. And he purchased a thousand of them?

17 A. That is correct.

18 Q. And what size were they?

19 A. Three-and-a-half inch.

20 Q. And they come in different sizes, correct?

21 A. Yes, they do.

22 Q. Okay.

23 And the other things in that order had to do with  
24 fertilizer?

25 A. No, they were actually planting media, soils and things

McRea - Direct / Bevan

1 that are used for propagation as well.

2 Q. Okay.

3 Propagation of what?

4 A. Plants.

5 Q. Okay.

6 A. Typically cuttings or seedlings.

7 Q. Okay.

8 If you could go to the next invoice, sir.

9 A. The data on this invoice is 09/11/1998. It's labeled as  
10 020358. It consists of five cartons of oasis root cubes at  
11 1000 per carton and that would be --

12 Q. Just to stop you. That is 5000 cubes?

13 A. That would be correct.

14 Q. Okay. Go ahead.

15 What is the next?

16 A. There is no more items on that invoice.

17 Q. Okay.

18 What is the next invoice?

19 A. The next invoice is dated 05/06/1998, has a document number  
20 of 020362. The invoice consists of five cartons of oasis root  
21 cubes. It's a different variety than that last one. It has  
22 2080 cubes per case so that would be oh, 10,000 individual  
23 units.

24 Q. 10,000 cubes?

25 A. Correct.

McRea - Direct / Bevan

1 Q. Okay.

2 Anything else purchased?

3 A. No.

4 Q. So far the invoices that you have talked about, Mr. McRea,  
5 I believe you have talked about five so far, is there any  
6 reference as to how that invoice was paid?

7 A. They were all marked as prepaid, and let me look at it for  
8 a second here.

9 Several of them were marked as money orders.

10 Q. Money orders?

11 A. Yeah.

12 Q. Did they say whether they are postal money orders or --

13 A. No, just says money order on it.

14 Q. Okay. All right.

15 What is the next invoice, sir, in that folder?

16 A. The date on this invoice is 05/21/1998, a document number  
17 020370. It consists of one -- one pound of root shield drench,  
18 which is an antifungal pesticide that is used to prevent root  
19 rot on propagated plants.

20 Q. Does that come in concentrated form?

21 A. Extremely concentrated, yes.

22 Q. So how many usages, or what have you, is it made for?

23 A. I really do not know how many they will get out of it. It  
24 would be thousands, though.

25 Q. Go ahead.

McRea - Direct / Bevan

1                   What else was purchased?

2   A.  Nothing else on that invoice.

3   Q.  Okay.

4                   What is the next one?

5   A.  The next invoice is dated 04/11/98.  It's a document number

6   020374.  It consists of one case of heavy propagation flats.

7   They are heavier density thickness for heavier whatever you are

8   transporting.  They are also 17 by 17 square, a different size

9   than the flats you saw earlier, and there are only 25 in a

10  carton.

11  Q.  Okay.

12  A.  In addition, he purchased a PM9 mat, which is a solid

13  rubber mat that is used to provide bottom heat.  It helps

14  stimulate root growth when you are propagating roots to give

15  bottom heat to the plant.

16                   And he bought a single GC4 thermostat which is used

17  in combination with the PM9 mat to control the temperature of

18  the soil to get the optimal levels for propagation.

19  Q.  Now, the heavy plants are they separately pictured in the

20  catalogue?

21  A.  Yes.

22  Q.  Can you find that for us?

23  A.  They are very close.

24  Q.  We can't have a private conversation, so if you say

25  anything, say it loud enough for everyone to hear.

McRea - Direct / Bevan

- 1 A. I apologize.
- 2 This would be close to it.
- 3 Q. Is that the item?
- 4 A. It would be very similar to that.
- 5 Q. There is some flowers in front of it?
- 6 A. Yes.
- 7 Q. Okay.
- 8 And he bought a case of those?
- 9 A. Yeah.
- 10 Q. And the mat is -- this heavy mat that has to do with
- 11 temperature, is that reflected in the book? Did -- the mat is
- 12 on page 17. Does this -- this comes with it; is that correct?
- 13 A. It's sold separately. It's the GC4 thermostat, but it is
- 14 part of the package, yes.
- 15 Q. And that provides the heat?
- 16 A. That controls how much -- whatever the temperature is there
- 17 is a probe that is put into the soil that will automatically
- 18 turn the mat on and off depending on the set points.
- 19 Q. Okay.
- 20 Have we finished the invoices in that folder?
- 21 A. No, there is one more invoice.
- 22 Q. Okay.
- 23 What is the date on that?
- 24 A. 04/28/1998, document number 020377.
- 25 Q. Um-hum.

McRea - Direct / Bevan

1 A. It's one case of flats at 100 per case and that's it. That  
2 would be it for this folder.

3 Q. Okay.

4 And the flats, those flats are the same as the first  
5 invoices or --

6 A. Yes.

7 Q. -- three cases of flats?

8 A. Correct.

9 Q. Okay.

10 What about the second folder? What period of time  
11 is covered by the second folder?

12 A. It appears to be from March of 2000 -- I'm sorry, looks  
13 like it's July of 1999 through March of 2000.

14 Q. Okay.

15 Same information, sir, if you would. The invoice  
16 and what was purchased.

17 A. Okay. The first invoice is dated 03/22/2000. Document  
18 number 020383. The first item was two cartons of oasis 5015  
19 root cubes, 1000 cubes per case.

20 Q. So that would be 2000 of those?

21 A. Correct.

22 Q. Okay.

23 A. The second item would be one bale of three-foot bamboo,  
24 natural bamboo stakes. There is a thousand stakes in a bundle.

25 Q. So he bought a thousand bamboo stakes?

McRea - Direct / Bevan

- 1 A. That is correct.
- 2 Q. We'll come back to that, sir.
- 3           Anyway, go ahead. Anything else?
- 4 A. That would be it for that invoice.
- 5 Q. Okay.
- 6           What's the next invoice?
- 7 A. The next invoice is 03/03/2000, document number 020387.
- 8 The first item would be two cartons of oasis 5015 root cubes,
- 9 1000 per carton, so that would be 2000 cubes.
- 10 Q. Okay.
- 11 A. And there were two boxes, would be the second item of
- 12 4-inch white plant labels at a thousand per -- per box, so it
- 13 would be 2000 labels.
- 14 Q. Anything else on this?
- 15 A. No, that would be it.
- 16 Q. Okay.
- 17           Now, on the previous order for labels, they were
- 18 two-and-a-half inch labels, correct?
- 19 A. I believe they are three-and-a-half inch.
- 20 Q. Okay.
- 21           Three-and-a-half. In any event, these are four
- 22 inches?
- 23 A. A little bit bigger label.
- 24 Q. And he bought 2000 of those?
- 25 A. Correct.

McRea - Direct / Bevan

1 Q. And I didn't ask you about the bamboo stakes. How are the  
2 bamboo stakes used?

3 A. Typically, the bamboo stakes would be used if a plant  
4 becomes too ungangly and it won't support itself, you will  
5 stick the stakes into the container, into the soil, and then  
6 you will use a string to help pull the plant up and support it  
7 with the bamboo stakes.

8 Q. So, page 64 of your catalogue --

9 A. Yes, that would be them.

10 Q. -- in the lower left-hand corner, how tall are the bamboo  
11 stakes?

12 A. They can be everything from 18 inches to 12 feet.

13 Q. Okay.

14 A. These were, I believe, three feet.

15 Q. And these are designed to hold up stronger plants?

16 A. Yes.

17 Q. Or larger plants?

18 A. Correct.

19 Q. Okay.

20 What's the next invoice?

21 A. It's dated 07/15/99. Document number 020391. The first  
22 item is one carton of flats at 100 carton. The second item  
23 would be one carton of flats as well, a different configuration  
24 of flats. And they were also a hundred per case. That would  
25 be it on that invoice.

McRea - Direct / Bevan

1 Q. Okay.

2 What's the next one?

3 A. The -- the next one is dated 01/27/2000. The document  
4 number 020395. The item consists of one pound of root shield  
5 drench, which is the same antifungal he purchased earlier.

6 Q. And that is concentrated?

7 A. Yes, it is.

8 Q. What else?

9 A. And that's the last invoice in that folder.

10 Q. Okay.

11 Go to the next folder. What time frame is  
12 referenced in the third folder?

13 THE COURT: Could I see the first two folders?

14 THE WITNESS: It looks like the time frame is from  
15 about 06/01 to March 1st, '01.

16 BY MR. BEVAN:

17 Q. Okay.

18 Same information, sir, if you would.

19 A. Okay.

20 Q. Starting with the first invoice.

21 A. The first invoice is dated 06/06/01, document number  
22 020401. It is for 600 -- I'm sorry, 100 linear feet of 6-foot  
23 black shade cloth, it provides a 30 percent shade.

24 Q. Okay.

25 One hundred linear feet?

McRea - Direct / Bevan

- 1 A. Right.
- 2 Q. Of black shade cloth?
- 3 A. Correct.
- 4 Q. Is that in your catalogue?
- 5 A. Yes, it would be.
- 6 Q. And what's that typically used for?
- 7 A. In cases where you are getting too much sunlight and it's  
8 burning the plants, you can use it to provide shade. This  
9 would be a sample right here.
- 10 Q. It's on the same page as the bamboo stakes. Page 64. It's  
11 in the top of that on the ELMO; is that correct?
- 12 A. That's correct.
- 13 Q. Okay.
- 14 What else was purchased?
- 15 A. That was the last item on that invoice.
- 16 Q. Okay.
- 17 What's the next invoice?
- 18 A. The next invoice is dated 04/20/01. A document number  
19 020413. It consists of two boxes of the four-inch white  
20 labels, 1000 labels per box, so 2000 labels.
- 21 Q. Four-inch plant labels?
- 22 A. That would be correct and that is the only item on the  
23 invoice.
- 24 Q. Are those white?
- 25 A. Yes, they are.

McRea - Direct / Bevan

1 Q. Okay.

2 What's the next -- so another 2000 labels?

3 A. Right.

4 Q. What's the next invoice, sir?

5 A. The date on this invoice is 03/07/01. The document number  
6 is 020419. It consists of three cases of vacuum formed flats.  
7 It would be 100 per case so it would be a total of 300 flats.

8 Q. Have we talked about those before?

9 A. Yeah, they are the same flats we showed you earlier.

10 Q. Okay.

11 Go ahead. What's the next invoice?

12 THE COURT: Counsel, are we going to go through all  
13 of these, each one?

14 MR. BEVAN: Yes, Your Honor.

15 THE COURT: Well, let's not do that.

16 MR. BEVAN: All right.

17 BY MR. BEVAN

18 Q. Mr. --

19 THE COURT: I think we have gotten the flavor of it.

20 MR. BEVAN: Can I do this, Your Honor?

21 THE COURT: Why -- what do they all show, can you  
22 give a magnitude of it, how many orders, roughly how many  
23 orders, over what period of time, how much money.

24 BY MR. BEVAN:

25 Q. Well, can you -- Mr. McRea, I got to expedite this. If you

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1 could look at the invoices that have plant labels and identify  
2 the quantity and the size of the label, if you would.

3 A. Okay.

4 Q. We'll focus on that one item.

5 THE COURT: Thank you.

6 THE WITNESS: Do you want me to refer to each  
7 invoice number?

8 BY MR. BEVAN:

9 Q. Just give the invoice date and how many labels were bought  
10 and how big were they?

11 A. Okay.

12 This would be dated 01/15/2001, document number  
13 020442. Ten boxes of seven-inch labels, white, 100 per box.  
14 This would be a total of 10,000 seven-inch labels.

15 Q. Okay.

16 A. Two boxes of six-inch white labels, 1000 per box, that  
17 would be 2000 total six-inch labels.

18 Q. Okay.

19 A. Invoice date 12/2/2000, document number 020454. Two boxes  
20 of six-inch white labels, 1000 per box for a total of 2000  
21 labels.

22 The next invoice is dated 11/02/2000. Document  
23 number 020474. Five boxes of seven-inch white labels. These  
24 are 100 per box so it would be 500 labels total.

25 The next invoice is dated 09/26/2000. Document

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1 number 020506. There are two boxes of five-inch labels. 1000  
2 labels per box which is 2000 labels.

3 THE COURT: The other invoices that you are going  
4 through and not reading to us are those for other supplies,  
5 supplies other than labels?

6 THE WITNESS: Yes.

7 THE COURT: Thank you.

8 THE WITNESS: They are pretty much the same  
9 materials that were on the other invoices.

10 Next is 09/11/00, document number 020512. One box  
11 of seven-inch white labels, 100 per box for a total of one  
12 hundred labels.

13 Invoice date 09/18/2000. Document number 020516,  
14 one box of eight-inch labels and there are a thousand in a box.  
15 So it's a thousand labels.

16 The next invoice is dated 07/17/2000. Document  
17 number 020552. It consists of five labels, seven-inch white,  
18 100 per box for a total of 500 labels.

19 That would be all the invoices in this folder with  
20 labels on it.

21 BY MR. BEVAN:

22 Q. So we are down to the last thin folder.

23 If you could go through that last folder, Mr. McRea,  
24 and tell us -- focus in on the label purchases, if any.

25 A. Okay.

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1 THE COURT: The folders are segregated by year; is  
2 that correct?

3 THE WITNESS: They are supposed to be.

4 THE COURT: So the one that you just read, what year  
5 was that?

6 THE WITNESS: Looks like mostly the year 2000.  
7 Typically there is a little bit of the --

8 THE COURT: -- overlap.

9 THE WITNESS: Yeah.

10 THE COURT: So that is the year 2000 that you have  
11 just completed and the one you are about to go into?

12 THE WITNESS: Looks like 2002. There are some 2001  
13 invoices in here as well.

14 BY MR. BEVAN:

15 Q. Go ahead.

16 Any label purchases in there?

17 A. The first invoice with labels on it is dated 10/31/2001,  
18 document 020613. Two boxes of five-inch white labels, 1000 per  
19 box so 2000 labels.

20 The next invoice with labels is dated 10/31/01. It  
21 has one box of six-inch white labels, 1000 per box. And there  
22 is also one box of eight-inch white labels, 1000 per box.

23 MR. AMPARAN: I'm sorry. Could I get that number?

24 THE WITNESS: The document number is 020621.

25 The next invoice is dated 09/12/01. Document number

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1 020645. One box of five-inch labels, 1000 per box.

2 BY MR. BEVAN:

3 Q. Any others?

4 A. The next invoice is dated 09/04/01. A document number

5 020659. One box of five-inch labels, 1000 per box.

6 The next invoice is dated 07/30/01, document number

7 020665. There were ten boxes of seven-inch white labels, 100

8 per box, so there would be a total of 10,000.

9 No more.

10 Q. Okay.

11 Did you see any other shipping address in there,

12 Mr. McRea, other than 1635 East 22nd Street in Oakland,

13 California?

14 A. No. It appears everything is shipped to the same address.

15 Q. Okay.

16 Showing you, sir, Exhibit 25T, as in Tom, it's a

17 portion of a box top from McCalif Growers, do you recognize

18 that to be one of your box tops or from a box that you shipped?

19 A. Yeah, that would be a label from our UPS program.

20 Q. And it says shipped to Ed Rosenthal at 1635 East 22nd

21 Street; is that correct?

22 A. Correct.

23 Q. And it's got invoice number 6267?

24 A. That would probably refer to one of these invoices.

25 Q. Okay.

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1 THE COURT: 25T admitted.

2 MR. BEVAN: Foundation on that. It's a search  
3 document.

4 THE COURT: I don't --

5 MR. BEVAN: That's fine.

6 THE COURT: Unless it's objected to, I'll admit it.

7 (Plaintiff's Exhibit 25T was received in  
8 evidence.)

9 BY MR. BEVAN:

10 Q. Now, did you see reference in there, Mr. McRea, to payment  
11 by credit card?

12 A. I didn't check that close a detail, so I didn't see it.

13 Q. If the invoice says credit or -- credit or credit card,  
14 would that indicate to you that it was paid by credit card?

15 A. Yes, it would have.

16 Q. Couple of final things.

17 Put on the easel --

18 THE COURT: Sorry, what is it?

19 MR. BEVAN: Board 9 or Exhibit 9, board 6 of 8, I  
20 don't know if that --

21 BY MR. BEVAN:

22 Q. Mr. McRea, taking a look at these plastic containers, can  
23 you identify what those are?

24 A. They appear to be just injection molded flats similar to  
25 what we were talking about earlier.

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1 Q. Okay.

2 A. And also some labels.

3 Q. The -- pointing to photograph A, that cover, do you sell  
4 those, that cover?

5 A. That would be a humidity dome.

6 Q. Okay.

7 And in picture B or -- why don't you do this, are  
8 there things that you sell depicted in these photos?

9 A. Oh, yes.

10 Q. Are there things in this picture that, in fact, were sold  
11 to Mr. Rosenthal by your company per those invoices?

12 MR. AMPARAN: Objection, calls for speculation, lack  
13 of foundation.

14 BY MR. BEVAN:

15 Q. If you can tell.

16 A. It would appear that the labels and flats probably came  
17 from my company, yes.

18 Q. Showing you, sir, Exhibit 9, board 7 of 8.

19 MR. BEVAN: May I ask the witness to stand up, Your  
20 Honor?

21 THE COURT: Go ahead.

22 BY MR. BEVAN:

23 Q. Mr. McRea, if you can take the pointer and with respect to  
24 the photo of D on this exhibit, do you -- are there any  
25 articles in there that -- that could be an item that you sell?

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1 MR. AMPARAN: Your Honor, I'm going to object,  
2 relevance as to could be.

3 THE COURT: Well, he said appear to be, that is the  
4 word.

5 It's appropriate.

6 THE WITNESS: These black containers are probably  
7 from our business.

8 BY MR. BEVAN:

9 Q. Okay.

10 What about in photo E? Is there anything there that  
11 you sell, the type of item that you sell?

12 A. The propagation plants, probably the oasis root cubes in  
13 here, the domes.

14 Q. All right.

15 And you are pointing to the right side of photograph  
16 E?

17 A. Yeah, the same thing as this.

18 Q. Okay.

19 One final board to take a look at, board 4 of 8, if  
20 you could step down.

21 These, sir -- take a look at these, I'm pointing at  
22 picture B, are those flats?

23 A. Yes, they are flats.

24 Q. Okay.

25 And down in the lower portion of picture B, are

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1 those plants sitting in flats?

2 A. Yes, they are.

3 Q. And these larger plants here, they are in some sort of  
4 what?

5 A. Nursery containers.

6 Q. You sell those?

7 A. Yes, we do.

8 Q. And here, again, on the top of photo A looking at the -- is  
9 that a flat?

10 A. Yes, it is.

11 Q. And that is a container, you sell that kind?

12 A. Yes, we do.

13 Q. Do you see any of those bamboo stakes or not? Not in those  
14 pictures?

15 A. No, not in those pictures.

16 MR. BEVAN: That's all I have, Your Honor.

17 THE COURT: Okay. Thank you.

18 Cross?

19 MR. BEVAN: Let me ask one more item.

20 Exhibit 25.

21 THE COURT: Twenty-five?

22 MR. BEVAN: 25E.

23 THE COURT: 25E.

24 BY MR. BEVAN:

25 Q. This is a -- in plastic, sir, the document themselves are

## McRea - Cross / Amparan

1 one copy is yellow and here is a white copy. Are those  
2 documents that would have emanated from your business?

3 A. Yes, they would have.

4 MR. BEVAN: I would offer Exhibit 25E, Your Honor.

5 THE COURT: Admitted.

6 (Plaintiff's Exhibit 25E was received in  
7 evidence.)

8 MR. AMPARAN: Can we see those?

9 (Handing exhibit to defense counsel.)

10 THE COURT: Cross?

11 MR. BEVAN: That's all I have, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. AMPARAN:

14 Q. Good afternoon, Mr. McRea.

15 You said that U.S. Attorney asked you if you were  
16 subpoenaed to be here, you said that you agreed to be here but  
17 weren't subpoenaed?

18 A. I don't remember receiving a subpoena. I do know I was  
19 asked to be here so I showed up.

20 Q. Do you know how many times you have been contacted by the  
21 Government before you came in to testify today?

22 A. I think on -- I had one meeting prior to this date. And I  
23 had a couple of phone calls helping them find the records.

24 Q. And you said that McCalif Growers is no longer in business?

25 A. That is correct.

## McRea - Cross / Amparan

- 1 Q. You said that it ended businesses in about June of 2002?
- 2 A. That is correct.
- 3 Q. And you said it is the -- do you believe that the  
4 termination of McCalif Growers to be in any way related to the  
5 prosecution of Ed Rosenthal?
- 6 A. No, sir.
- 7 Q. You said that in college your major was agricultural  
8 science at U.C. Davis?
- 9 A. That's correct.
- 10 Q. And that served as the basis for this horticulture supply  
11 business?
- 12 A. Yes.
- 13 Q. You said you entered into business with your father?
- 14 A. That is correct.
- 15 Q. Was he in agriculture as well?
- 16 A. His entire life, yes.
- 17 Q. And you testified that you had a background in plant  
18 physiology?
- 19 A. That's correct.
- 20 Q. Do you have experience personally in the -- trying to  
21 remember the term you used, propagation, but do you personally  
22 have experience in taking cuttings and using it to grow mediums  
23 that you sell?
- 24 A. Only in college.
- 25 Q. Is it fair to say that you have never seen Mr. Rosenthal

## McRea - Cross / Amparan

1 before?

2 A. That would be correct.

3 Q. You've never -- you've never spoken with Mr. Rosenthal  
4 before?

5 A. Not to my knowledge.

6 Q. You have never spoken with me or any other of the defense  
7 lawyers?

8 A. No, I have not.

9 Q. And you have no idea who personally -- well, let me ask you  
10 this: If someone orders products from McCalif or someone would  
11 have when it was in existence ordered product from your  
12 company, would you, as CFO, know who personally made that  
13 request for product or --

14 A. No, I would not.

15 Q. Would you be personally involved in the recordkeeping that  
16 we have talked about today?

17 A. No, sir.

18 Q. Would there be people under your direction or under your  
19 employment at McCalif Growers that would be responsible for  
20 document handling?

21 A. Yes.

22 Q. And it would be their job in order to know whether or not  
23 documents are kept in the appropriate course and scope?

24 A. That is correct.

25 Q. And where the documents are?

## McRea - Cross / Amparan

1 A. Correct.

2 Q. Is it fair to say that nothing -- well, actually, what  
3 happened to that catalogue?

4 Is it fair to say that nothing that is contained  
5 within Exhibit No. 42B, the McCalif catalogue, is anything in  
6 here a controlled substance?

7 A. No, sir.

8 Q. You don't have permission to sell anything in here?

9 A. No.

10 Q. And all the items you sell would be used by someone engaged  
11 in like a nurseryman business?

12 A. Correct.

13 Q. You -- in terms of being a CFO for McCalif Growers, would  
14 you have any responsibility to make sure that invoices are  
15 filled correctly?

16 A. No, sir.

17 Q. So in terms of all of the invoices that you have testified  
18 about today, you would have no personal knowledge as to whether  
19 or not those were filled?

20 A. Correct.

21 Q. And in order to minimize time, rather than going through  
22 all the receipts, I, likewise, will just focus on labels.

23 You testified about an invoice -- on my copy the  
24 year is cut off, 2/17 something, Bates Number 020351. And it  
25 indicated three-and-a-half inch push-on white label?

## McRea - Cross / Amparan

1 A. Correct.

2 Q. Do any of your labels come with print on them or are they  
3 all just blank?

4 A. We do not print on any labels or we did not print on any  
5 labels.

6 Q. And is it fair to say that at the relevant time that a box  
7 of a thousand three-and-a-half inch white labels would total  
8 \$17?

9 A. That seems reasonable, yes.

10 Q. So these are not very expensive?

11 A. No, they are not.

12 Q. Less than half a penny a piece?

13 A. Yeah.

14 Q. Oh, this -- the root shield drench that you talked about,  
15 is that food grade? Registered for vegetables?

16 A. I do not know the answer to that.

17 Q. Okay.

18 Do you know whether your products are organic or --

19 A. I believe that that particular product is a -- is some sort  
20 of beneficial bacteria or fungus, so in that case, I believe  
21 it's an organic product, but I'm going off of a memory that is  
22 seven years old at this point.

23 Q. Okay.

24 Out of the first folder that you talked about in  
25 terms of invoices, I'm only finding one receipt that indicates

## McRea - Cross / Amparan

1 labels and that's two -- I'm sorry, that's one box of the  
2 three-and-a-half inch labels?

3 A. I can't remember what I read or didn't read at this point.

4 Q. Okay.

5 If I were to hand you the invoices that you spoke  
6 about from the first folder, could you quickly review them and  
7 indicate for the jury whether or not there is more than just  
8 that one box in the first folder?

9 A. Sure.

10 MR. AMPARAN: May I approach? I'm sorry.

11 THE WITNESS: Yes, what you said is correct. There  
12 is one box here.

13 BY MR. AMPARAN:

14 Q. Okay.

15 And then just for the record, I handed the witness  
16 Bates Number 020351, 020343, 020339, 020358, 020362, 020370,  
17 020374, and 020377.

18 Moving on to the second folder you discussed, it  
19 shows that on, looks like, 03/03/01. Bates Number 020387,  
20 there is two boxes of a thousand white labels, four-inch. And  
21 it shows that each of these boxes is \$15.97, does that sound  
22 about right?

23 A. Sounds correct.

24 Q. And then out of folder No. 2, handing you just to make sure  
25 that I'm not missing, handing you 020383, 020387, 020391 and

## McRea - Cross / Amparan

1 020395, just want to make sure on folder No. 2 that I'm not  
2 missing any labels.

3 A. On these four invoices you gave me, those are the labels  
4 that are on them.

5 Q. Okay. Thank you.

6 In terms of the third group, there was talk about a  
7 hundred linear feet of some black shade, is that fair to say  
8 that that costs less than 90 cents a foot?

9 A. Probably, yes.

10 Q. And shows that on April 20th of 2001, two boxes of labels  
11 were purchased, a thousand per box, four inches.

12 On January 15th, '01, Bates Number 020442, it shows  
13 that there are ten boxes of seven-inch labels at 100 per box.  
14 And each one of those boxes is \$4.90. Less than half a cent  
15 each; is that about fair?

16 A. Correct, yeah.

17 Q. And two boxes of six-inch labels at a thousand per box at  
18 \$18 per box; is that about fair?

19 A. Sounds about right.

20 Q. Then we show 12/22/2000, Bates Number 020454, it shows two  
21 boxes of six-inch labels, and each box is \$18.35.

22 A. Okay.

23 Q. On November 2nd, 2001, Bates 020474, we show five boxes  
24 of -- five boxes of seven-inch labels, 100 per box at \$4.75 per  
25 box, does that sound about right?

## McRea - Cross / Amparan

1 A. Sounds right.

2 Q. September 26 of the year 2000, Bates 020506. We have two  
3 boxes of five-inch labels, a thousand in quantity for \$17 per  
4 box?

5 A. Sounds right.

6 Q. September 11th of the year 2000, box number 020512. We  
7 have one box of seven-inch labels at \$4.75?

8 A. Sounds correct.

9 Q. September 18th, 2000. We have one box of eight-inch  
10 labels, a thousand per box at \$23 for a thousand?

11 A. Sounds correct.

12 Q. And then on July 17 of 2000, Bates Number 020552, we have  
13 five boxes of seven-inch labels at \$4.75?

14 A. Sounds correct.

15 MR. AMPARAN: Handing the witness 020413.

16 THE COURT: You don't have to go through them all.  
17 You just read them all, so don't read --

18 MR. AMPARAN: Just wanted to confirm with him.

19 THE COURT: It's fine. He said yes. The jury can  
20 see it.

21 BY MR. AMPARAN:

22 Q. Then in the last of the four piles, you have October 31st  
23 of 2000. Two boxes of five-inch labels at a thousand per box  
24 and each one of these is \$33. If these are twice as much, does  
25 that still mean there is no printing on them?

## McRea - Cross / Amparan

1 A. There would be no printing on it, no.

2 Q. Okay.

3                   And then we have Bates Number 020621 from  
4 October 31st, and it shows one box of six-inch labels at \$18?

5 A. Sounds right.

6 Q. On September 12th, 2001, Bates 020645. We show one box of  
7 five-inch labels at a thousand per box, \$17.84?

8 A. Sounds right.

9 Q. On September 4th, 2001, one box of five-inch labels, a  
10 thousand per box for \$31.31?

11 A. Okay.

12 Q. And then on July 30th of '01, Bates 020665, ten boxes of  
13 seven-inch labels, 100 per box at \$5.31?

14 A. Sounds correct.

15 Q. And your records indicate that -- let me ask you this:  
16 When the Government asked you if you have seen these records  
17 before, you said one time before?

18 A. Correct.

19 Q. When was that?

20 A. On one occasion I flew up here and they asked me to review  
21 the records with them and that's when I saw them.

22 Q. Um, okay.

23                   Do you know what month or year that was?

24 A. I think it was February, maybe January of this year.

25 Q. February, January of this year?

## McRea - Cross / Amparan

1 A. Yeah.

2 Q. And when you flew up in January or February of this year,  
3 where did you fly from?

4 A. From San Diego.

5 Q. From San Diego? When you flew up, did you fly at your own  
6 expense or did the Government fly you up?

7 A. The Government paid my expenses.

8 Q. Including your stay?

9 A. I did not stay over.

10 Q. Okay.

11 Are the items purchased and listed on these items  
12 indicative of a serious nurseryman?

13 A. They would be what nurserymen purchase, yes.

14 Q. And in terms of the -- in terms of the operation of  
15 propagation, do you have -- do you have knowledge about the  
16 success rate of cloning?

17 A. Not on -- not specifically. It's different for every  
18 different type of plant, cultivar, different variety, so I  
19 don't have that specific knowledge.

20 Q. Do you have any knowledge regarding cloning of marijuana  
21 plants?

22 A. No, I do not.

23 Q. Okay.

24 Do you have any knowledge of what the labels in this  
25 case were used for?

## McRea - Cross / Amparan

1 A. You know, they are typically used to label plants, I don't  
2 know what they were used for in this specific case.

3 Q. And, in particular, you -- in terms of this specific case,  
4 you don't know if the invoices were made at the time the order  
5 was placed, right?

6 A. That would be the normal procedure. But I have -- I don't  
7 know that for a fact as far as these invoices are concerned.

8 Q. The Government asked you about these two photographs, these  
9 two, first looking at Exhibit 9, this -- board 4 of 8.

10 And you indicated that there are certain items --  
11 actually, let me ask you this: In terms of the first board, 4  
12 of 8, you testified that there are items that are found in your  
13 catalogue, correct?

14 A. Correct.

15 Q. You don't know if anything here came from McCalif Growers,  
16 do you?

17 A. I could not prove it, no.

18 Q. And, in fact, you are not the only supplier of  
19 horticultural materials, are you?

20 A. That's correct.

21 Q. Were you at the time?

22 A. That's correct, obviously, we weren't.

23 Q. And then the same questions as to the other -- well, first,  
24 I'll do it separately.

25 That the Federal Government asked you about.

## McRea - Cross / Amparan

1 Looking at 7 of 8 -- well, I can ask you this: I'm going to  
2 ask you to look at what has been marked as Exhibit 9, board 7  
3 of 8, and ask you to step down and focus your attention to the  
4 photograph that is marked A in the top left-hand corner. And  
5 in terms of the labels, can you identify if that's your labels?

6 A. No. We did not sell that type of label.

7 Q. Did you sell the color?

8 A. We do sell color labels, but our labels don't have any  
9 printing on it.

10 Q. Okay.

11 Do you know if it's possible to print your labels  
12 after you have purchased them?

13 A. You can, yes.

14 Q. Do you know whether or not the labels you sold came in  
15 rolls like that?

16 A. The labels he purchased did not come in those rolls.

17 Q. Okay.

18 Looking at Exhibit 9, board 6 of 8, in terms of  
19 the -- well, let me ask you this: In terms of the -- that root  
20 drench stuff, I forget what it's called -- in terms of the root  
21 drench --

22 A. Root shield, I believe.

23 Q. Root shield. In terms of the root shield, is it fair to  
24 say that the purpose of that is to -- is to help the  
25 propagation --

## McRea - Cross / Amparan

1 A. It's to --

2 Q. -- of clones?

3 A. -- prevent rotting of the roots, so yes, it's to help the  
4 propagation.

5 Q. Okay.

6 And in terms of Exhibit 9, board 6 of 8, you were  
7 asked questions about the cover, are you the only company that  
8 sells covers or was McCalif Growers?

9 A. No. There were many companies that sold covers.

10 Q. Okay.

11 Have seen these photographs before the Government  
12 showed you them today?

13 A. I don't recall seeing those before today.

14 Q. When you met with the Government in January or February of  
15 this year, was Mr. Bevan there?

16 A. Yes.

17 Q. And who else was there, if you recall?

18 A. David Mateer.

19 Q. Is it fair to say that you have no idea whether or not any  
20 of the labels were ever used in this case?

21 A. I do not have personal knowledge to that effect.

22 Q. And on top of what's been marked as People's -- I mean,  
23 sorry, Exhibit 42B, your -- the catalogue of McCalif products,  
24 on the -- on the copy, is there any significance to Ron's copy?

25 A. That was a copy that I had left over in my files. Ron was

## McRea - Redirect / Bevan

1 an employee of mine.

2 Q. Okay.

3 A. So there is no significance.

4 MR. AMPARAN: If I could just have a moment, Your  
5 Honor.

6 No further questions, Your Honor.

7 THE COURT: Okay.

8 MR. BEVAN: Briefly, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. BEVAN:

11 Q. Showing you, sir, Exhibit 25B --

12 MR. AMPARAN: Actually, Your Honor, object, beyond  
13 the scope of cross.

14 BY MR. BEVAN:

15 Q. This is a notebook. On this piece of paper, is it correct  
16 that in the lower half of that page it has information there  
17 that pertains to McCalif Growers.

18 A. Yes, that is correct.

19 Q. Okay.

20 What information do you recognize there?

21 A. It has our name, phone number, the city. It's also looks  
22 like it has some item numbers, prices.

23 Q. The name of any of your employees listed there?

24 A. Yeah. I see Janet.

25 Q. And did she take orders?

## McRea - Redirect / Bevan

1 A. She was a customer service rep, so she would have taken  
2 orders, yes.

3 Q. Any other names of employees there?

4 A. Claudia.

5 Q. Did she work there, too?

6 A. Yes, she was customer service as well.

7 Q. Okay. Is there a reference to credit there?

8 MR. AMPARAN: Can I ask what Bates page we are  
9 talking about?

10 MR. BEVAN: It's not Bates numbered, Your Honor.

11 MR. AMPARAN: Can we ask what the source of this  
12 notebook is that the witness is referring to?

13 MR. BEVAN: Pardon me?

14 MR. AMPARAN: I don't know what you have shown to  
15 the witness.

16 MR. BEVAN: Oh.

17 THE COURT: Can you tell the defense where it came  
18 from?

19 BY MR. BEVAN:

20 Q. This --

21 THE COURT: Mr. Bevan, the defense wants to know  
22 where did the document come from that you are showing to the  
23 witness.

24 MR. BEVAN: This comes from 1419 Mandela Parkway.

25 THE COURT: Okay.

## McRea - Recross - Amparan

1 BY MR. BEVAN:

2 Q. Mr. McRea, a final point, what is the reference to green  
3 and then black and then \$60 or 60.7500 per case. What is that  
4 a reference to?

5 A. Yeah, those would be part numbers for the flats that we  
6 discussed. The green would be more expensive, typically than  
7 the black would be.

8 Q. Okay.

9 MR. BEVAN: That's all I have, Your Honor.

10 THE COURT: Okay.

11 RECCROSS-EXAMINATION

12 BY MR. AMPARAN:

13 Q. Mr. McRea, when you came and met with Mr. Bevan and the  
14 Government agents in January or February, did he show you or  
15 talk to you about this notebook?

16 A. I do not recall seeing it at that time.

17 Q. Did he talk to you about your employees' names, this  
18 Claudia woman and you mentioned another one?

19 A. We discussed employees. I can't really remember if we  
20 talked about Claudia or anyone else.

21 Q. Okay.

22 And did you personally -- there was one you said  
23 took orders; who was the name of that woman?

24 A. Both of those individuals would take orders. They would  
25 not be in my immediate supervision.

## McRea - Recross - Amparan

1 Q. And you don't know whether or not they did paperwork in a  
2 timely fashion?

3 A. I didn't interview them, so I would say I can't say that  
4 one way or the other.

5 MR. AMPARAN: Okay. I have no further questions.

6 THE COURT: Thank you. You are excused.

7 Ladies and gentlemen, we are going to take a recess  
8 now. Remember the admonition. Don't discuss the case or allow  
9 anyone to discuss it with you. We'll be in recess until five  
10 after 3:00.

11 (Recess taken at 2:51 a.m.)

12 THE COURT: Okay, let the record reflect the jurors  
13 have retired.

14 Who do we have next?

15 MR. BEVAN: Dan Tuey. He was in charge of the  
16 search at Mandela Parkway.

17 MR. AMPARAN: We wish to address the issue of the  
18 Court's admitting the records related to McCalif Growers on the  
19 grounds of lack of foundation.

20 THE COURT: Well, the Government ought to get  
21 Mr. Whatever his name is.

22 What is the basis of the objection?

23 MR. AMPARAN: The basis of the objection is that as  
24 a CFO he has no basis to say whether or not business records or  
25 any other exception to the hearsay rule in the terms of

1 foundation for admissibility, how -- he is not the custodian of  
2 records. He can't say whether or not records are kept in the  
3 usually course and scope.

4 THE COURT: Why can't --

5 MR. AMPARAN: He didn't supervise the people doing  
6 the work.

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

9 MR. AMPARAN: Because he has no foundation to say  
10 that.

11 THE COURT: He is the chief financial officer of the  
12 company and these are financial records.

13 MR. AMPARAN: And I asked him if part of his scope  
14 and duties would entail supervising the maintenance of these  
15 records, and he said no.

16 THE COURT: I know the president of General Motors  
17 supervises and maintains the records of General Motors, but he  
18 can testify as a financial officer that he keeps records in the  
19 ordinary course of business.

20 MR. AMPARAN: And that wasn't the testimony.

21 THE COURT: Was his testimony -- he said these were  
22 records that were kept in the ordinary course of business. I  
23 thought I heard that in the very beginning.

24 MR. AMPARAN: I asked him on cross-examination and  
25 he said he didn't know.

1 MR. BEVAN: I disagree.

2 THE COURT: Is he here?

3 MR. BEVAN: Yes, Your Honor.

4 THE COURT: Fine. We'll put him back on at your  
5 request, and let me see what the -- let me look.

6 Business records exception; is that right?

7 MR. FIGUEROA: 803, subdivision 6, Your Honor.

8 (Witness retakes stand.)

9 THE COURT: Okay. So there is a dispute as to  
10 whether or not you said that these records were kept in the  
11 ordinary course of business. I heard him say it.

12 MR. BEVAN: I thought I asked that.

13 THE COURT: Mr. Bevan, when he returns to the stand,  
14 as the defense requires, you will ask him with respect to these  
15 four folders, were they and then read from 803.6.

16 MR. BEVAN: Yes, Your Honor.

17 THE COURT: And then we'll see what he says to that.

18 MR. BEVAN: Don't discuss your testimony with anyone  
19 from the jury.

20 THE COURT: You can discuss with him whether he --  
21 how he kept his records.

22 (Recess taken at 2:53 p.m.)

23 (Proceedings resumed at 3:05 p.m.)

24 THE COURT: Okay. Let the record reflect that the  
25 jurors are outside the presence of the Court.

1           Now, Mr. Amparan, I want it clear, you want to bring  
2 this person back because it is your belief that those are not  
3 records kept in the ordinary course of business.

4           You have now looked at all the records, you have  
5 seen the originals and you believe that they are not records  
6 kept in the ordinary course of business and that is what you  
7 are telling the United States District Court; is that correct,  
8 yes or no?

9           MR. AMPARAN: That's not my statement.

10          THE COURT: Your statement is what? Do you believe  
11 that they are records kept in the ordinary course of business  
12 or not?

13          MR. AMPARAN: I have no belief.

14          THE COURT: You look at these documents, you have no  
15 belief whether they were kept in the ordinary course of  
16 business?

17          MR. AMPARAN: It's my job to challenge them.

18          THE COURT: No, it's not your job to challenge  
19 everything that comes in. It's your job when you make a  
20 representation of the Court to make a representation made upon  
21 good faith.

22          MR. AMPARAN: And it was.

23          THE COURT: This is not an element of offense,  
24 Mr. Amparan.

25          MR. AMPARAN: Your Honor, I don't understand.

1           **THE COURT: Let me finish, or you are going to be**  
2 **spending the night inside.**

3           Now, it is not your job to challenge every bit of  
4 evidence that comes in. If that is your view of the job, then  
5 we are going to have a serious discussion. Then I'm going to  
6 simply have you try your case twice, once in front of me and  
7 once in front of the jury, if that is how you conceive your job  
8 to be.

9           I looked at these documents, you have looked at  
10 these documents. There is nothing about these documents to  
11 suggest that they are inauthentic, that they were not kept in  
12 the ordinary course of business.

13           You are requiring this witness to come back  
14 essentially and establish that they are kept in the ordinary  
15 course of business, which is not an element of the offense. We  
16 had this discussion at the very outset of this case as to  
17 whether or not documents would be challenged. **I said to you**  
18 **and you gave no indication to the contrary that unless you**  
19 **thought they were inauthentic that there wouldn't be a**  
20 **challenge to their authenticity.**

21           MR. AMPARAN: We never so stipulated to that, Your  
22 Honor, in the first place. If I could have an opportunity to  
23 answer your questions?

24           THE COURT: Go right ahead.

25           MR. AMPARAN: No. 1, I did not say whether or not I

1 believe these to be true and accurate records or not. What I  
2 challenged was the foundation of information and evidence that  
3 was presented in court by this witnesses to their  
4 admissibility.

5 I do believe it is my job to represent my client  
6 zealously between boundaries of the law and to challenge the  
7 evidence of the case as presented by the Government.

8 THE COURT: In other words, you believe that you  
9 have the right and the duty to challenge all evidence that  
10 comes in, even if you don't have a good faith belief on the  
11 basis of your challenges; is that correct?

12 MR. AMPARAN: I have a good faith belief that the  
13 evidence with which the Court has received does not serve as a  
14 legal foundation for the admission of these documents.

15 THE COURT: That's not my question.

16 MR. AMPARAN: That's my answer.

17 THE COURT: No, that's not your answer, Mr. Amparan.  
18 That is not your answer. You have to answer my question.

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

21 MR. AMPARAN: Neither I nor the Court nor counsel  
22 has any information at this point to make a decision.

23 THE COURT: So you are saying you have no belief?

24 MR. AMPARAN: I'm saying I don't believe that the  
25 record has been established to the foundational elements of

1 those records.

2 THE COURT: Fine. Mr. Amparan, that is not my  
3 question. Let's try to answer my question. My question is, do  
4 you have a good faith belief that these documents were not kept  
5 in the ordinary course of business?

6 MR. AMPARAN: Based on this witness' testimony, I  
7 don't believe the foundation is there.

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

14 But the question of whether to bring him back is not  
15 whether the record is adequate with respect to a foundation.  
16 The question is, do you entertain a good faith belief that the  
17 documents are not records kept in the ordinary course of  
18 business? If the answer is yes, that's your answer. If the  
19 answer is no, that's your answer. If your answer is you don't  
20 know, then that's your answer.

21 MR. AMPARAN: Then I don't know.

22 THE COURT: Oh, I see. You are telling the United  
23 States District Court you don't even know whether these  
24 documents were kept in the ordinary --

25 MR. AMPARAN: I don't.

McRea - Redirect / Bevan

1 THE COURT: You don't have to say anything further.

2 MR. AMPARAN: Okay.

3 THE COURT: Thank you very much.

4 Bring in the jury. We'll lay the foundation.

5 (Jury in at 3:12 p.m.)

6 THE COURT: Okay.

7 Ladies and gentlemen of the jury, please be seated.

8 You noticed that the witness has returned to the  
9 stand. As you may recall, the four files of documents which  
10 this witness brought -- or this witness testified to, I  
11 admitted into evidence. The defense has challenged that  
12 admission, saying that -- that they question whether or not  
13 they were documents kept in the ordinary course of business, so  
14 I have returned this witness to the stand and allowed the  
15 Government to ask questions to determine whether or not they  
16 are records kept in the ordinary course of business.

17 Mr. Bevan.

18 REDIRECT EXAMINATION

19 BY MR. BEVAN:

20 Q. Mr. McRea, was it the regular practice of McCalif Growers  
21 to maintain customer files?

22 A. Yes, it was.

23 Q. And was there a particular department or area within the  
24 company whose responsibility it was to maintain the files?

25 A. The accounting department would do that.

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1 Q. Okay.

2 From time to time, do you have interaction with the  
3 accounting department?

4 A. Yes, I would.

5 Q. And is it -- was it the regular practice to keep customer  
6 folders in manila folders like that?

7 A. Yes, it was.

8 Q. Could you look at the documentation. Are some of those  
9 forms multi-part forms?

10 A. Yes.

11 Q. And are the parts that are retained in that file the  
12 McCalif Growers' part of the form?

13 A. Yes, they are.

14 Q. And from your observation of the material in these folders,  
15 do those appear to be the retained copies of transactions  
16 entered into by McCalif Growers in the ordinary course of its  
17 business?

18 A. Yes, they would be.

19 Q. Do you have any doubt in your mind as to whether those four  
20 folders and their contents represent the original folders and  
21 business records of McCalif Growers pertaining to Ed Rosenthal?

22 A. No doubt whatsoever.

23 Q. Now, specifically, is this a compilation of transactions  
24 made at or near the time of transaction, as best you are aware?

25 MR. AMPARAN: Objection, lacks foundation, hearsay.

## McRea - Redirect / Bevan

1 THE COURT: Lay a foundation.

2 BY MR. BEVAN:

3 Q. Was it the regular practice of McCalif Growers, the people  
4 in either customer service that took the order or in  
5 accounting, to keep the records as things happened?

6 A. Yes, it was.

7 MR. AMPARAN: Objection. Lacks foundation, calls  
8 for speculation, multiple levels of hearsay.

9 MR. BEVAN: I'll rephrase.

10 THE COURT: Start at the beginning.

11 BY MR. BEVAN:

12 Q. Your position in the company, again, was what?

13 A. CEO.

14 Q. You are the chief executive officer having to do with  
15 finance, money, everything having to do with the business that  
16 could impact the finances?

17 A. That would be correct.

18 Q. Was that subject to your direct supervision?

19 A. Yes, it would be.

20 Q. And the ladies that you saw in that spiral notebook, the  
21 names, did they in any way have interaction with you?

22 A. Yes, they would.

23 Q. And when people came to work in the accounting department,  
24 were they trained as to how to keep records?

25 MR. AMPARAN: Objection, lacks foundation, calls for

McRea - Redirect / Bevan

1 speculation.

2 THE COURT: What do you mean it lacks foundation?

3 Were you the person who oversaw the operation of  
4 this business?

5 THE WITNESS: Yes, I was.

6 THE COURT: Okay. And are you familiar with -- with  
7 what instructions would be given -- well, I'll start at the  
8 beginning.

9 A person wants to make an order with your company.  
10 How is that order placed?

11 THE WITNESS: They would either call it in or fax an  
12 order to a member of our staff, who would pick up the order or  
13 take it over the phone and put it on the computer to process  
14 the order.

15 THE COURT: And they would process an order at or  
16 about the time that they received the order; is that correct?

17 THE WITNESS: Assuming that the materials were  
18 available to ship immediately, yes.

19 THE COURT: But let me go before processing.

20 Let me go back to taking the order. When a person  
21 took the order in your company, what would they do in terms of  
22 inputting data reflecting the order?

23 THE WITNESS: They would find out who the customer  
24 was, where it needed to be shipped to and make sure that the  
25 product was available, go through the catalogue, make sure that

## McRea - Redirect / Bevan

1 the appropriate part numbers, enter the order on the system.

2 THE COURT: How would the order itself be entered  
3 from a -- from a recordation point of view; in other words,  
4 what pieces of paper, how would that information get on the  
5 pieces of paper?

6 THE WITNESS: The customer service person would  
7 enter the order directly onto the computer and it would print  
8 out at that point in time.

9 THE COURT: It would print out a document?

10 THE WITNESS: Yes, a packing slip and a control  
11 document.

12 THE COURT: Okay. Now, the documents that you have  
13 examined in those four folders, do they appear to you to be the  
14 documents that would be inputted in the computer or copies  
15 thereof?

16 THE WITNESS: Yes, sir.

17 THE COURT: Is that the procedure that was followed?

18 THE WITNESS: Yes, it was.

19 THE COURT: And was it done at or about the time  
20 that the order was placed?

21 THE WITNESS: Yes.

22 THE COURT: Okay. Now, you looked at those  
23 documents, those documents, did they all appear to you to be  
24 copies of orders that were placed in this particular -- as  
25 evidenced by the document itself?

## McRea - Recross / Amparan

1 THE WITNESS: Yes, they do.

2 MR. AMPARAN: May I cross-examine him?

3 THE COURT: Let's see if Mr. Bevan is finished.

4 BY MR. BEVAN:

5 Q. And did Mr. Rosenthal have a customer account number?

6 Wasn't his customer account No. 13274?

7 A. Correct.

8 Q. And is that reflected in documents throughout each of the  
9 four folders?

10 A. Yes, it is.

11 Q. And the files on the computer was there an account  
12 maintained on the computer by a customer number?

13 A. Yes, there was.

14 Q. So when Judge Breyer asked you about an incoming order,  
15 where it would be typed out on the computer screen? Would that  
16 automatically be saved also on the customer account on the  
17 computer?

18 A. Yes, it would.

19 MR. BEVAN: That's all I have, Your Honor.

20 THE COURT: Cross?

21 RECCROSS-EXAMINATION

22 BY MR. AMPARAN:

23 Q. In terms of recordkeeping, I understand that there is a  
24 certain amount, as a CFO and a CEO you are going to be  
25 responsible for, my questions are particular to the documents

## McRea - Recross / Amparan

1 that you have in front of you.

2 Those particular documents, you said that you had  
3 seen them one time before?

4 A. That's correct.

5 Q. And you had to get them out of storage, correct?

6 A. I did not retrieve these from storage.

7 Q. Were you the person who retrieved -- who found those or  
8 was --

9 A. No, I was not the one who found these documents.

10 Q. Who was the one who found these documents?

11 A. They were found by the DEA, the Government.

12 Q. At your office?

13 A. No. The company had closed its doors. It was Chapter 11  
14 and they were in storage at a storage facility right near the  
15 office.

16 Q. And who was in charge of the storage facility?

17 A. It was a rental facility, like a normal facility that you  
18 go rent furniture or something. And so --

19 Q. And how long had those documents been there?

20 A. Since --

21 Q. Or do you know?

22 A. Yes, I do know. They were put in there, it would be  
23 September of 2002.

24 Q. And who had access to that storage?

25 A. Myself.

## McRea - Recross / Amparan

1 Q. Okay.

2 And who had -- in terms of the recordkeeping, you  
3 said that you oversaw the two women who would take orders?

4 A. There were a lot of personnel there.

5 Q. More?

6 A. I oversaw all of them.

7 Q. Did you personally oversee the filling of orders?

8 A. No, sir.

9 Q. Did you personally oversee -- did you personally oversee  
10 invoicing?

11 A. No, sir.

12 Q. Did you personally oversee billing?

13 A. No, sir.

14 Q. Did you personally oversee accounts receivable?

15 A. As far as the collection of it, yes, but no more than that.

16 Q. And in terms of these -- in terms of the orders, do you  
17 know -- do you know if any of the orders that you say were  
18 shipped to Mr. Rosenthal came in terms of phone call orders,  
19 E-mail orders or fax orders?

20 A. I can't really tell from this -- the short amount of time I  
21 looked at them. If you explore through the details  
22 specifically, you may be able to tell how the order was taken.

23 Q. And do you know whether or not -- do -- you have no  
24 personal knowledge as to whether or not your employees  
25 generated those records at the time the orders were made?

## McRea - Recross / Amparan

1 A. That -- no specific knowledge, correct.

2 Q. You are just assuming that it was done correctly?

3 A. Yes, I assume they did it correctly because they are still  
4 employed, or were employed, and if they didn't do their job  
5 correctly, they wouldn't have been employed.

6 Q. And the company went under very soon thereafter?

7 A. Yes, it did, but not because of what they did.

8 Q. Now, as to those four folders, before those four folders  
9 went into storage, where were they?

10 A. They would have been in the storage at the office in our  
11 filing room which consists of about 80 files, maintained in a  
12 locked facility.

13 Q. And do you know when those files were in there?

14 A. They would be there the day after the invoice was cut by  
15 the company.

16 Q. You're assuming that, you have no personal knowledge?

17 A. That's --

18 THE COURT: Counsel, he doesn't need to have  
19 personal knowledge. That is not a requirement. He has to have  
20 knowledge. You can get knowledge in a lot of different ways.  
21 You can get knowledge because you were told something; you can  
22 get knowledge because you observed something; you can get  
23 knowledge because you set up procedures. You can get knowledge  
24 because, in fact, bills went out in accordance with a  
25 particular procedure.

## McRea - Recross / Amparan

1                   There are a lot of ways that people can learn  
2 things. And in terms of the authenticity of the document, this  
3 witness has established that there were records kept in the  
4 ordinary course of business.

5 BY MR. AMPARAN:

6 Q. Well, my question is whether or not you learned things or  
7 whether or not you are assuming things.

8 A. The people in the organization are very competent, did  
9 their job well. I have complete confidence that they did what  
10 they were instructed to do.

11 Q. So you are assuming they did their job right?

12 A. I'm assuming they did their job right.

13                   MR. AMPARAN: Thank you. I have no further  
14 questions.

15                   THE COURT: Okay. Anything further?

16                   MR. BEVAN: None, Your Honor.

17                   THE COURT: Okay. The documents will be admitted.

18                   MR. BEVAN: The United States would call Dan Tuey,  
19 T-u-e-y.

20   DANIEL TUEY,  
21 called as a witness for the plaintiff, having been duly sworn,  
22 was examined and testified as follows:

23                   THE CLERK: State your full name, spell your last  
24 name for the record.

25                   THE WITNESS: Daniel Tuey, T-u-e-y.

Tuey - Direct / Bevan

1 DIRECT EXAMINATION

2 BY MR. BEVAN:

3 Q. Good afternoon, sir.

4 A. Good afternoon, sir.

5 Q. Were you a DEA agent for a period of time?

6 A. I was.

7 Q. And do you remember what period you were a DEA agent?

8 A. June of 1996 to March of 2007.

9 Q. And am I correct that at the present time you are no longer  
10 part of the DEA; is that correct?

11 A. Yes, it is.

12 Q. And I want to focus your attention really to the period of  
13 time of 2001, do you have that period in mind?

14 A. Yes, sir.

15 Q. 2001, 2002.

16 A. Yes, sir.

17 Q. During that period, were you assigned to a particular unit  
18 here in the DEA in San Francisco?

19 A. I was.

20 Q. And what unit was that?

21 A. The group 3, specifically detailed for marijuana  
22 investigation.

23 Q. And what is your experience -- withdraw that.

24 Do you have experience executing search warrants  
25 involving marijuana grows?

Tuey - Direct / Bevan

1 A. I do.

2 Q. And approximately how many search warrants would you  
3 estimate state or federal you have been involved in where there  
4 was marijuana growing indoors discovered?

5 A. More than 50.

6 Q. And have you participated in gathering evidence in any of  
7 those execution of search warrants?

8 A. Yes.

9 Q. And specifically in connection with this case, did you have  
10 occasion to be in charge, the agent in charge of the execution  
11 of a search warrant on February 12th, 2002 at 1419 Mandela  
12 Parkway in Oakland?

13 A. Yes.

14 Q. And did you write a report, Mr. Tuey, following the  
15 execution of that search warrant, on the morning of  
16 February 12th, 02?

17 A. Yes.

18 Q. Agent Tuey, I'm putting before you Government's Exhibit 1.  
19 Do you recognize that? If you could look through every page  
20 and verify the fact that that is a copy of your report that you  
21 wrote reflecting the results of the search at 1419 Mandela  
22 Parkway.

23 A. It is that report.

24 Q. Okay.

25 And you mentioned you were in charge of that search;

Tuey - Direct / Bevan

1 is that correct?

2 A. Yes, sir.

3 Q. And how many agents participated in the search of Mandela

4 Parkway building that morning?

5 A. I don't recall.

6 Q. Approximately?

7 A. More than eight.

8 Q. Okay.

9                   And were there procedures agreed upon or discussed  
10 in advance that needed to be followed in the course of making  
11 entry into the building?

12 A. Yes, sir.

13 Q. And what are those procedures?

14 A. We would approach the front door of the location, give  
15 knock and notice. After giving knock and notice of the  
16 presence of police, depending on whether or not anyone actually  
17 came to the door to open it, we would make entry into the  
18 location.

19                   Agents would then perform a protective sweep to  
20 determine if there were any dangers or any individual actually  
21 inside the building and then we would begin processing for  
22 evidence.

23 Q. Now, does your report reflect what time that search warrant  
24 was executed that morning?

25 A. Yes, sir, it does.

Tuey - Direct / Bevan

1 Q. What time was that?

2 A. 6:05 a.m.

3 Q. 6:05.

4 Did someone perform -- that is a legal requirement,  
5 correct, of knock and announce?

6 MR. AMPARAN: Objection.

7 BY MR. BEVAN:

8 Q. Are you aware that that is a requirement?

9 A. Yes, sir.

10 Q. And was that complied with here?

11 A. It was.

12 Q. And when entry was made, was there anybody inside?

13 A. No, sir.

14 Q. And after making entry and satisfying yourself and the  
15 other agents that there was no one inside, what was the next  
16 thing that occurred?

17 A. We immediately began videotaping the location and taking  
18 still photographs.

19 Q. Okay.

20 What is the -- what is the point of videotaping the  
21 interior of the building before it's searched?

22 A. We have a video record of the -- the items in there and the  
23 look of the location prior to us going in and searching it.

24 Q. Okay.

25 So -- so the video would it be fair to say that the

Tuey - Direct / Bevan

1 video would reflect the condition and appearance of the  
2 interior of the building before anything was disturbed or  
3 searched as the search warrant authorized you to do?

4 A. Yes, sir.

5 Q. Okay.

6 Did you videotape the interior of the building that  
7 morning before the search?

8 A. I did.

9 Q. You personally?

10 A. I did.

11 Q. And did you narrate the video?

12 A. I did.

13 Q. Showing you, Agent Tuey, Exhibit 6, can you identify what  
14 those are?

15 A. These are mini DVD tapes.

16 Q. And are those the original of the tapes that you took that  
17 morning?

18 A. They are.

19 MR. BEVAN: I would offer Exhibit 6 in evidence,  
20 Your Honor.

21 THE COURT: Admitted.

22 (Plaintiff's Exhibit 6 was received in  
23 evidence.)

24 BY MR. BEVAN:

25 Q. Now, for purposes of this trial, CDs were made, one for

Tuey - Direct / Bevan

1 each of these -- these -- what do you call these cassettes?

2 A. Mini DVD.

3 Q. Mini. I put in front of you, Mr. Tuey, Exhibit 7, CDs 1,

4 2, and 3. Have you watched those?

5 A. I have.

6 Q. And are they true and correct copies of the originals?

7 A. They are.

8 MR. BEVAN: I would offer in evidence, Exhibit 7  
9 consisting of three CDs.

10 THE COURT: Admitted.

11 (Plaintiff's Exhibit 7 was received in  
12 evidence.)

13 MR. BEVAN: I would ask at this time, Your Honor,  
14 permission to play No. 3 of 3 of Exhibit 7. In other words,  
15 Exhibit 7 in evidence, CD No. 3.

16 MR. AMPARAN: Your Honor, we would object to the  
17 nature of --

18 THE COURT: It's admitted. It was admitted without  
19 objection.

20 MR. AMPARAN: We are objecting to the playing of it.  
21 That it's a public trial and --

22 THE COURT: Excuse me, Counsel, you can't object to  
23 the display of evidence once the evidence is admitted. Your  
24 opportunity to object is when it's admitted. It was admitted  
25 without any objection. This is a public trial. It's going to

1 be played in front of the jury.

2 MR. AMPARAN: That is not my objection.

3 THE COURT: Well, I'll hear your objection later  
4 after the jury has been excluded.

5 You may play it.

6 (Whereupon, selected videotape was played.)

7 MS. GREENBERGER: Your Honor --

8 THE COURT: I'm sorry. Mr. Amparan is handling this  
9 battle.

10 MR. AMPARAN: I'm merely asking that the public be  
11 allowed to see this as well.

12 THE COURT: That's fine, Counsel. We are making  
13 arrangements for a second screen. All right?

14 MR. BEVAN: The person will be here after trial,  
15 Your Honor.

16 THE COURT: Thank you. Okay.

17 MR. BEVAN: Your Honor, how long do you plan on  
18 going today?

19 THE COURT: I think maybe now is the time to take a  
20 break. It's five after 4:00.

21 Ladies and gentlemen, we'll take our recess now.  
22 Remember the admonitions, don't discuss the case, allow anyone  
23 to discuss it with you, form or express any opinion.

24 See you bright and early tomorrow at 8:30.

25 Remember tomorrow we go from 8:30 to 1:30, and so we

1 will take a couple of breaks at that time, but you'll be out of  
2 here by 1:30.

3 Thank you very much. I'll see you tomorrow.

4 (Jury out at 3:58 p.m.)

5 THE COURT: Okay, let the record reflect the jurors  
6 are absent.

7 I think I need to get a better sense of what the  
8 defense intends to do with respect to all of the evidence in  
9 this case.

10 MR. BEVAN: Well, I was advised that they will not  
11 stipulate to any of the custodians. So we'll call, I think we  
12 had, I don't know four or five or six people circled. So they  
13 are not lengthy witnesses, but I would have to say that as of  
14 right now, I thought we had, I think, eight people lined up  
15 today, not knowing how far we would get and we are on witness  
16 No. 4.

17 THE COURT: Do you want to put your custodians on,  
18 like just tell them all to be here at 11:00 o'clock or 10:00  
19 o'clock or 9:00 o'clock, and we'll just interrupt whatever  
20 witness we have. We'll do the custodians of records.

21 MR. BEVAN: Could we do that first thing Thursday?

22 THE COURT: Sure. You can do that any day you want  
23 to. That's fine, but we'll take them out of order.

24 MR. BEVAN: Yes, Your Honor.

25 THE COURT: And see on that basis.

1 I think what I'm going to do on objections -- well,  
2 I would like to get -- I need, I guess, to get some estimates  
3 as to how long the witness will take and so forth. As to -- **is**  
4 **it the defendant's contention that they are not going to**  
5 **stipulate to foundation for any exhibits in this case?**

6 MR. AMPARAN: That's our position.

7 THE COURT: Pardon?

8 MR. AMPARAN: That's our position.

9 THE COURT: You are not going to stipulate to any --  
10 okay. Fine.

11 **So then I think -- do you have a basis for that? Do**  
12 **you wish to give a reason for it?**

13 MR. AMPARAN: I have no foundation or information  
14 upon which to believe that the corporate record can be made by  
15 the Government to admit the documents, and so --

16 THE COURT: That's not my question. My question is,  
17 do you have any basis for objecting to -- for example,  
18 requiring that a custodian of records -- are they telephone  
19 records?

20 MR. BEVAN: Yes, Your Honor.

21 THE COURT: **Do you have any basis for challenging**  
22 **the authenticity of the telephone record? Give me a basis for**  
23 **it.**

24 MR. AMPARAN: I have no basis for their admission,  
25 and therefore, I'm objecting to it.

1           THE COURT: So you are -- your objection is you are  
2 going to -- **your argument is you are going to object to any**  
3 **evidence coming in?**

4           MR. AMPARAN: Yes.

5           THE COURT: Of any kind?

6           MR. AMPARAN: Yes.

7           THE COURT: Okay. All right, so this is what I  
8 think I would like to do: I'll try to figure out how we are  
9 going to deal with this, but I don't want to interrupt the flow  
10 of the testimony, so maybe the thing to do is to if anybody has  
11 any objection to anything that comes in, they simply stand and  
12 they make an objection, no argument whatsoever. And then I'll  
13 rule on the objection based upon what is said to me.

14           Then we'll have a session on Fridays at  
15 3:00 o'clock. The defendant is ordered to be present. And  
16 anything that the defense -- that is assuming that the  
17 objections come from the testimony, and anything that they want  
18 to put on the record, you can do so at that time. And we will  
19 do it on a weekly basis. So we don't slow the presentation of  
20 the evidence. Okay?

21           MR. AMPARAN: I don't understand. **Is the Court**  
22 **saying that it's going to admit the evidence before it admits**  
23 **the custodians?**

24           THE COURT: I'm not going to -- am I going to admit  
25 the evidence before I -- the answer is the order of proof, I

1 really don't care. I'm not going to require everyone to follow  
2 the particular order. They can follow any order of proof that  
3 they want to. Anything that comes in that you feel is  
4 improper, you simply stand and you object. And I'll rule on  
5 the objection. And don't argue with -- the objection, just  
6 make it. I'll rule on it.

7           But I will tell you right now, an objection based  
8 upon the order of proof will be overruled. Any document that  
9 comes in which hadn't been sufficiently connected comes in  
10 subject to a motion to strike. So if the foundation hasn't  
11 been properly laid. But I will require the Government to  
12 proceed through the normal course of bringing in custodians  
13 that -- they -- assuming they do so before they rest. Do so  
14 any time.

15           MR. BEVAN: What time would that be on Friday, Your  
16 Honor?

17           THE COURT: 3:00.

18           MR. FIGUEROA: Can we state a ground for the  
19 objection or do we just state the objection?

20           THE COURT: No, you have to state the ground. There  
21 are a whole series of objections. If I don't understand the  
22 basis, and I think, I'll certainly advise you of that fact. In  
23 other words, if I -- if it's a colorable basis, then I may want  
24 to hear some further discussion. But I -- if I don't feel it's  
25 a colorable basis, I won't hear any further discussion.

1                   But I'm certainly going to allow you to make your  
2 record.

3                   MR. BEVAN: Your Honor, following up on this point  
4 that we talked about at the noon hour having to do with  
5 representation by Ms. Greenberger as to the defendant's lack of  
6 a criminal record --

7                   THE COURT: Um-hum.

8                   MR. BEVAN: -- I'm going to wait and see what the  
9 transcript says to that point, but I objected to that point or  
10 made my record. I pulled the Pre-Sentence Report which  
11 reflects an arrest in 1971 for marijuana, an arrest in 1995 for  
12 possession of marijuana for sale. And then a -- some  
13 interference with lawful occupation, a misdemeanor in Atlanta,  
14 Georgia, and this is in the Pre-Sentence Report.

15                   And I want to wait and see if representation was  
16 made as to the state of his criminal record, going to the  
17 extent of he has a perfect record. That is not a perfect  
18 record.

19                   It's not a conviction that we would talk about, but  
20 if the representation was made to the jury to the effect this  
21 is his first --

22                   THE COURT: Wait and see what Counsel said in her  
23 opening statement. That's the best of my recollection of what  
24 she said which would -- could be in error. My recollection is  
25 that she said he has a blameless record. He has had no

1 entanglements so far.

2           Why should I deal with my recollection? We have a  
3 record, and whatever she said she said. **And if it appears to  
4 be in error, then I'll allow you to correct it.**

5           That's -- it's that simple. I don't think we ought  
6 to make a mountain out of a mole hill. I'm not going to devote  
7 two days to something that happened in Georgia. Besides, the  
8 defense would never stipulate to its authenticity.

9           I don't have to deal with that. I can deal with it  
10 based upon records and we can proceed on that basis.

11           MR. FIGUEROA: Your Honor, may I make a record  
12 regarding excluding the evidence from view of the public?

13           **The defendant has a right to a public trial and we  
14 raised this issue this morning. We would like the record to  
15 reflect that the evidence -- the videotape or the CDs that were  
16 shown just now were not visible to the members of the public  
17 who are present.**

18           THE COURT: Right. And that is of concern to me as  
19 well. And I'm told that it's being corrected. What I think  
20 we'll do is they are going to put in another screen. And then  
21 you could advise the members of the public we will have a  
22 separate showing and I'll allow them to play the video that we  
23 just -- to the public.

24           If anybody is interested in watching it they may  
25 watch it. That is separately, out the presence of the jury.

1 And we'll just arrange the time to do it. I'm concerned about  
2 that. But I'm not going to stop the whole trial because we are  
3 following the procedure that we have in every other case.

4 Anything else?

5 MR. BEVAN: None from the Government, Your Honor.

6 MR. AMPARAN: None from the defense.

7 THE COURT: Okay. Thank you.

8 MR. BEVAN: Thank you, Your Honor.

9 (Proceedings adjourned at 4:04 p.m.)

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CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

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Sahar McVickar, RPR, CSR No. 12963

May 15, 2007