

United States District Court  
Northern District Of California

Before The Honorable Charles R. Breyer

United States of America, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Edward Rosenthal, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

NO. CR 02-0053 CRB

Jury Trial

San Francisco, California  
Wednesday, May 23, 2007

Reporter's Transcript of Proceedings

Appearances:

For Plaintiff: Scott N. Schools  
United States Attorney  
450 Golden Gate Avenue, Box 36055  
San Francisco, California 94102  
By: George Bevan, Esquire  
Assistant United States Attorney

For Defendant: Pier 5 Law Offices  
506 Broadway  
San Francisco, California 94133  
By: Shari Greenberger, Esquire  
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

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1 I N D E X

2 Plaintiff's Witnesses: Page

3 None

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Defendant's Witnesses:

None

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E X H I B I T S

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Plaintiff's Exhibits:	W/Drawn	Iden.	Evid.
83			1269
83, additional,			1295



11 THE COURT: Right.

12 MR. AMPARAN: We discussed what we believe would  
13 happen in either situation, putting on a defense, not putting  
14 on a defense and the implications that would stem from either  
15 of those two courses of action, and it's my intent, my belief  
16 that when Mr. Rosenthal arrives that we will be resting.

17 THE COURT: Without calling any witnesses.

18 MR. AMPARAN: Correct.

19 THE COURT: And without Mr. Rosenthal testifying.

20 MR. AMPARAN: Correct.

21 THE COURT: Okay. So let's just talk about some  
22 scheduling --

23 Mr. Bevan?

24 MR. BEVAN: Your Honor, yesterday we had  
25 discussions -- the Court raised the issue of the admission by

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1 Carol Ruth Silver in a memo, and Your Honor had asked the  
2 defense to comment on that, gave an opportunity to comment, and  
3 there was no comment. So at this point, given the lack of  
4 comment and given its clear reference in there and admission  
5 that Mr. Rosenthal, in fact, sold clones, as Mr. Martin  
6 testified, I am going to offer that memo as part of  
7 Government's Exhibit 83. We haven't rested. There are still  
8 pending matters.

9 THE COURT: Right.

10 MR. BEVAN: So that would be my proffer of that  
11 exhibit.

12 THE COURT: That will be admitted.

13 (Plaintiff's Exhibit 83 was received in  
14 evidence.)

15 MR. AMPARAN: We would object to the admission.  
16 That is not part of the record and not part of the exhibit that  
17 was shown to the witness.

18 THE COURT: Well, okay, let's make sure we are all  
19 talking about the same thing.

20 I have my copy -- and we can have an extended  
21 discussion when Mr. Rosenthal arrives, but preliminarily, so at  
22 least I know what we are talking about, my copy of 83 that was  
23 provided to me is -- maybe I should go with the Bates stamp.  
24 Is there a Bates stamp?

25 MR. BEVAN: There is. 22,000 --

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1 THE COURT: Well, no, starts at 022928.

2 Maybe you should write this down.

3 (Defendant enters courtroom.)

4 THE COURT: Okay, let the record reflect the  
5 defendant is present. Let's take first things first.

6 Okay, the question -- I wanted to ask  
7 Mr. Rosenthal -- first I ask your counsel, is it your intention  
8 to call any witnesses in connection with your case?

9 Mr. Amparan, that's you.

10 MR. AMPARAN: Oh.

11 THE COURT: You are in charge of witnesses.

12 MR. AMPARAN: Yes.

13 THE COURT: Mr. Rosenthal is in charge of whether he  
14 is going to testify or not, but you are in charge of witnesses.

15 Are you calling any witnesses?

16 MR. AMPARAN: Not unless they are allowed to  
17 corroborate Mr. Rosenthal's testimony.

18 THE COURT: Well --

19 MR. AMPARAN: The same position we were at last  
20 night, between -- the discourse between Mr. Rosenthal and the  
21 Court.

22 THE COURT: Let me explain once again what I would  
23 permit or perhaps what I wouldn't permit, because I would  
24 permit impeachment of the witnesses who testified for the  
25 Government. And to the extent that Mr. Rosenthal would testify  
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1 in a manner that would bring into question the credibility or  
2 the accuracy of the witness' testimony, of course I would allow  
3 corroboration of Mr. Rosenthal's testimony in that regard.

4 What I have said at the outset of this case, and  
5 which I maintained consistent through this case, is that I  
6 would not permit witnesses other than Mr. Rosenthal to testify  
7 about issues which the Court has already ruled to be irrelevant  
8 as a matter of law, such as the intended purpose of the  
9 marijuana was for medicinal purposes and that general category.

10 So, in other words, having ruled that the defense  
11 itself, if the defense itself is that he was authorized by the  
12 state government or that he was authorized by the City of  
13 Oakland or that he grew the marijuana for medicinal purposes  
14 for himself or for others, to the extent that those are  
15 defenses, this Court ruled in the first trial years ago that it  
16 was inadmissible. That issue was brought up before the Ninth  
17 Circuit, and the Ninth Circuit addressed it. That, then,  
18 became the law of this case, and which law I'm obligated to  
19 follow.

20 Therefore, I would not permit you to call witnesses  
21 who would corroborate a defense which is not, in the Court's

22 view, not in your view, in the Court's view an inadmissible or  
23 improper defense.

24 So when you say you are not going to call witnesses  
25 unless they could corroborate Mr. Rosenthal, I think we have to

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1 parse it as to what would be permitted and what wouldn't be  
2 permitted.

3 Now, having said that, and I've said that a lot of  
4 times, I turn back to you and say given that as the scenario,  
5 do you wish to call any witnesses or not?

6 MR. AMPARAN: I understand the Court's stated  
7 obligations and the Court's intention to follow federal law,  
8 and the Court and Mr. Bevan have that right to pursue that.

9 Where we feel the federal law is morally and  
10 ethically bankrupt, we feel obliged to challenge and fight that  
11 law, just like civil rights laws, just like voting laws, just  
12 like anti-miscegenation laws, where those laws are wrong we  
13 feel obligated to try to do justice and to fight them.

14 If the Court is not going to allow us to present  
15 that defense, I am resting to try to respect the Court's  
16 statement and the Court's obligation. I don't want to fight  
17 with the Court, I don't want to argue with the Court, nor do I  
18 want to be threatened with custody again.

19 So with that understanding, I believe that the  
20 defense is not going to be allowed to present its defense. I  
21 believe that we are not going to be calling witnesses. I  
22 believe that Mr. Rosenthal will not be testifying. And I  
23 believe that the defense will be resting.

24 THE COURT: Okay, well, Mr. Amparan, I'm not

25 threatening you with custody. You are entitled to put on any

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1 defense that the Court has ruled is admissible. And it has  
2 nothing to do with a custodial situation or that I would  
3 threaten you or hold you in contempt.

4 I simply need to know for the record in clear,  
5 unambiguous terms whether you intend to call any witnesses at  
6 all in connection with your defense. I'll leave Mr. Rosenthal  
7 out for a minute, okay? He is a special case because he is the  
8 defendant. Not your reasons, you can have whatever reasons you  
9 want. I said what I said, you said what you said --

10 MR. AMPARAN: Um-hum.

11 THE COURT: Now, all I need to know is, do you want  
12 to call a witness or not?

13 MR. AMPARAN: Based upon this record, no.

14 THE COURT: Okay.

15 Now, turning to Mr. Rosenthal, do you wish your  
16 client to testify?

17 MR. AMPARAN: Based upon this record, no.

18 THE COURT: Okay.

19 Mr. Rosenthal, I must ask you, you have a right to  
20 testify --

21 THE DEFENDANT: Your Honor --

22 THE COURT: Just let me finish, please. Please let  
23 me finish.

24 You have a right to testify, and you have a right  
25 not to testify, those are two constitutional rights you have.

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1 I need to know, and I have also told you in that regard that if

2 you testify, even though I have ruled certain defenses to be  
3 inadmissible and irrelevant and not material for the jury's  
4 determination, I have advised you and your attorneys that I  
5 would permit you to say whatever you wanted to say on the  
6 stand. I have said that.

7 Now, given that set of circumstances, do you wish to  
8 testify or do you not wish to testify?

9 THE DEFENDANT: You know, a few days ago, I saw a  
10 movie call Inherent The Wind, I'm sure you've seen it, and that  
11 was about the Scopes trial. And at the Scopes trial,  
12 Clarence Darrow was not allowed to present the defense that he  
13 wanted, he was not allowed to mention evolution.

14 Is this a monkey trial? Is this what this is?  
15 Because I have a fundamental right to present any defense that  
16 I want. And just because the Government says they don't like  
17 the defense or they don't think that the defense is admissible,  
18 I think that the jury has a right to it.

19 And if you disagree with that and the Supreme Court  
20 disagreed with it and all these courts disagreed with it, I  
21 suggest that you bring in the jurors from the last trial and  
22 question them and see what they think about it because they  
23 present true evidence of the dangerousness of those decisions,  
24 which I think that once you hear those jurors, you will find  
25 that you -- you could bring them in, listen to what they have

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1 to say, because they feel that at least the appearance of  
2 justice is denied.

3 But I think that they have stronger words about it  
4 than that. And I think that that should be taken into  
5 consideration. And that law should be overturned. And that's

6 what I move for you to do, to bring in those former jurors who  
7 actually had to scuff under those rulings and see what that did  
8 to their lives.

9 Thank you.

10 THE COURT: Do you wish to testify or --

11 THE DEFENDANT: I do wish to testify, but only --

12 THE COURT: Then I'll permit you.

13 THE DEFENDANT: Excuse me. Only if I can bring the  
14 witnesses that I choose without proffer.

15 THE COURT: Okay, well, no. That -- as to any  
16 witnesses, additional witnesses, that is a matter that the  
17 Court would have to consider on a witness-by-witness basis.

18 THE DEFENDANT: Yes -- well --

19 THE COURT: However --

20 THE DEFENDANT: How can I prove my case if I can't  
21 bring witnesses that I want to bring?

22 THE COURT: Mr. Rosenthal, you have the right to  
23 testify --

24 THE DEFENDANT: You are working for the Government.  
25 You know, you are not acting as an independent justice, you are

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1 acting as a prosecutor, Your Honor. And it's about time that  
2 you just get off this case because you can't be fair. You have  
3 never been fair in this case.

4 The day that I came in, you looked at me as if I was  
5 some kind of common criminal, that is how you looked at me.  
6 You had a look of disdain. Everybody noted it. And now that  
7 we have proved that I'm an honorable person, you won't do the  
8 honorable thing.

9                   This case stinks. You know the case stinks. This  
10 prosecutor has stepped over bounds. You can rule on this,  
11 Judge. You can end this. It's up to you. Are you going to be  
12 part of the Government's -- are you part of it? What is this?

13                   Give us a fair, a fair judge. We don't even need a  
14 fair jury, you've precluded that. If it's not a medical case,  
15 why did you say who could -- can't be fair? It's not medical.  
16 But you made it a medical case. So let us put on our  
17 witnesses. You have allowed medical in time and time again,  
18 and yet you won't let us flesh it out. You're wrong.

19                   THE COURT: Well, I'm going to interpret that as a  
20 statement by the defendant that he does not wish to testify  
21 unless I let in certain evidence which I have already ruled I  
22 would not let in. And since I won't let in that evidence,  
23 therefore, I think that the defendant has stated that he does  
24 not want to testify under those circumstances.

25                   MR. BEVAN: And the other thing --

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1                   THE DEFENDANT: We would like you to recuse  
2 yourself. We would like you to recuse yourself, and we would  
3 like a hearing on it.

4                   THE COURT: Well, I'm not going to recuse myself.

5                   Mr. Amparan, have I given a fair statement as to  
6 what your client's position is, that is, that since I've ruled  
7 that certain witnesses would not be permitted he does not wish  
8 to testify under those circumstances; is that correct?

9                   MR. AMPARAN: That certain witnesses and certain  
10 areas are precluded, that because of that, he is not allowed to  
11 have that corroborated evidence, I don't believe he wishes to  
12 testify. I believe the Court's statement is fair.

13 THE COURT: Okay. All right.

14 MR. BEVAN: Your Honor, and to the extent that  
15 Mr. Rosenthal yesterday moved for a mistrial --

16 THE COURT: Did he?

17 THE DEFENDANT: Yes.

18 THE COURT: Oh, denied. Sorry.

19 MR. BEVAN: To the extent he moved yesterday and  
20 today for recusal of the Court, similarly, the United States  
21 knows of no factual legal basis for that, and that should be  
22 denied.

23 THE COURT: Yes, well, it is denied.

24 MS. GREENBERGER: I would like to make motions under  
25 Rule 29 --

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1 THE COURT: Well, I don't think we are quite there  
2 yet. We have to deal with now this item of evidence that --  
3 because the Government has only conditionally rested.

4 MR. BEVAN: We haven't rested completely.

5 THE COURT: They haven't actually rested. I'll  
6 allow you to make the motion, that is not a problem.

7 MR. AMPARAN: I just don't want to waive it.

8 THE COURT: You won't waive it.

9 MR. AMPARAN: Okay.

10 THE COURT: I can guarantee you won't waive it.

11 So the exhibit that we are talking about is Exhibit  
12 83, and it consists of the following pages in my evidence, in  
13 my book that it was given to me: Bates stamp 022928 through --

14 MR. BEVAN: It skips.

15 THE COURT: Yeah, 022931. And then Bates stamp

16 022886 through 022893.

17 MR. BEVAN: That's what I have, Your Honor.

18 THE COURT: All right, that's what I have. And that  
19 was all part of Exhibit 83.

20 MR. AMPARAN: I'm sorry?

21 THE COURT: It was all part of Exhibit 83.

22 MR. AMPARAN: I think that's part of Exhibit 83 that  
23 the Court received, I'm not sure that's part of Exhibit 83 that  
24 the witness received, and that is our issue.

25 MR. BEVAN: Well, I only questioned Mr. Martin --

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1 first of all, both components of that exhibit are public  
2 documents, self-authenticating. I only asked Mr. Martin to  
3 vouch for the fact that he was sued. And on that basis I  
4 offered the exhibit.

5 And obviously, the post-trial brief which contains  
6 admissions by Mr. Rosenthal through his attorney, Carol Ruth  
7 Silver, in a public document that is self-authenticating, I  
8 don't need to ask the witness about it.

9 THE COURT: Okay, that is my understanding of the  
10 law. So admitted.

11 (Admitted earlier in the hearing.)

12 THE COURT: Let me ask, now that the defense will  
13 not be calling any witnesses, what is the Government's position  
14 as to the witnesses who have been subpoenaed to testify and  
15 have indicated that they are taking the Fifth Amendment on  
16 Friday? Is it your intention to pursue that or not?

17 MR. BEVAN: We are going to pursue it unless and  
18 until the defense tells the Government on the record and the  
19 Court that they are not going to make a sufficiency of the

20 evidence argument.

21 THE COURT: Okay.

22 MR. BEVAN: They are reserving, and from the opening  
23 statement and the cross-examination, it is clear that they are  
24 going to argue credibility and the sufficiency of the evidence.  
25 Based on that, it's our intention to go forward, Your Honor,

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1 and call the witnesses that we wanted to call.

2 THE COURT: Okay.

3 So this is what I plan to do on scheduling, I'll  
4 hear from the parties.

5 MR. AMPARAN: May I respond at all?

6 THE COURT: Of course.

7 You are going to argue sufficiency, aren't you?

8 MR. AMPARAN: I am going to argue sufficiency.

9 THE COURT: I assumed you are.

10 And credibility.

11 MR. AMPARAN: And credibility. I have a couple of  
12 comments, however.

13 THE COURT: Yeah.

14 MR. AMPARAN: I don't believe -- to my knowledge, I  
15 have not been advised whether or not any of the immunized  
16 witnesses are refusing to testify or not. So if Mr. Bevan has  
17 that knowledge, I would ask that it be discovered.

18 MR. BEVAN: I haven't heard a thing.

19 MR. AMPARAN: And the other issue would be, Your  
20 Honor, I think the Court still needs to make a determination as  
21 to the cumulative nature, the fact that --

22 THE COURT: Well, this is what I would think, I

23 think you're right -- well, first of all, I don't know whether  
24 they are going to take the Fifth. I assume that they are.

25 They have already taken the Fifth. They have

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1 already indicated to the Government they would not testify  
2 based upon their Fifth Amendment privilege. And based upon  
3 that representation, the Government obtained an authorization  
4 from the Attorney General for immunity. I signed the orders,  
5 and that is all in the record, where we are today.

6 I postponed the hearings until after the  
7 Government's -- basically, until after the Government's case in  
8 chief was concluded so I could make a determination as to two  
9 issues, No. 1, whether, in fact, a witness would refuse to  
10 testify -- and I don't know which is first -- whether the  
11 testimony is cumulative, and that the witness would refuse to  
12 testify unless ordered to do so by the Court.

13 MR. AMPARAN: Well --

14 THE COURT: Now, I haven't made either of those  
15 determinations yet, they would have to be made at a hearing.

16 MR. AMPARAN: The issue for me, Your Honor, is  
17 especially in light of the Court's ruling where it just  
18 admitted documents that go to the very nature -- as the Court  
19 and counsel have said, it's an admission by Mr. Rosenthal's  
20 former counsel as to the elements of the offense charged before  
21 it. If the Court admits that document, what could be the  
22 possible benefit of additional testimony by any of the  
23 immunized witnesses?

24 THE COURT: I have no idea. I mean, the way I would  
25 proceed would be a witness is called to the stand, that witness

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1 is asked some questions outside the presence of the jury, that  
2 witness is asked some questions by the Government; if the  
3 witness still refuses to testify, then I haven't quite worked  
4 out the order in my mind. I think I ask the Government what is  
5 the evidence that the Government intends to introduce.

6 If I -- and then the Government says whatever it is,  
7 you make whatever argument you want to make on that issue, and  
8 then I make a determination as to whether or not I'll order  
9 that witness to testify in light of the proffered testimony.

10 MR. AMPARAN: Okay.

11 THE COURT: That's all to come. I can't do it now.

12 MR. AMPARAN: Okay.

13 THE COURT: I don't know, you know, I mean, I think  
14 you are right, I agree with you, to some extent getting, for  
15 example, counsel's -- Mr. Rosenthal's former counsel stating  
16 that these checks, and so forth, was for product of a certain  
17 type, marijuana being delivered to somewhere, I don't know all  
18 the details. But you're right, that may obviate the necessity  
19 of some of the testimony. I have to make that determination,  
20 okay? But I'm not there yet.

21 MR. AMPARAN: Well, then, Your Honor --

22 THE COURT: I'm just trying to set the process.

23 MR. AMPARAN: I would ask, then, at an earlier  
24 occasion in these proceedings in the presence of the jury the  
25 Court admonished defense counsel and told the jury that delays

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1 in this case were being caused at the hands of defense counsel.

2 I would ask the Court to make a curative instruction  
3 and an admonition to the jury in fairness, as the Government

4 likes to say, an even playing field, and advise the jury that  
5 the delays in the case and the delays in the closing argument  
6 are the responsibility of the U.S. Government.

7 THE COURT: No, it was my fault. It wasn't  
8 Mr. Bevan.

9 MR. AMPARAN: It's a curative instruction --

10 THE COURT: I said -- I mean, you are saying that I  
11 should tell the jury that the delay is occasioned by Mr. Bevan.

12 MR. AMPARAN: Exactly, I think like the Court did to  
13 the jury when it felt that it was the defense's problem.

14 THE COURT: Mr. Amparan --

15 MR. AMPARAN: It's fairness. Even playing field.

16 THE COURT: I agree there should be an even playing  
17 field.

18 MR. AMPARAN: Even not in an even playing field, it  
19 should inure to the benefit of Mr. Rosenthal.

20 THE COURT: Mr. Amparan, the delay in the case is  
21 the Court's fault.

22 MR. AMPARAN: No, it's his decision --

23 THE COURT: No, it's not.

24 MR. AMPARAN: -- to present these witnesses --

25 THE COURT: Oh, but I said --

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1 MR. AMPARAN: -- that are cumulative.

2 THE COURT: Well --

3 MR. AMPARAN: It's his decision. It's the  
4 Government's choice --

5 THE COURT: Don't shout.

6 MR. AMPARAN: I'm sorry. I'm just asking for an

7 even playing field.

8 THE COURT: I think --

9 MR. AMPARAN: Not even asking for the benefit of our  
10 burden of proof, Your Honor. I'm just asking for an even  
11 playing field.

12 THE COURT: Yeah, I understand. You are interested  
13 in justice, I'm interested in justice, the Government is  
14 interested in justice. We just have different views of perhaps  
15 what justice is. That is fine, I understand that. And it's  
16 not really advancing the discussion to say that you are  
17 interested in justice. I appreciate. I assume you are. I  
18 have always assumed you are. I continue to assume you are  
19 interested in justice.

20 All right, the problem is to blame the Government  
21 for the fact that there is a hearing on Friday is a little  
22 unfair, in the Court's view, when the Court knows the reason  
23 that the hearing is set on Friday is because I set it on  
24 Friday. Mr. Bevan didn't set it on Friday, you didn't set it  
25 on Friday, I set it on Friday.

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1 And when we discussed about bringing in,  
2 Mr. Amparan, yesterday, when we discussed about bringing in the  
3 witness earlier you pointed out that there were attorneys who  
4 were flying in from out of town, and so forth, and we couldn't  
5 move the date ahead.

6 So -- and I appreciate that, and you are absolutely  
7 right. So I'm not going to tell the jury that the delay in the  
8 case is the Government's fault when, in fact, it's the Court's  
9 fault.

10 Anyway, this is what I propose --

11                   MR. AMPARAN: May I respond? Because I think there  
12 is a startling leap of faith in the Court's argument, and that  
13 is it presumes the fact that Mr. Bevan has to call these  
14 witnesses.

15                   THE COURT: Oh, I don't know.

16                   MR. AMPARAN: And, in fact, that is the purpose for  
17 Friday's hearing, because he is demanding on calling these  
18 witnesses. So, yes, it does lay on the Government's shoulders  
19 the delay. And in fairness the Court should comment.

20                   THE COURT: Okay, well, I don't believe that  
21 fairness dictates the comment that you are suggesting. Okay,  
22 so we take different views of what fairness requires here.

23                   Now, this is what I propose to do: I propose to  
24 have the jury come in, any further documentation or anything I  
25 turn to the Government first, and then -- well, I can do it a

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1 couple of ways.

2                   Maybe the right thing to do is to simply then excuse  
3 the jury and -- I don't think I should require you to say  
4 anything until after we have made the determination. You may  
5 change your mind after Friday, you may decide you want to put  
6 on witnesses, and so forth. If you do, that's obviously your  
7 decision.

8                   So I don't think I should ask you do you have any  
9 witnesses or do you rest, or whatnot because the Government  
10 hasn't really rested.

11                   MR. AMPARAN: I would ask the Court to ask the  
12 defense if they rest, and at that time I would ask this morning  
13 to allow the Court to say to the jury that the defense rests.

14 MR. BEVAN: That's fine.

15 THE COURT: Well --

16 MR. BEVAN: Seems to me Your Honor is offering them  
17 what seems logical, given the fact that the Government --

18 THE COURT: I'll do whatever you want to do in that  
19 regard, Mr. Amparan.

20 Do you want me to tell them that you have rested --  
21 no, I'm not going to do that because that's bizarre. I'm not  
22 doing that. Even though you are suggesting I should do it, I'm  
23 not going to -- I'm going to try not to do anything in this  
24 case that is any more unconventional than normal procedures.

25 Okay, so what I'm going to do is turn to the

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1 Government, have the Government say what they said before,  
2 explain to the jury that they are going to be in recess until  
3 Tuesday morning.

4 I will go over jury instructions on Friday  
5 afternoon. And then you'll have three days to prepare your  
6 argument. And the argument can take place on Tuesday morning.

7 I will only tell the jury that they will get the  
8 case early next week, I don't know when -- oh, next week. And  
9 I don't even have to say "early."

10 MR. BEVAN: That's fine.

11 THE COURT: And then we are going to go through some  
12 legal matters.

13 I would like to address two things. Let's see --  
14 here is another note.

15 The following -- I want to now talk about the jury  
16 notes. Here is a note:

17 "What does Proposition 215 say? Does federal law

18 trump Proposition 215? Does the proposition" -- "govern the  
19 San Francisco and Oakland area? Thank you for clarifying."  
20 This is from a juror.

21 So this is what I proposed to do in response to the  
22 jurors' inquiries which I gave you yesterday, and then I'll  
23 hear some comment before I do it.

24 First, Question No. 1, asking for the number of  
25 counts, I'll explain to the jury that at the time of

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1 instructions I will define each count, explain what the  
2 elements of the counts are, and that they will get in the jury  
3 room a written set of the instructions and a verdict form which  
4 will define the counts. That's No. 1.

5 The second question:

6 "Will there come a point where this trial is no  
7 longer open to the public?" The answer is no. From their  
8 point of view, I think the answer is no. There may be some  
9 proceeding outside the presence of the jury and outside of the  
10 presence of the public, but I don't know which one that is. I  
11 haven't had one yet, I don't think, in this case. I've had  
12 some ex parte proceedings with the defense, but other than that  
13 it's all been open to the public. I'll explain to them it is  
14 open to the public, and it will remain open to the public  
15 except for their deliberations, which are conducted in private.

16 The Question No. 3:

17 "How is it the Federal Government can bring this  
18 type of case to trial within the State of California?"

19 Along with the question this morning, "Does federal  
20 law trump in Proposition 215," I would offer the following

21 instruction, and let me read it to you, I will advise as  
22 follows:

23 "The Court" -- I will advise as follows:

24 "The federal law prohibits someone from  
25 manufacturing, distributing, or dispensing a controlled

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1 substance which under federal law includes marijuana, that this  
2 law is the law everywhere in the United States, notwithstanding  
3 any contrary provision of law at a state or local level.

4 "Where there is a conflict between federal law on  
5 the one hand and state or local law on the other hand, then  
6 under our constitutional system of Government federal law must  
7 prevail."

8 That's what I would instruct.

9 MR. BEVAN: The Government -- that's obviously a  
10 correct statement of the law, and the Government supports the  
11 giving of that statement for the reason being that this is the  
12 second note where the Court -- where the jury is asking about  
13 the interplay between local, California and federal law. And I  
14 think it's incumbent on, you know, for this process and to  
15 follow up essentially what was already told to the entire  
16 venire during jury selection that federal law controls. So I  
17 think it's consistent with that and should be given.

18 MR. AMPARAN: I think that the Court -- I would ask  
19 the Court to reconsider and reflect back to the comments it  
20 made yesterday related to these questions, which I believe  
21 would be a more appropriate response, in that California law is  
22 not relevant for your consideration in this courtroom.

23 THE COURT: Okay. Well, I intend to also -- I  
24 intend to answer the question about the trumping the way I

25 proposed.

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1                   Now, as to all the other questions about marijuana,  
2 "what does Proposition 215 say," "does the proposition govern  
3 San Francisco and Oakland," and three other questions that that  
4 juror asked, I would simply say state law, whatever that state  
5 law is, is not relevant for their considerations.

6                   MR. AMPARAN: I wasn't asking for both, I was asking  
7 for the other, but I understand the Court's ruling.

8                   THE COURT: Okay. All right.

9                   MR. BEVAN: One final point, Your Honor --

10                  THE COURT: Yes.

11                  MR. BEVAN: That I haven't brought up, but I believe  
12 on the second day of trial, which would have been last Tuesday,  
13 there was a card being passed out, I believe we have it  
14 downstairs, going to the issue of nullification. Today -- and  
15 I see the lady in the courtroom hanging a banner about medical  
16 marijuana.

17                  And, you know, I'm not naive; bottom line, it's hung  
18 at a time prior to the jury's arrival. And I would simply ask  
19 Your Honor to at the time of discharge of the jury for the day  
20 you always repeat the admonition, not only to not read  
21 anything, but to the extent that there is -- I don't know how  
22 you want to phrase it, Your Honor, but something should be said  
23 about ignoring whatever advertisements, or what have you, may  
24 be posted around the courthouse. Because there is a big banner  
25 on the Golden Gate side this morning posted by a lady that is

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1 now in the courtroom. I saw her do it.

2 MR. AMPARAN: Your Honor, Mr. Bevan may want to keep  
3 the jurors here in your courtroom deaf, dumb and blind, but  
4 there is only a certain amount of prophylactic action that the  
5 Court can take to keep everybody, dumb, deaf and blind  
6 everywhere.

7 THE COURT: Well, are you objecting to my  
8 admonishing the jury that they shouldn't consider any publicity  
9 or signs or posters or newspaper articles or TV articles?

10 MR. AMPARAN: No. I think the Court has done that  
11 and done it repeatedly. And I assume the Court will continue  
12 to do it.

13 THE COURT: I will, but I think I can mention the  
14 fact that people may be putting up signs outside the courthouse  
15 addressing this case and that they shouldn't consider that in  
16 allowing them to arrive at a verdict, one way or the other,  
17 whatever those signs are.

18 Shouldn't I say that?

19 MR. AMPARAN: I think it's been covered. And I  
20 think at a certain point the jury will start to take a queue  
21 from the Court and start to take direction from the Court. And  
22 as the Court piles on in terms of granting these issues and  
23 motions and requests by the Government, the jury will pick up  
24 on it.

25 THE COURT: But they are supposed to pick up on it.

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1 They are actually supposed to follow the Court's instruction.

2 MR. AMPARAN: You are assuming they are going to see  
3 signs.

4 THE COURT: Well, there is a sign -- I didn't see

5 this sign this morning.

6 MR. AMPARAN: I didn't see any sign.

7 THE COURT: But Mr. Bevan has described --

8 Describe the sign for the record. What is it? What  
9 does it say? How big is it?

10 MR. BEVAN: It's a banner that is posted on the  
11 Golden Gate side that says something to the effect, "we care.  
12 Support medical marijuana," to that effect, in bold large  
13 letters.

14 MR. AMPARAN: Was that on the California, the state  
15 side of the street or was that on the federal side of the  
16 street, Mr. Bevan?

17 MR. BEVAN: It's on federal property on the  
18 building.

19 MR. AMPARAN: I'm sure you have agents --

20 MR. BEVAN: It's near --

21 MR. AMPARAN: -- that could probably get them  
22 arrested.

23 MR. BEVAN: Let me finish.

24 It's near the entrance.

25 THE COURT: How large is it?

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1 MR. BEVAN: It's a banner.

2 THE COURT: Yeah, I understand --

3 MR. BEVAN: Probably 10 feet wide and high,  
4 probably --

5 MR. AMPARAN: Perhaps we can shackle and flog her.

6 MR. BEVAN: Three and a half, four feet high. It's  
7 a large banner.

8 THE COURT: And it's the entrance, of course, the

9 jurors use to come into the courtroom.

10 MR. BEVAN: You can't miss it if you come to the  
11 Golden Gate side.

12 THE COURT: One of two entrances to the courthouse.  
13 The plaza entrance is the general entrance.

14 MR. AMPARAN: Amazing how the Federal Government is  
15 afraid of the truth.

16 THE COURT: Those types of comments aren't  
17 particularly helpful, Mr. Amparan.

18 So --

19 MR. BEVAN: I will then proffer -- I'm going to  
20 substitute the schedules, the ones that were punched -- had  
21 three holes, we have corrected that. And I'll proffer the rest  
22 of 83, Your Honor.

23 THE COURT: Yeah, okay.

24 All right is the jury here? Barbara, is the jury  
25 here?

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1 THE CLERK: Yes.

2 THE COURT: All right, bring them in.

3 (Jury in at 9:05 a.m.)

4 THE COURT: Okay, let the record reflect all jurors  
5 are present.

6 Good morning, ladies and gentlemen. Mr. Bevan has  
7 some exhibits in connection with the Government's case.

8 Is that correct?

9 MR. BEVAN: Yes. Good morning, Your Honor.

10 The United States referenced yesterday these summary  
11 of telephone calls prepared by Patty Harai, and I offer these

12 in evidence. And they were received in evidence as Exhibit 91.

13 They are summaries, and I pointed out that there  
14 were three-hole punches in the top. And as so happened, it  
15 punched out some of the names involved in the calls. So with  
16 Your Honor's permission, we would substitute the same schedule  
17 only without the three holes for the existing Exhibit 91. We  
18 would simply substitute that one out and remove the exhibit tag  
19 on the one with holes and put it on the one without holes.

20 THE COURT: Okay, that's permitted.

21 MR. BEVAN: And then secondly, Your Honor, we would  
22 offer as part of -- as an addition to Exhibit 83 a post-trial  
23 brief filed on behalf of Mr. Rosenthal in the small claims  
24 action of Ed Rosenthal versus Bob Martin, Small Claims Case  
25 CSM04027594, as part of Exhibit 83.

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1 THE COURT: And it consists of eight pages?

2 MR. BEVAN: Consists of the pages, consecutive pages  
3 Bates numbered 22,886 through 22,893. And I believe there are  
4 eight pages.

5 THE COURT: Okay, that will be admitted.

6 (Plaintiff's Exhibit 83, addition, was  
7 received in evidence.)

8 MR. AMPARAN: For the record, note that was objected  
9 to.

10 THE COURT: Okay, the objection is overruled.

11 MR. BEVAN: And with that, the United States, as we  
12 indicated yesterday, rests its case in chief subject to the  
13 matters that are under consideration.

14 THE COURT: Okay.

15 So, ladies and gentlemen, the Government essentially

16 has rested its case. It may or may not have -- I have to make  
17 some rulings in connection with some other matters, and you  
18 don't have to be present for that. That is the good news.

19           Actually, maybe it's all good news because I'm going  
20 to release you today in a minute or so and ask you to come back  
21 on Tuesday morning. The case will be given to you next week  
22 for your determination. So even though we are not meeting for  
23 this morning, other than just now, and Thursday, we will resume  
24 on Tuesday. And the case will be given to you for decision  
25 next week. Exactly when, I don't know. It depends to some

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1 extent on matters that have yet to be determined. But we are  
2 moving ahead, and there should be no problem.

3           Let me -- I have received two communications from  
4 the jury in written form. And I appreciate the fact that you  
5 do write notes to me, that is the way to communicate with the  
6 Court. And I would like to try to answer some of the  
7 questions -- actually, I would like to try to answer everything  
8 that you have said in a particular way.

9           The first question was how many counts, that is, how  
10 many individual crimes have been charged against Mr. Rosenthal,  
11 and will that be made clear; the answer is that there are five  
12 counts that have been charged against Mr. Rosenthal. And when  
13 I instruct you on the law, it will all be made, I hope, very  
14 clear. I take each count, I explain what the elements are of  
15 the count. I explain the burden of proof. I explain a number  
16 of things with respect to each count. And you will get all of  
17 that in written form clearly set out.

18           I also will give you what's called a verdict form.

19 And each verdict form -- I mean, the verdict form is broken  
20 down by count explaining what the count is. And you vote on  
21 each count separately. That is, a vote on one count won't  
22 dictate a vote on another count.

23 So I'm not going to explain it now, I would be  
24 explaining it twice or three times. There isn't any necessity  
25 for me to do it now. There is, of course, an absolute

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1 necessity that I do it before you commence your deliberations.  
2 And I just want to assure you that that's the procedure that  
3 I'll follow in this case, as I do in every case.

4 A second question was asked, and this isn't in any  
5 particular order, whether there is some point at which the  
6 trial does not become public, and to that I would say except  
7 for jury deliberations, which are absolutely private, the  
8 public is free to attend anything that goes on in the court in  
9 connection with this trial. So the short answer is, no -- or  
10 maybe it's yes, the short answer is all proceedings are public.

11 That doesn't mean that you attend all the  
12 proceedings because you are -- while you are the public, you  
13 are actually the public acting in a particular capacity, acting  
14 in the capacity as the judge of the facts. And so certain  
15 things that come in or are offered and are discussed with the  
16 lawyers and so forth, while the public may have a right to be  
17 present, you don't.

18 And I don't want to add an air of mystery about it,  
19 but because we have Rules of Evidence, what is admissible, what  
20 isn't admissible, you are -- you are shown that which is  
21 admissible. I make that determination based upon the law, the  
22 arguments of counsel and the proffers.

23                   So it's not a mystery. I want you to understand  
24 that; however, you want -- to the extent you are asking about  
25 your deliberations, if you are asking about your deliberations,  
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1 I want to assure you it's absolutely private. It occurs in the  
2 room that you are in. No one can enter. You -- whatever you  
3 say in there is what you want to say, and it remains  
4 confidential during your deliberations.

5                   As I explained, after you are discharged from your  
6 jury duty, you are free to tell anybody anything about the case  
7 at all, anything you want to say, including what you -- your  
8 deliberations. I don't impose any type of gag order on jurors.  
9 You are free to say and you are free not to say it, too. You  
10 are free to keep it confidential with yourself.

11                   So that is an option that you have. And I want you  
12 to understand that that is the way that deliberations are  
13 conducted. If you have any other questions about your  
14 deliberations, you are, of course, free to address the Court.

15                   Now, a third question that you asked, and you sort  
16 of asked it two different ways, was whether federal law and  
17 this is the quote, federal trumps Proposition 215. As you  
18 know, Proposition 215 is a state enacted, or it's a law of the  
19 State of California enacted by a vote, the proposition by a  
20 vote of the citizens of this state. The answer is as follows,  
21 and some of this I've already told you, but let me try to flesh  
22 it out a bit more.

23                   "Federal law, which is the law that governs you in  
24 this case and governs me in this case, prohibits someone from  
25 manufacturing, distributing, or dispensing a controlled

1 substance, including marijuana. That is the law everywhere in  
2 the United States, notwithstanding any contrary provision of  
3 law at a state or local level.

4 "When there is a conflict between federal law on the  
5 one hand and state or local law on the other hand, then under  
6 our constitutional system of Government federal law must  
7 prevail. That is to say, federal law trumps state law or local  
8 law." I think that is in direct response to the question that  
9 was asked.

10 Then you have, I say you, maybe one of you or more  
11 of you, asked a series of questions about medical marijuana or  
12 medical use or a state law as it relates to medical use of  
13 marijuana. You have asked it in several different ways, and I  
14 will give you this instruction:

15 "As to the medical use of marijuana and any state or  
16 local provisions governing the medical use of marijuana, it is  
17 irrelevant, immaterial and cannot be considered by you in your  
18 deliberations; that is, that the medical use of marijuana, if  
19 it is permitted by state law or if it is permitted by local  
20 ordinance, while that may or may not be true in this case, it  
21 cannot be considered by you in arriving at your verdict."

22 You may recall that at the beginning of this process  
23 when you were voir dired by the Court I asked the question  
24 whether or not you would follow the law with respect to the  
25 laws governing the use of marijuana. And I think I

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1 specifically said that -- asked you as to whether or not you  
2 had views about medical marijuana. And then I asked further,

3 the view, whether you could set aside those views in arriving  
4 at a verdict and that you would not allow your views, whatever  
5 your views are, about medical marijuana to impair your ability  
6 to be a fair and impartial juror.

7           And I also explained to you, if you recall, that it  
8 is federal law that prevails in this case, not state law, not  
9 local law. So the Court has made -- and you took an oath, you  
10 took an oath to follow that law.

11           So, I simply want to tell you that I will, when I  
12 instruct you as to what the law is, I will give you the law  
13 which is the federal law of the United States, which laws have  
14 been held to be constitutional. And you are, under your oath,  
15 required to follow the law, even if, and I emphasize this, even  
16 if you disagree with it. Okay, so that's my response to the  
17 questions that you have propounded.

18           Now, you are going to be free Thursday, Friday,  
19 Saturday, Sunday, Monday. And there, again, I would think,  
20 that there is the possibility that there will be newspaper  
21 articles about this or TV stories or, as an example, coming in  
22 and out of the courtroom, coming in and out of the federal  
23 building on your way here, on your way home, you may see signs  
24 or displays up which can have -- which may relate to this  
25 particular case or some of the issues that you have heard about

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1 in this particular case; again, let me caution you not to read  
2 any of those articles and not to be influenced at all in your  
3 decision by any signs of any kind, one way or the other, in  
4 connection with this case.

5           You are, and I've said this repeatedly, you are the  
6 people who have heard all and will hear all of the relevant

7 evidence in connection with this matter to make your  
8 determination. You will also be instructed on the law. You  
9 are in the best position to make a judgment in this case, but  
10 only if you make your judgment based upon what happens in this  
11 courtroom from the witnesses who testify, the exhibits that are  
12 brought forward, and the law as I give it to you. So I want  
13 you to remember that. And I want you to have a very pleasant  
14 weekend.

15 It's Memorial Day, which is an important day for a  
16 lot of us. And I want you to come in here Tuesday morning,  
17 8:30, and we'll proceed. So thank you very much. Please leave  
18 your jury books in the room. And I appreciate your coming in  
19 this morning.

20 (Jury out at 8:52 a.m.)

21 THE COURT: Let the record reflect the jurors have  
22 retired.

23 What time is the hearing on Friday?

24 MR. BEVAN: 2:00 o'clock, Your Honor.

25 THE COURT: 2:00 o'clock.

1302

1 MR. BEVAN: Your Honor, I just wanted to make a  
2 comment, really as an officer of the Court and out of  
3 self-respect, really, for myself.

4 Mr. Rosenthal has made certain comments to me,  
5 called me a coward in the courtroom and followed me down the  
6 hallway, calling me a coward, and I put counsel on notice to  
7 get their client under control.

8 You know, it doesn't bother me what -- defendants  
9 have said things to me all the time and, you know, it comes

10 with the territory to some extent, but like yesterday when I  
11 left the courtroom, Mr. Rosenthal is out there with the crowd,  
12 inciting the crowd as I walk by, you know, jeering at me as I'm  
13 walking down the hallway, something was said about an aneurism,  
14 I don't know if it was directed at me.

15 THE COURT: About what?

16 MR. BEVAN: An aneurism.

17 THE COURT: Oh.

18 MR. BEVAN: And bottom line is, you know what, that  
19 sort of behavior is childish, it's disrespectful, it's uncalled  
20 for. And from my perspective it's unacceptable.

21 There were a lot of things said yesterday to the  
22 Court about the Court personally, about the processes that are  
23 -- that I think are being carried out fairly and in accordance  
24 with the law in this case, those remarks, obviously, he has a  
25 right to say whatever he wants, but you know, it's a matter of

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1 self -- it's a matter of respect for what this building  
2 represents, what the Court represents, our system of justice.

3 And I just want to go on record as saying that that  
4 sort of behavior, which I'm not accustomed to hearing in a  
5 federal courtroom from my perspective on behalf of the United  
6 States is uncalled for. And the personal attacks against me  
7 are unacceptable. And I would simply renew my request to  
8 defense counsel to get their client under control.

9 MR. AMPARAN: You know, the only possible purpose  
10 for those comments and to try to rehash things is to attempt to  
11 again bias the Court against Mr. Rosenthal. The Government's  
12 continuous whining about conduct and continuous whining about  
13 being placed on an even playing field and being treated fairly

14 and evenly is hypocrisy almost to the absurd.

15 I think the basis of this pattern, I would ask the  
16 Court simply to let Mr. Bevan know that sticks and stones may  
17 break his bones, but words will never harm him and to develop a  
18 thicker skin.

19 THE COURT: Well, Counsel, I don't subscribe to your  
20 notion that I should simply admonish the U.S. Attorney that  
21 words have no effect and that they ought to be -- they ought to  
22 be disregarded.

23 The question in my mind is, first of all, I guess  
24 you are telling me that your client may very well have engaged  
25 in the statements that Mr. Bevan has stated.

1304

1 MR. AMPARAN: My client may very well have called  
2 Mr. Bevan a coward. My client has said a lot of things. My  
3 client enjoys the First Amendment, as the Court has found.

4 I also saw Mr. Bevan walk out of the building with  
5 four agents, so if he was shaking in his shoes, I think that  
6 would reflect upon his security in bodyguards that have been  
7 with him.

8 THE COURT: Well, look, I don't think that it is  
9 appropriate for -- I don't think it's a question of the First  
10 Amendment, is it, when a person accosts the Government  
11 prosecutor in the hall and calls him a coward? Is that a First  
12 Amendment issue?

13 MR. AMPARAN: Is that prescribed?

14 THE COURT: Pardon?

15 MR. AMPARAN: That -- unless the Court is taking  
16 that as some kind of threat, it would appear to be protected

17 speech.

18 THE COURT: No, I don't know. I haven't looked at  
19 it. Maybe it's protected. I would be surprised. I actually  
20 would be surprised that if defendants in a federal building in  
21 the earshot of jurors --

22 MR. AMPARAN: There is no allegation that it's  
23 within earshot of jurors.

24 THE COURT: Okay, in the federal building in the  
25 public quarters can state the things that Mr. Bevan said were

1305

1 stated to him.

2 Anyway, I think the Court has the responsibility of  
3 making sure that the decorum of these proceedings remains  
4 professional and civil. And to the extent that a defendant  
5 engages in this type of conduct I think that that ought to be  
6 at least the subject of a discussion between counsel and his  
7 client to admonish him not to say those things.

8 MR. AMPARAN: I believe that we have asked --

9 THE COURT: He can say it in the courtroom, as he  
10 did yesterday and this morning. He expressed his views about  
11 Mr. Bevan and about the Court, and that -- that's not  
12 inappropriate. He can say what he wants to on the record. The  
13 question is whether he can go out in the hallway here and say  
14 the sorts of things as counsel goes in and out of the  
15 proceedings. I think that is an attack on the decorum of the  
16 proceedings.

17 Nevertheless, I'm not admonishing anybody.  
18 Mr. Rosenthal -- first of all, an admonition to Mr. Rosenthal I  
19 think would be useless. He doesn't follow -- there is no  
20 indication that he would follow the Court's instructions. And

21 I don't wish to make this a confrontation.

22 All Mr. Bevan is asking is that defense counsel  
23 please discuss this matter with Mr. Rosenthal. And I think  
24 that is not inappropriate.

25 MR. AMPARAN: We had that discussion, Your Honor.

1306

1 THE COURT: I think you might have it again, because  
2 it doesn't seem to be working.

3 MR. AMPARAN: As the Court indicated, the admonition  
4 from the Court probably wouldn't be effective.

5 THE COURT: I'm not -- okay, let me say this: No.  
6 1, Mr. Rosenthal is free to say what he wants to say, all  
7 right?

8 THE DEFENDANT: Thank you.

9 THE COURT: He has a First Amendment right to say  
10 what he wants to say. I do want to make sure that whatever he  
11 says in the context of a court proceeding be said on the record  
12 so that there is a record of what he is saying.

13 MR. AMPARAN: Your Honor, I wish to apologize,  
14 because that was an error that was basically caused by I  
15 believe Ms. Greenberger and I, because after Mr. Bevan made his  
16 statement, we spoke with Mr. Rosenthal and we said out of  
17 respect for the Court and the courtroom and decorum, please  
18 don't make any disparaging comments in the courtroom. And  
19 apparently he took that to mean it was appropriate for him to  
20 call Mr. Bevin a coward outside of the courtroom.

21 So that may have been inappropriate legal advice  
22 that would fall back to my shoulders. And to the extent that I  
23 may relay an apology on his behalf for calling Mr. Bevan a

24 coward, I surely extend that apology, Mr. Bevan.

25 THE COURT: Okay, that's fine.

1307

1 I want to make sure that your client understands  
2 that in no way is his speech going to be limited. He may be  
3 highly critical of the Court. He may be highly critical of the  
4 Federal Government and this prosecution, and he has that right.  
5 And it's a right that he enjoys. And I'm not in any way trying  
6 to discourage him from exercising that right. He has an  
7 absolute right to do that, and I recognize that. And I think I  
8 have recognized that during the course of the proceedings.

9 Nevertheless, I just want to make sure that there is  
10 some decorum in these proceedings. We have a court, we have a  
11 court reporter; it's important that this case be decided on  
12 what occurs in this court and not on some other -- some other  
13 way.

14 So we have said enough about that issue, right?

15 MR. BEVAN: Yes, Your Honor.

16 THE COURT: Nothing else we have to say to that.

17 THE DEFENDANT: So I can't call him a coward?

18 Your Honor, I just want to understand, can I call  
19 him a coward or not?

20 THE COURT: You can call anybody --

21 THE DEFENDANT: Because he is a coward. I'll call  
22 it to him in court, and I'll go outside the courtroom and I'll  
23 say he is a coward, he's a liar, he's vindictive, and he is in  
24 a Rico arrangement with Bob Martin. And I'll say it time and  
25 time again until you stop me from saying it. Because once I go

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1 outside that courtroom, as you said, I have the First  
2 Amendment.

3 And you are a tattletale and a crybaby.

4 THE COURT: Well, I'm not restricting your client's  
5 speech.

6 MR. AMPARAN: Thank you, Your Honor. I appreciate  
7 that.

8 MR. BEVAN: So Friday, at 2:00 o'clock, Your Honor?

9 THE COURT: Yes.

10 Now, this is what I would like to do, the procedure  
11 I would like to follow is with respect to any of these  
12 witnesses that if, in fact -- I mean, you ought to call them in  
13 the order in which you want them called. I want to come to a  
14 decision on Friday as to what I have to do, so --

15 MR. AMPARAN: Your Honor, I would ask that in light  
16 of the Court's making the defense file or provide the Court,  
17 even in an ex parte fashion, with a written proffer as to each  
18 of our witnesses as to their relevance and as to why they are  
19 not cumulative, why they are not undue consumption of time --

20 THE COURT: Well, you are asking the Government to  
21 make a written offer of proof as to each witness.

22 MR. AMPARAN: As to these remaining witnesses --

23 THE COURT: Fine, that request is granted. I think  
24 that would be useful to the Court, I think it's useful to the  
25 defense. I want to hear from the defense why it's not

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1 cumulative -- why it is cumulative, if they say it is  
2 cumulative.

3 But I want to caution the defense, if you make an  
4 argument that something is cumulative, then that very well may

5 bind you in your argument, you see? You can't say on the one  
6 hand all this witness is going to do is corroborate Smith or  
7 Jones, or whatever it is, and then you get up, and so I say,  
8 okay, that's right, it's cumulative in that regard, therefore  
9 it's not to be permitted, and then you get up and you say,  
10 Smith is not to be believed, Jones is not to be believed.  
11 Because, in fact, you have eliminated -- I'm just telling you,  
12 I try to set out the rules in advance so you make your judgment  
13 based upon that and you are not surprised.

14 So you can make any argument you want to on that  
15 being cumulative. You might be right, it may be cumulative.  
16 Cumulative, as I've said at the beginning, I do not allow  
17 cumulative witnesses to testify unless the credibility of the  
18 statement is under attack, that is, of the other witnesses  
19 under attack. If it's under the attack, then, obviously, you  
20 can produce another witness. That's the rule.

21 So I'm granting your request. I want by -- if you  
22 would by Friday morning at 9:00 a.m. please file a written  
23 proffer as to any of these witnesses that you intend to call  
24 and furnish a copy to the defense and to the Court. I guess  
25 I'll get it.

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1 MR. BEVAN: E-file it, Your Honor?

2 THE COURT: Yeah, E-file it, that's fine.

3 Well, let's see, today is Wednesday; can you do it  
4 by 5:00 o'clock on Thursday? Then I'll have it that evening.  
5 5:00 o'clock on Thursday.

6 MR. BEVAN: Fine.

7 THE COURT: Yes, Mr. Amparan?

8                   MR. AMPARAN: I want to inquire as to if, in fact,  
9 the immunized witnesses, let's say they all take the Fifth, or  
10 just for an example there is many of them, say two or three  
11 would be allowed by the Court, if they were to testify, two or  
12 three take the Fifth, and we are stuck and we have now gone  
13 till Tuesday, and does the Court have any indication where we  
14 were going to be going from there, or is that all going to be  
15 decided Friday afternoon?

16                   THE COURT: Well, I don't know what -- are you  
17 asking if I --

18                   MR. AMPARAN: If, in fact, some of these immunized  
19 witnesses the Court allows Mr. Bevan to call them, just for  
20 argument's sake, and --

21                   THE COURT: And they are going to testify.

22                   MR. AMPARAN: And they don't.

23                   THE COURT: Well, if they don't testify, then I have  
24 to figure out what the appropriate remedy is for these  
25 witnesses. I have to figure that out, I don't know yet. I

1311

1 have to hear -- among other things, I have to hear their  
2 counsel on that issue.

3                   So I can't predict where we are going to be on  
4 Tuesday or Wednesday or Thursday, it just depends on -- I have  
5 to also believe that these witnesses will be relatively brief  
6 if allowed -- if they do testify, their testimony will probably  
7 be -- I don't know, 15 minutes, 20 minutes, something of that  
8 nature.

9                   MR. BEVAN: Probably.

10                   THE COURT: They would be relatively brief.

11                   MR. BEVAN: That's true.

12 THE COURT: So I have to figure that out as well.

13 MR. BEVAN: That's all, I have, Your Honor.

14 MR. AMPARAN: That's all I have.

15 MS. GREENBERGER: I have something.

16 THE COURT: Yes.

17 MS. GREENBERGER: When does the Court want to deal  
18 with jury instructions?

19 THE COURT: Tomorrow afternoon.

20 MR. BEVAN: You said Friday.

21 THE COURT: I mean Friday, that's what I meant.  
22 Friday.

23 What I propose to do -- I don't know whether we are  
24 going to finish or not, I mean, the question may be what to do  
25 with -- about these other witnesses.

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1 Anyway, Friday I will give you a proposed set of  
2 instructions, okay? So you will be able to look at them. We  
3 then can have a discussion, either Friday about them or Tuesday  
4 about them or Wednesday about them, if we have -- if the case  
5 is still going on. I don't know how long the case will go on.

6 MS. GREENBERGER: We may just submit some additional  
7 that I pulled --

8 THE COURT: Oh, if you have additional  
9 instructions --

10 MS. GREENBERGER: I'll E-file them today.

11 THE COURT: Perfect. I want all additional  
12 instructions to me today.

13 MR. BEVAN: And I have a CD of the Government's  
14 instructions which are from the Ninth Circuit.

15 THE COURT: Okay. Haven't I said anything about  
16 instructions already? I think I have said something.

17 MS. GREENBERGER: We had a hearing.

18 THE COURT: I don't give Eleventh Circuit --

19 MR. AMPARAN: You already said that.

20 THE COURT: Yeah. Okay.

21 Oh, I may very well be able to get -- I'll get them  
22 to you as quickly as I can. I may be able to get them to you  
23 today or tomorrow so you can see what I intend to give. And  
24 then I would invite comments to that. I'm sure I can get them  
25 to you today. I'll get them to you today. Exactly. But they

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1 are being sent out for your comment, okay? Okay.

2 MR. BEVAN: Thank you.

3 THE COURT: All right. We are in recess. We'll  
4 resume at 2:00 o'clock on Friday.

5 Thank you very much.

6 (Proceedings adjourned at 9:10 a.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 23, 2007

