

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  
Friday, May 25, 2007

Reporter's Transcript of Proceedings

Appearances:

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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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11 for the defendant, first.

12 MR. FIGUEROA: Omar Figueroa for Ed Rosenthal.

13 MS. GREENBERGER: Shari Greenberger.

14 THE COURT: And the record should reflect the  
15 defendant is present.

16 MR. HORNGRAD: Douglas Horngrad for Vince Brown.

17 THE COURT: Let me make a list here.

18 MR. HORNGRAD: He is a very minor character.

19 THE COURT: Yeah, sure.

20 Okay, what is --

21 MR. HORNGRAD: Vince Brown.

22 THE COURT: Brown, okay.

23 MR. HORNGRAD: Thank you.

24 MR. VIZZI: Good afternoon, Ean Vizzi for witness  
25 Etienne Fontan.

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1 MS. RUIZ: Nedra Ruiz appearing for Mr. Anthony  
2 Lopez.

3 THE COURT: Okay.

4 MR. GOLDROSEN: Good afternoon.

5 Mark Goldrosen appearing for witness James Squatter.

6 THE COURT: James?

7 MR. GOLDROSEN: Squatter, S-q-u-a-t-t-e-r, also  
8 referred to as James Blair, B-l-a-i-r.

9 THE COURT: Okay.

10 MR. GOLDROSEN: He was subpoenaed.

11 THE COURT: Blair.

12 MR. GOLDROSEN: Yes. He was subpoenaed yesterday.  
13 This is the first time we have been here.

14 THE COURT: Okay. Thank you.

15 MS. REGAN: Lauren Regan with Cory Okie.  
16 THE COURT: Okie.  
17 MR. LICHTER: Good afternoon.  
18 My name is Lawrence Jeffrey Lichter.  
19 THE COURT: I'm sorry?  
20 MR. LICHTER: On March 27th --  
21 THE COURT: Who do you represent?  
22 MR. LICHTER: Kathleen Capetti.  
23 THE COURT: Kathleen -- sorry.  
24 MR. BEVAN: Kathleen Capetti, also known as Lemons.  
25 MR. LICHTER: C-a, and I hope this is right,

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1 C-a-p-e-t-t-i.  
2 THE COURT: Thank you.  
3 MR. AMPARAN: Robert Amparan on behalf of  
4 Mr. Rosenthal.  
5 MR. SWANSON: Ed Swanson on behalf of Jeff Jones and  
6 OCBC. Mr. Jones is not yet present. He is coming with my  
7 co-counsel.  
8 MS. HEADLEY: Laurel Headley on behalf of Brian  
9 Lundeen, and he is present.  
10 MR. CHASIN: Seth Chasin on behalf of Lu Saechao who  
11 is present.  
12 THE COURT: Okay.  
13 So the Court has received a written offer of proof  
14 from the Government and as well, briefs on behalf of Jeffrey  
15 Jones and the Oakland Cannabis Buyers Cooperative, Cory Okie,  
16 Brian Lundeen, Lu Saechao.  
17 Are there any other briefs that have been submitted

18 that I haven't identified?

19 (No response.)

20 THE COURT: Okay, none.

21 So let's go through -- this is what I propose to do:

22 As to those witnesses that I think I would not require them to

23 take the stand, I would -- I would like to go through those

24 first. And because if I disagree with the Government in

25 connection with the proffer, then so be it. But I don't need

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1 any defense counsel to weigh in at this point or witness'

2 counsel to weigh in.

3 And I may need some further explanation.

4 Let me just go through the proffer, maybe that's the

5 way to do it.

6 Evan Schwartz. There is nobody here on that

7 person's behalf; is that right?

8 MR. BEVAN: I didn't get anyone's appearance on

9 Evan Schwartz. His counsel is --

10 MS. GREENBERGER: Eric Safire.

11 MR. BEVAN: Eric Safire, who was here at the last

12 meeting, so I don't know where he is.

13 THE COURT: So we don't know. So we'll deal with

14 that later.

15 Anthony Lopez.

16 MS. RUIZ: Nedra Ruiz appearing on behalf of

17 Mr. Lopez.

18 THE COURT: I think his testimony is certainly

19 cumulative. It's cumulative, not only cumulative to the case

20 but I don't know that -- that the people who are similarly

21 situated as Mr. Lopez, their credibility would be attacked. I

22 mean, yes, every witness' credibility can be attacked.

23 MR. BEVAN: Nate Tyler, for example.

24 THE COURT: That's right. Just seems to me this  
25 individual was the plumber. I assume he would testify to the

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1 things that are proffered here. I don't know that that really  
2 advances the case significantly. I think it is cumulative.  
3 And so I would not require him to testify.

4 You are excused; your client is excused.

5 MS. RUIZ: Thank you, Your Honor.

6 THE COURT: Turning to Lu Saechao. Again, I have  
7 the same reaction to his testimony. I think it's cumulative.  
8 I think it's not seriously being contested, the issues that he  
9 would cumulatively testify to.

10 Therefore, he's excused. You're excused.

11 MR. CHASIN: Thank you.

12 THE COURT: Okay.

13 Vince Brown, I have the same view. Cumulative, and  
14 not sufficiently substantive that we would need his testimony.

15 So I'm excusing him; I'm excusing you.

16 MR. HORNGRAD: Thank you, Your Honor.

17 And have a nice weekend.

18 THE COURT: Thanks. It's doubtful, but --

19 (Laughter.)

20 THE COURT: I appreciate the sentiment.

21 Let's go to Cory Okie -- not to Cory Okie, sorry, I  
22 want to go to -- maybe it is Cory Okie.

23 Well, this is the person who says they don't know  
24 anything about it at all. You have your facts wrong in a sense

25 or you are making certain surmises about -- about what Mr. Okie  
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1 would testify to. And those surmises are incorrect. That is  
2 the assertion that's being made by defense counsel.

3 MR. BEVAN: Perhaps Counsel's unaware of the packet  
4 that my case agent, Dave Mateer, called the number on Exhibit  
5 25M, that number for Cory Okie, which is (530)521-5351, left a  
6 message for Cory at or about December 18th, '06. Cory Okie who  
7 identified himself as Okie, returned that call. He said his  
8 last name was Okie, gave his date of birth and address in  
9 Oregon. He confirmed that he was affiliated with the Fort  
10 Bragg address and phone number that is on 25M. Apparently some  
11 sort of a mailbox service. But he did so in response to  
12 counsel's statement that he never lived there, knowing it's a  
13 mail drop.

14 I would concede he didn't live in the mail drop but  
15 denied any connection that that is not true.

16 Cory Okie did confirm he was affiliated with that  
17 address to my agent. And the proffer that I have made with  
18 respect to Cory Okie is essentially what I've set forth, Your  
19 Honor, and that is that he is listed in one of the grow  
20 notebooks recovered from the grow as having ordered or received  
21 two trays of marijuana clones, Max 49 and Romulan.

22 And there are three calls from the defendant's cell  
23 phone to that number. Space between the period that I have  
24 indicated.

25 His -- Cory Okie has actually never indicated that  
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1 he would refuse to testify. And I would ask that Your Honor

2 defer as to Cory Okie and --

3 THE COURT: I will defer. Especially since I'm  
4 somewhat troubled by the disparities between what counsel  
5 asserts --

6 MS. REGAN: And I looked back at my client when  
7 Mr. Bevan was speaking and he was adamantly shaking his head  
8 no.

9 THE COURT: Well, then he is free to testify.

10 MS. REGAN: The other issue is that I had pointed  
11 out in my brief the fact that the immunized order that was  
12 issued by the Court and the proffer made by the U.S. Attorney  
13 office was relating to the tax charges that have now been  
14 dismissed.

15 Further, if the --

16 THE COURT: Well, wait a minute. The immunized  
17 order was related to the tax charges?

18 MS. REGAN: Yes.

19 MR. BEVAN: No.

20 THE COURT: You mean, that's what it said --

21 MS. REGAN: Yes.

22 THE COURT: -- it said he can testify to the tax  
23 charges?

24 MS. REGAN: That's right.

25 THE COURT: Can I see it?

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1 I didn't know that I fine tuned it.

2 MS. REGAN: Further, Your Honor --

3 THE COURT: I get to read it, right?

4 MS. REGAN: Okay.

5 THE COURT: Just have the first page of the immunity

6 order.

7 MR. BEVAN: I have an unsigned copy.

8 THE COURT: I signed it, right? Let me see it.

9 MR. BEVAN: You did. You signed it on January 31st,  
10 at docket 384-6789.

11 THE COURT: Well, of course, the immunity order  
12 isn't limited; is not limited, is it?

13 MS. REGAN: Well, based on what the U.S. Attorney  
14 provided to the Court, it would seem that the reason Mr. Okie's  
15 testimony was necessary to the public interest was based upon  
16 the tax and money laundering charges, which have now been  
17 dismissed.

18 Further, Mr. Okie was never subpoenaed in the first  
19 trial which did result in a conviction without his testimony.  
20 And since he is --

21 THE COURT: That is a separate argument.

22 MS. REGAN: Right.

23 And since he is only deemed to be a, quote/unquote,  
24 customer, certainly that evidence would be cumulative as well  
25 as irrelevant to the matter that is already proceeded.

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1 THE COURT: Why is it irrelevant? The issue is --

2 MS. REGAN: Because there has already been --

3 THE COURT: Sorry.

4 MS. REGAN: There has already been testimony that  
5 Mr. Rosenthal maintained a grow operation based on the  
6 Government's case.

7 THE COURT: But that's being challenged. That's  
8 being challenged.

9 MS. REGAN: Certainly, the evidence is already in  
10 the record, though.

11 THE COURT: That's right, but, of course, the  
12 argument that is going to be advanced by the defense as they  
13 have advised the Court is the sufficiency of the evidence.  
14 That's the argument. That is one of the arguments being --  
15 they are not conceding any of the Government's evidence.

16 MR. AMPARAN: May I address that issue, Your Honor?

17 THE COURT: Sure.

18 MR. AMPARAN: Your Honor, my argument is going to be  
19 the same -- if the Court were to allow Mr. Bevan to call all 11  
20 witnesses, and, in fact, if the Court would allow Mr. Bevan to  
21 call every member of the DEA's marijuana group or every single  
22 person who came in and smoked a medicinal marijuana doobie at  
23 the Harm Reduction Center, it is not going to change my  
24 argument that this --

25 THE COURT: I don't understand that.

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1 MR. AMPARAN: That it is not going to change my  
2 argument that the Government has not satisfied its burden of  
3 proof.

4 THE COURT: Okay, fine.

5 MR. AMPARAN: So --

6 THE COURT: So you are challenging the sufficiency  
7 of the evidence?

8 MR. AMPARAN: No, but it is irrelevant. How many  
9 other witnesses they call, it's always going to be the same  
10 argument. You are not going to --

11 THE COURT: I don't know -- it's not my job to  
12 change or not change your argument. You may give the argument.

13 MR. AMPARAN: No, but if you are saying I'm allowing  
14 additional witnesses to testify to address Mr. Amparan's  
15 concerns, I'm saying that it doesn't.

16 THE COURT: Fine, then let me make sure I understand  
17 this.

18 Are you offering to stipulate that this witness, if  
19 called to testify, would testify that, in fact, they had  
20 whatever the Government thinks they had, two transactions,  
21 three transactions, whatever it is, involving Mr. Rosenthal?  
22 Is that what you are offering?

23 MR. AMPARAN: I have no idea what this witness --

24 THE COURT: Well, maybe you ought to sit down --  
25 maybe you ought to have a discussion. Obviously, I won't put

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1 anybody on the stand, and I'm not requiring you to do so, but  
2 when you -- but, if, in fact --

3 MR. AMPARAN: Your Honor, we have rested. I'm not  
4 calling any more witnesses.

5 THE COURT: Mr. Amparan. Let me just finish, okay?

6 I'm not requiring you to stipulate, but if your  
7 argument is that it makes no difference the number of witnesses  
8 who testify in support of the prosecution's case, their theory  
9 of the case, if you say that makes no difference, then you can  
10 certainly have the option, if you choose, which is the option  
11 that I've given you, of not calling any of these witnesses at  
12 all and we'll simply -- and entering into a stipulation that so  
13 and so would testify a particular way if that's what you want  
14 to do.

15 MR. AMPARAN: We will not be stipulating. And if

16 the Court wants to allow these witnesses, it can. But what I  
17 was trying to get across, and maybe not very clearly or  
18 articulately, what I'm trying to get across is Mr. Bevan can  
19 call 500 more witnesses, he can call witnesses until he's blue  
20 in the face, it's not going to change the way I address the  
21 jury and the evidence and whether or not the Government is ever  
22 going to --

23 THE COURT: He is not here --

24 MR. AMPARAN: -- going to be able to satisfy --

25 THE COURT: Mr. Amparan, Mr. Bevan's views of this

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1 case, I think, is that he is not ever going to convince you  
2 of -- of the soundness of his case. And that I quite  
3 understand. But that is not the issue. The issue isn't  
4 whether you are convinced or whether you believe there is  
5 sufficient evidence, or not. The question is whether the jury  
6 does.

7 You have said in your opening -- it wasn't your  
8 opening, it was your co-counsel's opening, that the Government  
9 witnesses, all these Government witnesses who are testifying,  
10 can be readily impeached either by virtue of their criminal  
11 background, by virtue of the deals that they have made with the  
12 Government, by virtue of any number of things. That's a  
13 perfectly legitimate and recognized way to attack the  
14 prosecution's case.

15 So what Mr. Bevan is attempting to do, is to call  
16 some witnesses who, in his opinion, don't fall within that  
17 ambit of impeachability that you have established by your  
18 opening statement.

19 That is what he's doing. So nobody has to make any

20 grand pronouncements. The idea is he sees his case a  
21 particular way, you see your case a particular way. And the  
22 way he sees his case that he is requesting that these people  
23 testify because he thinks it answers a proposition, a defense  
24 that has been tendered by the defense in this case. That's his  
25 view.

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1 MR. AMPARAN: But for the Court having admitted the  
2 lawsuit by Mr. Rosenthal's former counsel, where the elements  
3 of the offenses would appear to be established. So what you  
4 are saying is, oh, he can challenge -- he has a right to  
5 challenge the defense, despite the fact that I have admitted  
6 evidence that indicates his guilt. So at what point do these  
7 witnesses become cumulative, Your Honor?

8 THE COURT: Well, I actually don't think this  
9 involves me to the extent that you think it does. But at any  
10 rate, the answer to your question is that he is entitled to  
11 call particular witnesses. If you believe that the -- that the  
12 evidence of his former counsel's admission would be sufficient  
13 and they may be in and of themselves, that they may be  
14 sufficient, that that may be the case or it may not be the  
15 case.

16 And by the way, since you've objected to the  
17 introduction of that evidence, which I overruled, but that  
18 would be a subject in the event that there is an appeal, that  
19 would be a subject of issue. He may very well want to produce  
20 additional evidence in case the Court of Appeals agrees with  
21 your proposition.

22 And then they would look at it, they could agree

23 with it, and they could make a determination whether or not  
24 it's harmless error. And they may say in light of the other  
25 evidence that has been propounded, it's not harmless error.

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1           Anyway, I'm not putting you on the spot because I  
2 don't -- because it's entirely up to you whether or not you  
3 want to stipulate to it, but I think that you have two  
4 arguments to make -- or one argument to make which is that this  
5 is cumulative evidence, some of it is, and I think some of it  
6 may not be. That's the Court's view.

7           But I would like to do it witness by witness because  
8 I think that they are all individually situated and quite  
9 different.

10           I think as to Mr. Okie we will just have him come up  
11 and testify.

12           MS. REGAN: Your Honor --

13           THE COURT: There seems to be a disparity.

14           MS. REGAN: If I may --

15           THE COURT: You know, I've got a big calendar this  
16 afternoon, so I would sort of like to go ahead.

17           MS. REGAN: I would just like to establish --

18           THE COURT: You will be able to establish anything  
19 you want on the record. Just as long as you don't talk over  
20 me. All right?

21           MS. REGAN: Yes.

22           THE COURT: Thank you.

23           All right, now, what I want to do, then -- I was on  
24 this point, I think, if I haven't lost my train of thought,  
25 which is that your representations of what he has to say and

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1 would say appear to be at odds with the Government's view as to  
2 what this person would say. And I don't know who's right in  
3 that regard.

4 But before getting into that contest, I would at  
5 least like to hear what he is going to say, if he chooses to  
6 say. And if he doesn't, that's another issue.

7 So I will go to him in a minute.

8 But I want to deal with the counsel that are here on  
9 another matter, so they don't have to sit through this, though  
10 maybe Mr. Stepanian might want to.

11 MR. STEPANIAN: It's interesting.

12 THE COURT: Yeah, interesting, right. Brings me  
13 back to 1967.

14 (Laughter.)

15 (Other matter heard; proceedings resume:)

16 THE COURT: Okay. Let's return to the Rosenthal  
17 matter.

18 Now, so, I wanted to ask before we get to --

19 MS. REGAN: Perhaps a preliminary matter. Mr. Bevan  
20 mentioned a report. It appeared to be a 302 that I have never  
21 seen, and I'm understanding that the defense may have never  
22 seen as well.

23 MR. AMPARAN: That is correct, Your Honor.

24 MR. BEVAN: My agent has notes of that conversation  
25 and we would be happy to turn over a copy of the notes.

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1 THE COURT: Okay. Would you do so and do so before  
2 we start the examination.

3 MR. BEVAN: Sure.

4 THE COURT: Okay.

5 So we have -- here is another question -- let's get  
6 to -- tentatively, I thought going through this that Brian  
7 Lundeen is someone who ought to testify, it's not cumulative.  
8 Etienne Fontan, the same thing.

9 Debbie Goldsberry, the same thing, if I do  
10 understand the nature of her testimony. I have to ask you  
11 about that.

12 Jeff Jones, I'm not -- I'm not convinced that that  
13 person ought to testify. So do we want to have some discussion  
14 on that subject? Not because it's not cumulative, of course,  
15 all of this -- all this testimony is cumulative. But in one  
16 sense, but for the reasons I've already stated on the record,  
17 it just appears to me that you are entitled to have  
18 corroboration.

19 I'm just not convinced that this is the witness that  
20 ought to testify to those things, for a variety of reasons. I  
21 don't know that it's a legal issue because I don't think it  
22 really is a legal issue. I think you can compel someone to  
23 testify in a criminal proceeding and use it in a civil  
24 proceeding.

25 The threat of a civil proceeding is real in this

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1 case, and that's not what this is about from the Court's point  
2 of view, it is about a criminal proceeding.

3 I'm somewhat reluctant to require a person to  
4 testify that would impair his civil -- his right to his civil  
5 defense or plaintiff's force that matter. He was a plaintiff,  
6 wasn't he? No, maybe he wasn't. I forget how that injunction

7 worked.

8                   Anyway, I'm a little reluctant to do it. I think  
9 that that goes into the who kettle of what is just cause or  
10 good cause. You see, his case is somewhat different from the  
11 others. And he does have a horse in the race on the civil  
12 aspects of it.

13                   And I'm a little reluctant because then I balance, I  
14 try to figure out, well, should he put that risk which he can  
15 do, which I think legally I can require him to do, should I  
16 require him to do it? And in order to gain what is being  
17 proffered here. There are other witnesses who would testify,  
18 some of whom I just mentioned to most of what he can testify  
19 to.

20                   So I don't know. That's my tentative view. Maybe I  
21 have to wait until everybody is all finished. That is my  
22 tentative view on him.

23                   MR. BEVAN: Of course, we don't know who is actually  
24 going to say anything.

25                   THE COURT: Well, we're going to find out. We are

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1 going to find out.

2                   MR. BEVAN: That's fine.

3                   MR. SWANSON: Just for the record, he is present.  
4 He was not when you -- when the case was called, but he is now  
5 present.

6                   THE COURT: All right.

7                   So I've excused certain people. Certain ones I have  
8 not.

9                   I think we should simply proceed.

10                   How do you want to proceed?

11 MR. BEVAN: I would like to start with Brian  
12 Lundeen. Have him sworn in.

13 THE COURT: Go ahead.

14 MR. SAFIRE: I represent Evan Schwartz. I'm  
15 Eric Safire. For the record, I thought it was 2:30. I  
16 apologize.

17 THE COURT: That's all right. Let me get to Evan  
18 Schwartz for a minute.

19 MR. BEVAN: So Your Honor, we would start with  
20 Brian Lundeen and ask that he step forward.

21 THE COURT: Okay. We'll get to Mr. Schwartz.

22 MR. SAFIRE: Sorry.

23 THE COURT: Is he present?

24 MS. HEADLEY: Yes, Your Honor. He is present. And  
25 I apologize, but he would like about a minute to --

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1 THE COURT: I'm not calling him now.

2 MR. BEVAN: Pardon me?

3 THE COURT: Are we talking about Brian Lundeen?

4 MS. HEADLEY: Yes.

5 THE COURT: I thought we were talking about Evan  
6 Schwartz. He is not here?

7 MS. HEADLEY: He is here. I'm sorry. Is  
8 Mr. Lundeen being called?

9 MR. BEVAN: Yeah. I'm calling him to the stand.

10 MS. HEADLEY: To the stand, right. And he has  
11 requested a very brief moment to speak with me, if that's --

12 THE COURT: Of course, go ahead.

13 MR. BEVAN: Okay. So then we'll go with Etienne

14 Fontan, Your Honor, if we could. That's E-t-i-e-n-n-e, Fontan,  
15 F-o-n-t-a-n.

16 ETIENNE HERSCH FONTAN,  
17 called as a witness for the plaintiff, having been duly sworn,  
18 was examined and testified as follows:

19 THE WITNESS: I don't believe in God, but I will so  
20 affirm.

21 THE CLERK: You do affirm? You may be seated.  
22 State your full name.

23 THE WITNESS: Etienne Hersch Fontan, F-o-n-t-a-n.

24 ///

25 ///

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Fontan - Direct / Bevan

1 DIRECT EXAMINATION

2 BY MR. BEVAN:

3 Q. Mr. Fontan, have you been advised by your attorney,  
4 Mr. Vizzi, that Judge Breyer has ordered you to testify in this  
5 matter under a grant of immunity pursuant to authorization from  
6 the Department of Justice?

7 A. I am aware I was offered. I do not agree with it.

8 Q. No.

9 But have you been advised of the Court's order?

10 A. I stated so.

11 Q. Okay.

12 And was there a period of time between 1998 and  
13 2002, that you were employed by Mr. Rosenthal at the location  
14 of 1419 Mandela Parkway in Oakland?

15 A. With respect to the Court, Your Honor, I, as an American  
16 citizen and a veteran of this country, I see this as no reason  
17 to answer any of these questions.

18 I completely disagree with this Court's actions with  
19 all respect to the Court. And I cannot proceed with any  
20 answering of any of your questions.

21 Q. Would it be your intention, Mr. Fontan, that with respect  
22 to each and every other question I may ask you that is  
23 pertinent to this case that you would likewise decline to  
24 answer those questions on the advice of your counsel?

25 A. This is advice of my own self and person, yes.

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Examination by the Court

1 Q. Okay.

2 And that would be true and notwithstanding the order  
3 of Judge Breyer that you do so testify under oath in this  
4 matter?

5 A. With respect to the Court, I do understand that, but I  
6 disagree with the whole reason for this Court's actions today.

7 MR. BEVAN: With respect to Mr. Fontan, then, Your  
8 Honor, our proffer is as set forth in the memo that was filed  
9 yesterday, which is that Mr. Fontan, if he testified truthfully  
10 and completely in this matter, would acknowledge and establish  
11 that he worked at the marijuana grow with Mr. Rosenthal at  
12 Mandela Parkway. That he is the Etienne listed on Exhibit 25M,  
13 with the telephone number of (510)418-0072, and that -- and  
14 that as an employee of Mr. Rosenthal he participated fully with  
15 other employees who we would also ask him about in terms of his  
16 knowledge. He participated in the manufacture and distribution  
17 of marijuana at that location.

18 And based on that proffer, I would ask Your Honor to  
19 once again query Mr. Fontan whether or not it would be his  
20 intention to refuse to obey your order. If he acknowledges

21 that it is, I would ask that Your Honor find him in contempt.

22 THE COURT: Mr. Fontan, first of all, you were  
23 represented by counsel?

24 MR. VIZZI: I would just like to formally object to  
25 the evidence as cumulative and irrelevant, and the record of

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Examination by the Court

1 the trial has already established all the facts that he is  
2 potentially asked to testify to. So I would just like to note  
3 it for the record.

4 THE COURT: Your counsel is present. And the  
5 Government's advised that I did sign an order granting you  
6 immunity which means that anything that you say in response to  
7 a question by the Government or in cross-examination could not  
8 be used against you in any criminal prosecution.

9 And I wish to advise you that the failure to respond  
10 to questions subjects you to certain potential penalties,  
11 including confinement in a custodial situation for some period  
12 of time until you would comply with the Court's order.

13 It also subjects you to the possibility of fines and  
14 I think it also subjects you to -- and the Government, and  
15 correct me if I'm wrong, to the possibility of a prosecution by  
16 the United States Government, for failing to respond to an  
17 order of the Court in this context.

18 I want to advise you of those facts.

19 Now, having those facts in mind, my question is  
20 whether or not -- whether in response to any of the  
21 prosecution's questions, it is your intention not to answer  
22 those questions even though I'm directing you at this point to  
23 respond to those questions? So having directed you to respond  
24 to those questions, what is your intention?

25

THE WITNESS: As a sovereign American citizen, I

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Lundeen - Direct / Bevan

1 disagree with this Court's actions and I respect the Court, and  
2 I respect the words you have spoken toward me. But I stand  
3 firmly in my belief that I will not answer any of the  
4 questions. And I understand the repercussions that are  
5 available.

6 I've been a product of this system before in the  
7 military. I understand the incarceration and what the  
8 Government can do to me, and I've been the subject of its  
9 guinea pig as a Gulf War veteran and I've suffered because of  
10 that. And there is nothing you can do to change my mind. I  
11 stand firmly behind my belief.

12 THE COURT: Okay.

13 Mr. Fontan, I'm going to pass and try to deal with  
14 everybody at one time.

15 So thank you. You may step down. But please remain  
16 in the courtroom.

17 MR. BEVAN: The United States would return, then, to  
18 Mr. Brian Lundeen.

19 THE CLERK: Will the witness please come forward.

20 BRIAN LUNDEEN,  
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: Brian Lundeen, B-r-i-a-n,

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Lundeen - Direct / Bevan

1 L-u-n-d-e-e-n.

2

DIRECT EXAMINATION

3 BY MR. BEVAN:

4 Q. Mr. Lundeen, up until today or recently you have been  
5 represented by Mr. Mark Vermuelen?

6 A. That's correct.

7 Q. And did Mr. Vermuelen advise you that Judge Breyer had  
8 signed an amended order, an immunity order, requiring you to  
9 testify in this matter as to questions that were put to you in  
10 exchange for which nothing you say in this case can be used  
11 against you pursuant to the provision?

12 A. But apparently nothing I say in the case can be used to  
13 help Ed Rosenthal, so there is --

14 Q. Let me finish.

15 A. I'm absolutely going to refuse.

16 THE COURT: Mr. Lundeen, let him ask you --

17 BY MR. BEVAN:

18 Q. Let me finish my question.

19 -- and that whatever information you do provide  
20 could not be used against you pursuant to federal statutes save  
21 and except for a prosecution for giving false testimony during  
22 the course of your testimony in this case, do you understand  
23 that?

24 A. I do understand that.

25 Q. And was there a period of time between 1998 and 2002 in

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Lundeen - Direct / Bevan

1 which you were employed by Ed Rosenthal at the location of 1419  
2 Mandela Parkway in Oakland?

3 A. Will this be information that would be used for his defense  
4 or his prosecution? I'm not getting involved with answering

5 questions involving his prosecution.

6 Q. Is it your intention to answer that question if you are  
7 called at trial or to refuse to answer that question?

8 A. I'm going to refuse to answer questions. I love to tell  
9 the whole truth and nothing but the truth, and if I swear to do  
10 that, I'm going to by God get the opportunity.

11 Q. My question to you is if you were to be called --

12 A. I would be -- you made me swear --

13 THE COURT: Mr. Lundeen. Mr. Lundeen.

14 THE WITNESS: -- and then you refuse to let me do  
15 it. You would be asking me to commit a crime. Do you see how  
16 that works?

17 THE COURT: Please, allow -- I would like it quiet  
18 in here. I have no hesitation clearing the courtroom if it's  
19 not.

20 Okay. Mr. Lundeen, please allow counsel to ask the  
21 question, then you may give any response you want to give.

22 Go ahead.

23 BY MR. BEVAN:

24 Q. Did you work at the location of 1419 Mandela Parkway in  
25 Oakland at any time during the period between 1998 and

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Lundeen - Direct / Bevan

1 February 12, 2002?

2 A. I've already stated that I'm not going to cooperate with  
3 your prosecution.

4 Q. And by saying you are not going to cooperate, would it be  
5 your intention, Mr. Lundeen -- would it be your intention with  
6 respect to that question and all other questions having to do  
7 with your relationship to Mr. Rosenthal as it pertains to  
8 matters that are deemed pertinent by Judge Breyer in this

9 prosecution, would it be your intention to decline to answer  
10 those questions?

11 A. With all respect to the judge, he is only doing his job. I  
12 can't -- I can't -- you know, it's not a matter of disobeying  
13 the Judge. It's a matter of following what I believe to be the  
14 true path here, which is to not get involved in your  
15 prosecution in any way.

16 Q. So your answer is that you would so refuse to answer those  
17 questions notwithstanding the fact that Judge Breyer has  
18 ordered you to answer questions?

19 A. Yes.

20 Q. Is that correct?

21 A. Yes.

22 MR. BEVAN: Your Honor, the proffer I would make  
23 with respect to Mr. Lundeen is that Mr. Lundeen, like  
24 Mr. Fontan, worked as an employee for Mr. Rosenthal at 1419  
25 Mandela during the period at issue in this case. He worked on  
1345

Examination by the Court

1 all matters pertaining to the manufacture of marijuana,  
2 distribution of marijuana, and use of those premises for the  
3 purposes alleged and the counts for which Mr. Rosenthal is on  
4 trial.

5 Further, if this witness testified truthfully and  
6 completely, his testimony would reveal that he distributed  
7 marijuana on various occasions, and in concert with  
8 Mr. Rosenthal.

9 And on that basis, and given Your Honor's order, I  
10 would ask Your Honor to query the witness whether or not it  
11 would be his intention to refuse to answer if called before the

12 jury. And if he declines to answer the questions or indicates  
13 that he would answer the questions, then he should be found in  
14 contempt for his refusal.

15 THE COURT: Mr. Lundeen, I want you to understand  
16 that you are under an order of the Court to respond to the  
17 questions that are being propounded by the prosecution. And  
18 failure to do so under the grant of immunity that was given to  
19 you by the Court, could place you in personal jeopardy in the  
20 sense that you could be ordered to be placed into custody until  
21 you responded to questions. You could be fined, and in  
22 addition, the Government has the right to seek a criminal  
23 indictment against you for failure to respond to questions.

24 Now, I want you to have that in mind, and having  
25 that in mind, will you still refuse to answer these questions?

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Examination by the Court

1 THE WITNESS: Yes.

2 THE COURT: Okay. Would you just step down, please,  
3 and remain in the courtroom.

4 MR. BEVAN: Did you have an inclination as to Evan  
5 Schwartz, Your Honor?

6 THE COURT: Let me take a look again at Evan  
7 Schwartz.

8 He should be required to take the stand.

9 MR. BEVAN: United States would call Mr. Evan  
10 Schwartz.

11 MR. SAFIRE: On behalf of Mr. Schwartz, we would  
12 object to any information given pursuant to the proffer  
13 received yesterday would be cumulative and irrelevant in these  
14 proceedings.

15 THE CLERK: Will the witness please come forward.

16 EVAN SCHWARTZ,  
17 called as a witness for the plaintiff, having been duly sworn,  
18 was examined and testified as follows:

19 THE CLERK: State your full name, spell your last  
20 name for the record.

21 THE WITNESS: Evan Schwartz, S-c-h-w-a-r-t-z.

22 ///

23 ///

24 DIRECT EXAMINATION

25 BY MR. BEVAN:

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Schwartz - Direct / Bevan

1 Q. Good afternoon, sir.

2 Have you been represented in this proceeding by  
3 Mr. Eric Safire?

4 A. Yes.

5 Q. And has he advised you that Judge Breyer on or about  
6 January 31st, 2007, signed an immunity order ordering you to  
7 testify in this matter subject to a grant of immunity from the  
8 Department of Justice, which means that nothing you would say  
9 during your testimony here at trial could be used against you  
10 save and except for a prosecution for perjury or otherwise  
11 giving materially false testimony during trial; do you  
12 understand that?

13 A. Yes.

14 Q. And, Mr. Schwartz, is it correct that sometime during the  
15 period between 1998 and February 12, 2002, you were employed or  
16 otherwise worked for Mr. Rosenthal at the location of 1419  
17 Mandela Parkway in Oakland?

18 A. I respectfully refuse to answer this question.

19 Q. And would it be your intention, Mr. Schwartz,  
20 notwithstanding having been ordered by Judge Breyer to answer  
21 questions during the trial, that if you were to be asked  
22 questions having to do with your employment at that location  
23 and whatever else you may have done for and on behalf of  
24 Mr. Rosenthal having to do with matters pertaining to  
25 marijuana, would it be your intention to decline to testify

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Examination by the Court

1 even though you have been ordered to do so by Judge Breyer?

2 A. Yes.

3 MR. BEVAN: Your Honor, our proffer as to  
4 Mr. Schwartz is set forth in the Government's filing yesterday,  
5 which is that if he were to testify truthfully and completely  
6 at trial, his testimony would reveal that he, like Brian  
7 Lundeen and Etienne Fontan, was employed at Mandela Parkway  
8 during his employment there. He contributed fully with other  
9 persons there in the manufacture of marijuana, the use of the  
10 premises for that purpose, and did whatever else you do with  
11 respect to your employment there at Mandela Parkway.

12 And that he, in fact, is the "E" listed on the work  
13 schedule, that he is the Evan listed on the to-do list, and  
14 that he, in fact, when -- in his father's car was observed by  
15 DEA on the dates of 11/26/01 and 12/6/01 was, in fact, the  
16 person that drove the car there and that he at that time was  
17 working inside the grow.

18 On the basis of his refusal today and that proffer,  
19 I would ask Your Honor to confirm with Mr. Schwartz that it  
20 would be his intention to decline to answer questions in  
21 violation of Your Honor's order. And I would ask that he be  
22 held in contempt for his refusal to do so.

23 THE COURT: Mr. Schwartz, you understand -- you  
24 understand that I have issued an order directing you to answer  
25 the questions that are propounded by the prosecution, that if

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Examination by the Court

1 you chose to answer those questions, that is to follow the  
2 Court's order, you could not be prosecuted for anything that  
3 you said during the course of your testimony?

4 I also want you to understand that should you refuse  
5 the Court's order, which is to testify in accordance with  
6 the -- in response to the prosecution's questions, I can hold  
7 you in contempt and if I hold you in contempt, you then will be  
8 subject to certain penalties, including the possibility of  
9 incarceration or fines -- and/or fines.

10 In addition, the Government has the possibility of  
11 seeking a criminal indictment against you for failure to follow  
12 the Court's order.

13 Do you understand that?

14 THE WITNESS: I do understand.

15 THE COURT: Okay.

16 With that in mind, do you continue to refuse to  
17 answer the questions propounded by the prosecution?

18 THE WITNESS: Respectfully, I do not wish to answer  
19 any questions.

20 THE COURT: Okay.

21 Thank you. You may step down.

22 THE WITNESS: Thank you.

23 THE COURT: Please remain in the courtroom.

24 MR. BEVAN: The United States then would call

25 Ms. Debbie Goldsberry, DBA Berkeley Patients Group.

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Goldsberry - Direct / Bevan

1                   DEBORAH JOE GOLDSBERRY,  
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.

6                   THE WITNESS: Deborah Joe Goldsberry,  
7 G-o-l-d-s-b-e-r-r-y.

8                   DIRECT EXAMINATION

9 BY MR. BEVAN:

10 Q. Good afternoon, ma'am.

11                   MR. PANZER: Excuse me, Your Honor. William Panzer  
12 appearing for Ms. Goldsberry.

13                   At this time we would object. Neither I nor  
14 Ms. Goldsberry received any notice of this hearing. We did not  
15 receive anything from the Government indicating what the  
16 relevance of Ms. Goldsberry's testimony would be. I have heard  
17 talk of something filed with the Court yesterday, we haven't  
18 seen it.

19                   Out of an overabundance of caution having read on  
20 the Internet about this hearing taking place, I did call  
21 Mr. Bevan on Wednesday night and ask what's going on, and he  
22 told me that this hearing was taking place and that  
23 Ms. Goldsberry was supposed to be here.

24                   So I did call Ms. Goldsberry, we did come. But we  
25 have not read any notice to be here.

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1                   THE COURT: You are here.

2                   MR. PANZER: We are here. But I would certainly

3 like the opportunity, if the Government is contending that  
4 Ms. Goldsberry has relevant information to something that was  
5 filed with the Court, I would like the opportunity to see that  
6 and discuss it with Ms. Goldsberry prior to her testifying.

7 THE COURT: Okay. Would you show -- Counsel says he  
8 hasn't seen the proffer. Can you hand it to him and then we'll  
9 take a recess with this witness, and you can confer outside.

10 You may step down.

11 MR. PANZER: Thank you, Your Honor.

12 THE COURT: Okay.

13 Call your next witness.

14 MR. BEVAN: You haven't indicated, Your Honor --

15 THE COURT: Well, let's see, who do we have?

16 MR. BEVAN: You have indicated, Your Honor, that you  
17 are not inclined to require Jeff Jones to testify.

18 THE COURT: I need to ask a question of counsel for  
19 Jeff Jones.

20 Would Mr. Jones testify?

21 MR. BEVAN: I'm sorry.

22 THE COURT: I don't know that Mr. Jones -- we are  
23 talking about Jeff Jones?

24 MR. BEVAN: I missed --

25 THE COURT: My question is whether he would testify.

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1 I don't know if we have an indication that he would not  
2 testify.

3 If ordered to testify, is it your understanding he  
4 would or would not testify?

5 MR. SWANSON: It's my understanding he would not.

6 I want to clarify one thing about what the Court

7 said previously just to make sure the Court understands the  
8 posture of Mr. Jones. He is a defendant in a civil suit and I  
9 think that makes a difference. Were he a plaintiff and brought  
10 that suit --

11 THE COURT: I think that does make a difference. I  
12 had thought as much, I mean, that is why I said what I said.  
13 But I wasn't quite sure conceptually how it occurred because  
14 it's the Oakland Cannabis Club versus, isn't it?

15 MR. SWANSON: No. It's the United States versus the  
16 Oakland Cannabis Buyer's Cooperative. The significance, Your  
17 Honor, is just that he was put in the position, not he injected  
18 himself into it.

19 THE COURT: I think that is an issue and that is one  
20 factor I think I can consider in making some determination as  
21 to good cause.

22 However, I want to make sure that this is not moot.  
23 Or, you know, that is to say, I want to make sure that I  
24 understand the representation of counsel correctly that he  
25 would not testify even if ordered to do so. I appreciate that

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1 I could require him to be here and exert that privilege.

2 And if you were to tell me, well, actually, for a  
3 variety of circumstances, he wants the opportunity of  
4 testifying, which some witnesses sometimes do, but he is not in  
5 that category as I take it.

6 MR. SWANSON: That's correct, Your Honor.

7 THE COURT: So he would refuse to testify even if  
8 ordered to do so in these proceedings.

9 MR. SWANSON: My understanding is he would.

10 Obviously, that is me speaking, not him.

11 THE COURT: I understand that, but I want to avoid  
12 requiring him, for the reasons I've stated, I want to avoid  
13 that -- requiring that situation.

14 MR. SWANSON: Thank you very much.

15 THE COURT: Okay.

16 He is free to stay, free to go, whatever.

17 Do we want to return to this, Mr. Panzer?

18 MR. PANZER: We are prepared, Your Honor.

19 THE COURT: Okay.

20 Would the witness return to the stand.

21 I'm going to ask that the oath be readministered.

22 He's still under oath, but I ask that it be readministered.

23 DEBORAH JOE GOLDSBERRY,  
24 called as a witness for the plaintiff, having been duly sworn,  
25 was examined and testified as follows:

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Goldsberry - Direct / Bevan

1 THE CLERK: Do you affirm?

2 THE WITNESS: Affirm.

3 Deborah Joe Goldsberry, G-o-l-d-s-b-e-r-r-y.

4 DIRECT EXAMINATION, CONTINUED

5 BY MR. BEVAN:

6 Q. Good afternoon, ma'am.

7 Have you been represented in the matter by Mr. Bill  
8 Panzer?

9 A. Yes.

10 Q. And has he advised you that on or about January 31st, 2007,  
11 Judge Breyer signed an order compelling you to testify in this  
12 matter, pursuant to a grant of immunity by the Department of  
13 Justice, such that if you were to testify in this matter,

14 nothing you would say on the witness stand could be used  
15 against you save and except for a prosecution for perjury,  
16 false declaration or otherwise failing to comply with this  
17 order.

18 Have you been so advised?

19 A. I've found the service and the way this case unfolds to be  
20 nearly impossible to follow, so up to the moment I'm still not  
21 sure where I stand legally, what subpoena, what kind of  
22 immunity, how many times have I been subpoenaed, for what  
23 court, on what dates and on what cases, nothing has been clear.

24 Q. Okay.

25 Let me advise you for purposes of these questions,

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Goldsberry - Direct / Bevan

1 you have been ordered by Judge Breyer to testify in this case,  
2 to testify in this case pursuant to a grant of immunity, which  
3 gives you protection from having anything you say during your  
4 testimony used against you save and except for the exception I  
5 just mentioned.

6 Do you understand what I just indicated to you?

7 A. Not exactly, but I'll take your word for it.

8 Q. Okay.

9 Is it correct, Ms. Goldsberry, that sometime in or  
10 about 1998, you purchased quantities of marijuana from  
11 Mr. Rosenthal at the location of 1626 East 22nd Street in  
12 Oakland, or elsewhere, from Mr. Rosenthal?

13 A. Sir, with respect to the Court, with respect to the  
14 prosecutor and respect to the judge, I decline to answer the  
15 questions. I would like to invoke my Fifth Amendment right.

16 Furthermore, I think that this prosecution is

17 against the will of the people, against the will of the  
18 citizens, and it's actually harming the citizens of California.  
19 And I believe it would be illegal and immoral for me to  
20 participate in the prosecution because of that.

21 And, in fact, I know deep in your heart you both  
22 share that same view, although Mr. Bevan, I know you are upset  
23 and taking this very personally, but Judge Breyer, I know you  
24 are a good man and you know this is right.

25 It's a political movement and there is nothing that 1356

Goldsberry - Direct / Bevan

1 will change my mind about the fact that I will not answer  
2 questions or participate in a travesty of justice that will  
3 hurt my friends and the people around me and our community.  
4 That would be illegal, and that would be immoral.

5 And you can't make me do that.

6 Q. Okay.

7 And would it be your intention, Ms. Goldsberry, that  
8 if you were asked other questions having to do with your  
9 purchases of marijuana from Mr. Rosenthal during the period  
10 between 1998 through February 12, 2002, or anything else having  
11 to do with your relationship pertaining to marijuana with  
12 Mr. Rosenthal, including a receipt that is in evidence from the  
13 Berkeley Patients Group, evidencing your or the club's purchase  
14 of marijuana clones, would it be your intention to not answer  
15 those questions contrary to the order of Judge Breyer that you  
16 do so?

17 A. Again, with respect to the Court, it's my firm belief that  
18 it would be immoral and illegal for me to answer any of your  
19 questions, and it's important for me to be a moral person. So  
20 I respectfully decline and I choose to invoke my Fifth

21 Amendment right to decline to answer your questions and to  
22 remain silent.

23 And not only that but to teach other people how to  
24 stand up against this kind of oppression and to make this  
25 change once and for all.

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Goldsberry - Direct / Bevan

1 So I'm honored to be here and I'm honored to stand  
2 up for what is actually right and what is just.

3 So thank you.

4 MR. BEVAN: Your Honor, based on this witness'  
5 refusal or indication that she would refuse to answer questions  
6 propounded to her on the subject matter pertinent to this case,  
7 and on the basis of the United States' proffer as filed  
8 yesterday pertaining to her anticipated testimony, which is  
9 that if she were to testify truthfully and completely, she  
10 would confirm and establish that she purchased quantities of  
11 marijuana at a location known as 1626 East 22nd Street in  
12 Oakland.

13 Further, that the organization that she is  
14 affiliated with or was during that period of time purchased  
15 quantities of marijuana from Mr. Rosenthal.

16 Further, that she would confirm that the sales  
17 receipt that was found on February 12, 2002, indicating a sale  
18 to the Berkeley Patients Group of marijuana plants that that  
19 receipt reflected sales of plants by or on behalf of  
20 Mr. Rosenthal. That she is the Debbie and she is the or  
21 represents the Berkeley Patients Group, and that she is at  
22 (510)540-6013, as listed on Exhibit 25M offered in evidence by  
23 the defense.

24 Further, that she received numerous telephone calls  
25 from Mr. Rosenthal during the period of September 2000 to

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Examination by the Court

1 December 2001, specifically approximately 58 calls from  
2 Mr. Rosenthal. And that her number or the Berkeley Patients  
3 Group number of (510)540-6013 is listed in one of the notebooks  
4 recovered at the Mandela site, specifically 25A at Bates page  
5 3142.

6 Based on that proffer and this witness' indication  
7 that she would refuse, I would ask the Court to inquire of  
8 Ms. Goldsberry whether it would be her intention to refuse  
9 questions propounded by the prosecution at trial. And if she  
10 indicates that her refusal would continue, I would ask Your  
11 Honor to hold her in contempt for refusal to obey your order.

12 THE COURT: Ms. Goldsberry, you understand that you  
13 are under an order of the Court to respond to these questions.  
14 You have been granted immunity, which means that you cannot be  
15 prosecuted for anything that you may say. As a result of  
16 the -- other than if you don't testify honestly.

17 You have mentioned that you are asserting your Fifth  
18 Amendment privilege. I would advise you that by the grant of  
19 immunity for this subject, you do not have a Fifth Amendment  
20 privilege, because the privilege is against self-incrimination  
21 and the Government has -- and the Court has ordered that you  
22 can't incriminate yourself by virtue of the testimony.

23 I understand that is a legal concept, but you have  
24 counsel here to advise you. And if you have any confusion in  
25 your own mind on that issue, I would adjourn your appearances

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Examination by the Court

1 right now and you can talk to Mr. Panzer on that issue. That  
2 is a separate issue, in some respects from the other reasons  
3 why you are refusing to testify.

4 So I just want to make sure that you understand that  
5 from the Court's point of view, an opinion, by the way, you may  
6 not share, but from the Court's point of view, you have no  
7 privilege against self-incrimination once I ordered you to  
8 testify under a grant of immunity.

9 I have ordered you to testify. The question is  
10 whether, notwithstanding that order, and the possible  
11 consequences of the order which would be up to confinement for  
12 some indefinite period, by indefinite, I mean, during the  
13 course of the trial, you could be confined in a facility, in a  
14 custodial situation. You could also be fined, and  
15 notwithstanding whether the trial concludes without your  
16 testimony, or if it did conclude without your testimony, you  
17 still are subject to the possibility of a criminal indictment  
18 or criminal charge brought by the United States Attorney and  
19 the United States Government for failure to testify in these  
20 proceedings. Those are possibilities.

21 So having those in mind, is it -- what is your  
22 desire with respect to responding to the questions of the  
23 prosecutor? Will you respond to those questions or will you  
24 not, even though ordered to testify?

25 THE WITNESS: Sir, respectfully, again, I feel like

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Examination by the Court

1 this prosecution is against the will of my community, against  
2 the will of the voters of the United States, not just of  
3 California. I believe that it is causing imminent harm,  
4 potentially death to my friends, my family, the people that I

5 love. I believe it would be immoral and illegal for me to  
6 participate.

7           And as much as I respect the Court, I can't wait  
8 until you guys are on our side of this thing. This thing is  
9 going to change, and I appreciate that, and I'm sure you all  
10 do. I have no idea why we are here. This is a literal joke.

11           And the truth is I can't participate. I have  
12 thought about the harm. I've taken the threats seriously.  
13 They have sent the DEA after me. I am living in fear and that  
14 is going to do nothing to break my will because I'm a good  
15 citizen. I support this community.

16           And what I don't support is what this Court is doing  
17 to the citizens of my community. And there is no way that I  
18 can or will participate because that is what will cause harm.

19           And I will not be forced by the Government to cause  
20 harm to my community or to go against the will of our citizens,  
21 the voters and the people in my community, the people of the  
22 United States of America.

23           So I respectfully decline to ever participate in  
24 something that harms my community. And I beg you not to make  
25 me do that.

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Examination by the Court

1           MR. BEVAN: I have nothing further, Your Honor.

2           THE COURT: Okay. Thank you, would you please  
3 remain in the courtroom.

4           Who is the next witness?

5           MR. BEVAN: It would be Kathleen Lemons Capetti.

6           THE COURT: Okay.

7           MR. LICHTER: Lawrence Jeffrey Lichter, Your Honor.

8 May I be heard on this matter? Ms. Capetti is in the  
9 courtroom.

10 THE COURT: Yes.

11 MR. LICHTER: However, that is serendipity, because  
12 on March 2nd, this Court offered Mr. Bevan to order all  
13 subpoenaed witnesses back. And Mr. Bevan said, no, what he  
14 wanted to do is read a list of people to be ordered back, and  
15 Ms. Capetti was left off that list.

16 Based on that, I told her she could go on vacation.  
17 Now, I understand from Ms. Greenberger and from Nedra Ruiz that  
18 that was inadvertent, and so I have attempted to look at the  
19 materials that have been supplied, and I have brought  
20 Ms. Lemons back from her vacation, Ms. Capetti Lemons.

21 However, I ask that she not be asked to make any  
22 decisions today. And the reason I ask them, Your Honor, is  
23 because although I haven't seen the immunity order, I  
24 understand that it's not transactional immunity.

25 And I understand that Mr. Rosenthal is originally

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1 charged with a crime where he could get a ten-year mandatory  
2 minimum sentence. And if she has use immunity, not  
3 transactional immunity, she has some serious thinking to do,  
4 not just about the moral issues that the other people have  
5 raised, but about her own life, her own future. And she may  
6 very well decide that she wants to help Mr. Rosenthal by  
7 testifying truthfully.

8 However, I can't tell that today because we are not  
9 properly before the Court.

10 THE COURT: You are properly before the --

11 MR. LICHTER: I was released by the subpoena. I

12 would like to be subpoenaed again so she can talk with me over  
13 the weekend and testify Monday, if need be. Or be given  
14 transactional immunity and that would make my advice to her  
15 much more simple.

16 MR. BEVAN: Well, the immunity is not transactional  
17 immunity. It's use immunity. She has been properly subpoenaed  
18 for trial. Your Honor has extended that order, the  
19 effectiveness of that order to whatever trial date was  
20 pertinent to this case where we started May 14th.

21 My position is that the request and objections of  
22 counsel should be overruled. She has had plenty of time to  
23 think about the issues here. I would request that we proceed.

24 THE COURT: When did you consult with your client?

25 MR. LICHTER: After -- after I reviewed the

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1 transcript of May 2nd, where on page 33, it appeared -- line  
2 19, it appeared that she was released from the subpoena.

3 MR. BEVAN: I don't know what Counsel is talking  
4 about.

5 MS. HEADLEY: She was subpoenaed for the 2nd and the  
6 19th. There is an appearance on the 2nd where Nedra --

7 THE COURT: Are you telling --

8 MR. LICHTER: And she wasn't ordered back for any of  
9 these proceedings.

10 THE COURT: Here is what I'm trying to figure out.  
11 I'm trying to figure out are you saying to me that you need  
12 some additional time to consult with your client as to whether  
13 or not she is going to refuse to testify?

14 MR. LICHTER: Yes.

15 THE COURT: And how much additional time do you  
16 need?  
17 MR. LICHTER: The weekend, till Monday.  
18 THE COURT: Okay.  
19 MR. LICHTER: I understand that you have a trial  
20 going on. It wouldn't take longer than that.  
21 THE COURT: I'll consider that.  
22 MR. LICHTER: Thank you.  
23 THE COURT: Okay.  
24 Let's move on to the next person.  
25 MR. BEVAN: James Blair, also known as Jim Squatter,

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1 DBA Long Haul.  
2 JAMES SCOTT BLAIR, aka JIM SQUATTER  
3 called as a witness for the plaintiff, having been duly sworn,  
4 was examined and testified as follows:  
5 THE WITNESS: If you'll allow it, yes.  
6 THE CLERK: State your full name, spell your last  
7 name for the record.  
8 THE WITNESS: My full name is James Scott Blair,  
9 B-l-a-i-r.  
10 MR. GOLDROSEN: May I add before we start --  
11 Mark Goldrosen attorney for Mr. Blair.  
12 Mr. Blair received a subpoena yesterday to be here  
13 today. In accordance with that subpoena, he is here. We did  
14 not have an opportunity to file any objections in writing since  
15 he did not get a subpoena until yesterday afternoon, so I would  
16 like to join in all objections that were filed by other  
17 witnesses, particularly, that Mr. Blair's testimony would be  
18 cumulative and unnecessary to prove the point of distribution



22 I'm not sure that it's valid.

23 Q. Okay.

24 But do you understand, sir, that currently you are  
25 subject to a court order to testify in this case?

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Blair - Direct / Bevan

1 A. I'm not specifically aware of that.

2 Q. Okay.

3 I'm advising you right now that you are -- you have  
4 been ordered by Judge Breyer to testify in this case, when you  
5 were called as a witness by the Government, do you understand  
6 what I just indicated?

7 A. That you are trying to act as my attorney.

8 Q. No, I'm just advising that you have been ordered to testify  
9 in this case. Do you understand that?

10 A. I understand that that is what you have said.

11 THE COURT: Well, so there is no confusion. I'm  
12 ordering you to testify in the case. You are testifying under  
13 a grant of immunity, that is anything that you say in this case  
14 in response to the prosecution's questions cannot be used  
15 against you unless you didn't testify truthfully. So it's the  
16 Court's order that you testify.

17 Okay. Go ahead, Mr. Bevan.

18 BY MR. BEVAN:

19 Q. All right.

20 Mr. Blair, at any time during the period between  
21 1998 and February 12, 2002, did you acquire marijuana from  
22 Mr. Rosenthal or from anyone working in connection with  
23 Mr. Rosenthal?

24 A. At this time, I guess I'm defying the Court's order.

25 Q. So it would be your intention to refuse to answer that

Blair - Direct / Bevan

1 question if you were called before the jury in this case?

2 A. That is correct.

3 Q. And would it be your intention to similarly refuse any  
4 other question that was asked of you pertaining to that same  
5 subject matter or your connection in Long Haul or your  
6 connection to the number (510)486-1025, or anything else having  
7 to do with matters that are deemed pertinent by Judge Breyer  
8 and the prosecution going on in this case?

9 A. Absolutely.

10 MR. BEVAN: Based on this witness' indication, Your  
11 Honor, that he would refuse to answer questions along or  
12 involving that subject matter, and based on the proffer filed  
13 yesterday by the United States specifically that if  
14 Mr. Squatter -- Mr. Blair were to testify truthfully and fully  
15 in this case, he would acknowledge that he is or at that time  
16 was known or called Jim Squatter, that he is the Jim Squatter  
17 referenced on a piece of notepaper and recovered from inside  
18 the Mandela grow as having ordered and received two trays of  
19 marijuana; that he is, in fact, the person that Mr. Rosenthal  
20 called approximately 29 times between the period of  
21 December 1998 and December 2001 to the number (510)486-1025.

22 And further, that his testimony would reveal that he  
23 is the Jim Squatter associated with Long Haul at the number  
24 (510)486-1025 that is listed in Defendant's Exhibit 25M in  
25 evidence.

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Examination by the Court

1 And I would ask Your Honor to confirm with Mr. Blair  
2 that it would be his intention to disobey Your Honor's order.

3 And if he confirms that he does intend to disobey, I would ask  
4 Your Honor to hold Mr. Blair in contempt.

5 THE COURT: Mr. Blair, you are under a court order  
6 to testify. And if you fail to respond to the prosecution's  
7 questions, I can hold you in contempt. If I hold you in  
8 contempt, I can impose certain sanctions. One could possibly  
9 be placing you in custody. Another could be fining you. The  
10 third, another alternative is that the Government has the  
11 choice, if they so choose, to seek a criminal charge against  
12 you for refusing to testify.

13 So I want you to have those thoughts in mind. In  
14 having those thoughts in mind and the fact that the Court has  
15 ordered you to testify, will you testify in this matter?

16 THE WITNESS: I will not.

17 THE COURT: Okay.

18 You may step down. Would you please remain in the  
19 courtroom.

20 MR. BEVAN: That would leave, Your Honor, Cory Okie.

21 MS. REGAN: Your Honor, we have not received that  
22 report.

23 CORY OKIE,  
24 called as a witness for the plaintiff, having been duly sworn,  
25 was examined and testified as follows:

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Okie - Direct / Bevan

1 THE CLERK: State your full name, spell your last  
2 name for the record.

3 THE WITNESS: Cory Okie, O-k-i-e.

4 DIRECT EXAMINATION

5 BY MR. BEVAN:

6 Q. Mr. Okie, have you been represented in this matter by an  
7 attorney?

8 A. Yes.

9 Q. And what is the name of that attorney?

10 A. Lauren Regan.

11 Q. Okay.

12 And --

13 MS. REGAN: At this time, we will object again. We  
14 received these documentations that Mr. Bevan referenced, and  
15 neither of them indicate the factual information that he has  
16 represented to the Court, and I would like to tender them to  
17 you.

18 THE COURT: I think it's not terribly relevant to my  
19 consideration and I'll tell you why. If there is a dispute as  
20 to what this witness would say, so be it. I can't resolve  
21 these types of disputes. The question is whether or not he has  
22 been immunized.

23 The Government has a proffer, you have suggested  
24 that that proffer is in error. You might be right. I don't  
25 know. But I am trying to avoid the confrontation. I don't

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Okie - Direct / Bevan

1 know that I can, at this point. And so I'm going to permit  
2 Mr. Bevan to call this witness, and see what this witness is  
3 going to do.

4 MS. REGAN: Okay, Your Honor. For the record --

5 THE COURT: You can submit them.

6 MS. REGAN: -- the proper basis was that address  
7 that we discussed. Mr. Bevan indicated that the address was  
8 from a report by his agent. There is no address on either of  
9 these.

10 THE COURT: Okay. Thank you very much.

11 Go ahead.

12 BY MR. BEVAN:

13 Q. Mr. Okie, has your counsel, Ms. Regan, advised you that on  
14 or about January 31st, 2007, Judge Breyer, who is the judge in  
15 this courtroom presiding over the trial against Mr. Rosenthal  
16 by the United States, that Judge Breyer signed an order  
17 requiring you to testify in this trial subject to a formal  
18 grant of immunity from the Department of Justice? Which means  
19 that nothing you would say in this case could be used against  
20 you save and except for a prosecution for perjury, giving false  
21 testimony or otherwise failing to comply with Judge Breyer's  
22 order.

23 Have you been advised of that?

24 A. Not -- not entirely. I was under the impression that the  
25 immunity pertained to the tax evasion charges which have since

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Okie - Direct / Bevan

1 been dismissed.

2 Q. And I'm advising you now that the order is not limited to a  
3 particular subject matter but pertains to the case against  
4 Mr. Rosenthal. Do you understand what I just indicated that  
5 it's not limited to?

6 A. Somewhat, yes.

7 Q. Okay.

8 THE COURT: So it's not unclear in your mind, I'm  
9 ordering you to testify on the matters that the Government is  
10 going to ask you questions about, all right?

11 THE WITNESS: Okay.

12 BY MR. BEVAN:

13 Q. Mr. Okie, at any time during the period between 1998 to  
14 2002, specifically February 12, 2002, were you associated with  
15 a number (530)521-5351?

16 A. With all due respect to the Court, I refuse to answer that  
17 question.

18 Q. Were you, Mr. Okie, associated in any way with the address  
19 be it a residence or a mailing address of 247 North Main Street  
20 in Fort Bragg, zip code 95437?

21 A. No, not at all.

22 Q. Were you, sir -- did you at any time, purchase or acquire  
23 or have a conversation with Mr. Rosenthal, Ed Rosenthal, about  
24 acquiring marijuana in any form?

25 A. Again, with all due respect to the Court, I refuse to

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Okie - Direct / Bevan

1 answer that.

2 Q. And are you refusing to answer on the basis of the advise  
3 of your counsel?

4 A. Yes.

5 Q. Are you aware that your refusal is in violation of Judge  
6 Breyer's order that you do answer those questions?

7 A. Yes.

8 Q. And, Mr. Okie, would it be your intention to refuse other  
9 questions that may be asked of you when you are called to  
10 testify in front of the jury in this case having to do with the  
11 same subject matter that I just asked you about which was your  
12 acquisition of marijuana from Mr. Rosenthal or anyone working  
13 for Mr. Rosenthal? Would it be your intention to refuse to  
14 answer those questions?

15 A. Yes, I refuse.

16 MR. BEVAN: Your Honor, on the basis of Mr. Okie's

17 refusal this afternoon to answer those questions, and on the  
18 basis of the United States' proffer which is that he is the  
19 Cory Okie associated with the number (530)521-5351, listed or  
20 identified as Cory on Defendant's Exhibit 25M, that if he were  
21 to testify truthfully and completely when called to testify, he  
22 is the Cory listed on a notepaper recovered from inside the  
23 Mandela Parkway grow as having ordered and received two trays  
24 of marijuana clones, specifically the strain of Max 49 and  
25 Romulan.

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1 Further, that it was his number that was called  
2 approximately three times from Mr. Rosenthal's cell phone  
3 during the period between May 2001 to December 2001.

4 On the basis of his refusal this afternoon, and the  
5 Government's proffer, I would ask Your Honor to inquire of  
6 Mr. Okie if it's his intention to refuse to answer questions.  
7 If he confirms that it is, I would ask Your Honor to find him  
8 in contempt.

9 THE COURT: Mr. Okie, in response to one question  
10 that the Government asked you, you said that you were relying  
11 on advise of counsel. And I am not going to inquire to what  
12 advice your attorney gave you in this matter but I want to  
13 explain something to you. When a grant of immunity is given as  
14 it has been in your case, and when you are ordered by the Court  
15 to testify, regardless of the advice that your attorney gives,  
16 the decision --

17 THE WITNESS: Let me --

18 THE COURT: -- as to whether you testify or not must  
19 be your own. I want to put that on the record because --

20 THE WITNESS: Can I correct myself? It is my  
21 intention to not testify, it's not hers. I didn't understand  
22 the question.

23 THE COURT: I don't know that the question -- I  
24 thought perhaps you didn't, but I didn't know.

25 THE WITNESS: No, I'm sorry. It's my intention.

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Examination by the Court

1 THE COURT: Okay.

2 Notwithstanding your attorney can advise you one way  
3 or the other, that is a matter between you and your attorney.  
4 But it has to be your decision itself, not that I'm making this  
5 decision because my lawyer told me I should make this decision.  
6 It has to be your own decision, though, in fact, your lawyer  
7 may very well have told you to make this decision, I don't  
8 know, okay? It has to be your decision.

9 THE WITNESS: It is my decision, yes.

10 THE COURT: Okay.

11 THE WITNESS: I understand.

12 THE COURT: Also you understand, as I have told the  
13 other witnesses this afternoon, that if you refuse to answer  
14 questions, I can hold you in contempt, that there are sanctions  
15 for holding you in contempt, such as confinement -- the  
16 possibility of confinement, fines, and in addition, the  
17 Government has the right, should it choose to exercise it, to  
18 seek a criminal charge against you for failure to follow the  
19 Court's order in answering these questions.

20 I want to make sure you understand that. Do you  
21 understand that?

22 THE WITNESS: Yes.

23 THE COURT: Okay.

24                    Now, having that in mind, will you answer the  
25 prosecution's questions?

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Examination by the Court

1                    THE WITNESS: No.

2                    THE COURT: Okay. Would you please have a seat and  
3 remain in the courtroom.

4                    MR. BEVAN: That completes --

5                    THE COURT: Did we deal with Vince Brown?

6                    MR. BEVAN: You released him.

7                    THE COURT: Released. Okay.

8                    All right. So if my list is correct, I have of  
9 those people who have refused to testify, Mr. Lundeen,  
10 Mr. Fontan, Mr. Schwartz, Ms. Goldsberry, Mr. Okie, and we  
11 haven't -- and Ms. Capetti has been continued.

12                   MR. BEVAN: Did you mention James Blair?

13                   THE COURT: Didn't. James Blair. I haven't gotten  
14 to him, yes. Jim Squatter, also known as James Blair, maybe  
15 his actual name is James Blair.

16                   And Ms. Capetti is to be determined at a later date.

17                   All right. Now, what I would like to know from  
18 the -- what is the Government's position assuming I hold these  
19 people in contempt, what then is the Government's position as  
20 the appropriate sanction?

21                   MR. BEVAN: Your Honor, the procedural context of  
22 this case was from our perspective was not ideal in the sense  
23 that -- and I'm not -- I'm just -- that is as a preamble. This  
24 is the Friday before closing argument on Tuesday. If --

25                   THE COURT: We don't quite know that because I

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1 haven't received --

2 MR. BEVAN: Likely.

3 THE COURT: I mean, there are possibilities. There  
4 are a couple of possibilities.

5 But go ahead and we'll run through them.

6 MR. BEVAN: I -- there is two forms of contempt,  
7 civil and criminal. At this point, I am asking Your Honor to  
8 make a finding of civil contempt as to all the witnesses who  
9 have indicated that they would decline to testify.

10 I would further ask Your Honor to make inquiry of  
11 the witnesses as to whether or not being confined between now  
12 and the resumption of trial at 8:30 on Tuesday, would, in fact,  
13 whether they would change their decision if they were to be  
14 held in custody during that three-day period.

15 I believe the law is that upon submission of the  
16 case to the jury, that they would be entitled to be released  
17 from a finding of civil contempt because at that point they can  
18 no longer purge their contempt.

19 If, in fact, the witnesses indicate to you that  
20 being jailed for those three days would not make a difference,  
21 and would not induce them to change their or purge their  
22 contempt, the United States, given the posture of the case  
23 right now, would not ask that they be jailed, given that the  
24 remedy would be ineffective.

25 But I would ask Your Honor --

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1 THE COURT: I think I certainly can do that. And  
2 then -- but is it your suggestion that I impose no remedy?

3 MR. BEVAN: I'm requesting, Your Honor.

4 THE COURT: I would go through this procedure, maybe  
5 that is what I have to do. I'll do that now. You don't have  
6 to say anything. I'll do that now and then we'll see where we  
7 are.

8 Could I have the named witness just to come forward  
9 with their attorneys. They don't have to resume the witness  
10 stand.

11 (Witnesses and counsel step forward.)

12 THE COURT: Okay. Let the record reflect, I have in  
13 front of me Mr. Lundeen, Mr. Fontan, Mr. Schwartz,  
14 Ms. Goldsberry, Mr. Okie, and Mr. Blair.

15 Is that correct? Each individual is accompanied by  
16 counsel?

17 And the question I have for each of you is if I do  
18 find you in contempt, and I would indicate that the Court would  
19 find you in contempt, though I haven't done so quite yet, but I  
20 would find you in contempt. I need to know from each of you  
21 whether having been found in contempt, you would -- you would  
22 persist in your refusal to answer. I think that's the first  
23 question I ask.

24 Identify yourself for the record.

25 MS. HEADLEY: Laurel Headley on behalf of

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1 Mr. Lundeen.

2 It's occurring to me that while we establish that  
3 these witnesses have the intention of not testifying, we are  
4 not at trial today. And Tuesday would be the day that they  
5 actually would be refusing to testify at trial. And that would  
6 be the actual moment of contempt. I'm wondering whether or not  
7 procedurally we have a contempt.

8 THE COURT: I don't think that's correct. Well,  
9 fine. Are you -- I can act today, then. I think that is an  
10 incorrect statement of the law. That they are -- I would find  
11 each of them in contempt now.

12 Then they can purge their contempt. They can purge  
13 their contempt by testifying and I would give them that option.  
14 Of course, I would give them that option. This is a civil  
15 contempt proceeding. The purpose of civil contempt is to seek  
16 compliance with the Court order. So, of course, I would give  
17 them that option.

18 I will do so as to Mr. Lundeen. I don't know that  
19 this is necessarily in everybody's interest, your position in  
20 the matter.

21 I'll find Mr. Lundeen in contempt now.

22 Now, I don't know that I would find the others in  
23 contempt unless they are going to take the same position that  
24 you want to take.

25 MS. HEADLEY: Your Honor, if I might, this does put 1379

1 us in a very awkward position, and I think --

2 THE COURT: I'm not quite sure what the awkward  
3 position is other than -- I mean, the court has postponed this.  
4 In terms of procedure, this cannot come as a surprise to anyone  
5 in this courtroom. The -- because, in fact, we have had  
6 several discussions about this process and at least the Court  
7 has taken the position that I wanted to wait until the very end  
8 to make several determinations, so that, and I made those  
9 determinations. I know that you have submitted your objections  
10 on its cumulative nature and other procedural objections that

11 you have raised. And I've overruled them.

12 Now, the question is how do we proceed from here.  
13 There are a couple of options. One option is that I could  
14 find, as I will, as I have your client, I could find all of  
15 them in contempt. I can ask them the question, would being  
16 confined -- in their view being confined over the Memorial Day  
17 weekend result in their changing their mind.

18 I can ask that question, the Government has asked me  
19 to ask that question and I don't think it's an improper  
20 question to ask.

21 MR. LUNDEEN: At one point, it wouldn't.

22 THE COURT: So that's what I'm doing.

23 MS. HEADLEY: With regard to my referral to the  
24 awkward position. The awkward position is that the Court now  
25 is discussing civil contempt, and the civil contempt remedy is  
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1 to coercively jail people so that they might change their mind.  
2 The concern that I have with this Court imposing civil  
3 contempt, finding that my client is in civil contempt is that  
4 that leaves open the question of criminal contempt. If --

5 THE COURT: I don't think I -- I don't know that I  
6 could find criminal contempt. I have always treated this as a  
7 civil contempt.

8 First of all, criminal contempt I think you are  
9 entitled to a jury trial, aren't you? This is a civil contempt  
10 proceeding.

11 The question is -- I think I have to go through this  
12 procedure. I think the alternative that I was considering was  
13 not entering any contempt order at this time but awaiting  
14 Tuesday morning to do so to see whether or not anything changes

15 their mind. What I was thinking about -- I'm not quite sure I  
16 really understand the Government's question.

17 Is there anybody -- anybody would -- should step  
18 forward who believes that by being in jail for three days they  
19 will then change their mind. Is there anybody who believes  
20 that?

21 (No response.)

22 THE COURT: You don't have to say no. Okay. All  
23 right. I mean, I understand that. I don't -- I -- and I think  
24 the Government asked that question to have that as part of the  
25 record of these proceedings. And I understand that. And I

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1 accept that statement.

2 So then the question is -- well, now, I turn to the  
3 Government. What do you want me to do? I can hold them in  
4 contempt today. I can require them to come on Tuesday morning  
5 to see if they change their minds. I can do that. Or do you  
6 have some other suggestion?

7 MR. BEVAN: I would ask that they be found in  
8 contempt today, Your Honor, based on their refusal given the  
9 fact that the law absolutely requires that this process be  
10 conducted outside the presence of the jury, which Your Honor  
11 has done.

12 And I would ask following a finding of contempt that  
13 you order these witnesses back Tuesday morning at whatever time  
14 Your Honor directs to on a day in which the jury is here and  
15 they could testify to find out if, in fact, they are inclined  
16 to purge the contempt by changing their decision.

17 THE COURT: I think that's actually the correct

18 procedure.

19 MS. HEADLEY: May I?

20 THE COURT: Of course -- if anybody believes it's  
21 not the correct procedure, they should voice their -- that  
22 doesn't mean their willingness to accept the procedure, but if  
23 there is a legal reason why I shouldn't follow that procedure,  
24 then I'll consider it.

25 MS. HEADLEY: On behalf of Brian Lundeen -- Laurel

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1 Headley again.

2 I do believe that is a perfectly acceptable  
3 procedure. This is my concern and I will just put it out  
4 there.

5 Mr. Bevan has already voiced an intention, and he,  
6 and correct me if this has changed, of criminally prosecuting  
7 Mr. Lundeen if Mr. Lundeen refuses to testify.

8 If the Court finds him in civil contempt, there will  
9 remain the possibility that Mr. Bevan will bring a separate  
10 information against him. And for that matter, perhaps all of  
11 these witnesses. And a number of them.

12 My -- my concern is that if the Court finds civil  
13 contempt today, it will lose jurisdiction down the line to find  
14 criminal contempt, which I believe that the Court has the  
15 authority to do under 401 and 402, 18 U.S.C. 401 and 402. And  
16 what I would --

17 THE COURT: Well, would I lose jurisdiction? I  
18 don't know whether I would or wouldn't. If there is a criminal  
19 contempt charge, it has to be returned by a Grand Jury. It  
20 would then go through a -- it would then be assigned by the  
21 random number if either side believed that -- if either side

22 believed it would be related to me and if, and I underscore if,  
23 I agreed with that proposition, it then would be a related  
24 case.

25 But I can't give any assurance nor do I think it's 1383

1 proper of either, one, whatever the Government's going to --  
2 whatever the Government is going to do is the Government's  
3 business in the first instance. And they don't have to commit  
4 to doing something or not doing something in connection with  
5 this matter.

6 All they have committed to do and all the Court has  
7 committed to do is to ensure that if a witness testifies, that  
8 testimony cannot be used against them in a criminal  
9 prosecution, if there is a criminal prosecution.

10 But that's a matter between the Government and the  
11 Grand Jury and decisions to be made further on down the line,  
12 at least not decisions made by this Court.

13 MS. HEADLEY: And I am suggesting that the Court can  
14 go further than that, and make a decision to hold these -- hold  
15 my witness, hold Mr. Lundeen, specifically in criminal  
16 contempt.

17 THE COURT: Okay. Let me make it clear. I  
18 understand what you are saying.

19 I don't know that I have that power. If I had that  
20 power, I would refuse to exercise it. I am treating this  
21 matter, solely, as a civil contempt proceeding. That's the way  
22 the Court is going to treat this matter at this instance.

23 So the invitation is respectfully declined if, in  
24 fact, that is a correct statement of the law. I don't know

25 whether it is or not. But I need not go there because I'm not  
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1 going to transpose a civil contempt into a -- in a criminal  
2 contempt in these proceedings.

3 Now, I've advised each of the witnesses that the  
4 Government has the right to bring a charge of criminal contempt  
5 should they choose to do so and they think that the facts  
6 warrant it and the circumstances warrant it in their  
7 discretion. I think they have that power to do so.

8 I may, by the way, I am not giving a legal opinion  
9 on that, that is not in front of me now, but it's a potential  
10 consequence. Even if it's unsuccessful, it's a potential  
11 consequence.

12 So I thought that I had a duty to advise the  
13 witnesses as they spoke that that is a possible consequence.  
14 But I'm not converting that into -- this into a criminal  
15 proceeding, I'm not.

16 MR. GOLDROSEN: I'm not going to beat this down. I  
17 just want to point out -- again, it's Mark Goldrosen for  
18 witness Blair.

19 I think the Court does have discretion to find  
20 summarily criminal contempt under Rule 42(a)(b), which allows  
21 for summary disposition.

22 THE COURT: The Government is not asking me to do  
23 so.

24 MR. GOLDROSEN: And that the Court could, and the  
25 Court has received briefing on this point already.

1385

1 THE COURT: You are saying that I have been

2 inattentive. Well, that's entirely possible.

3 MR. GOLDROSEN: It was quite some time ago, Your  
4 Honor. But the Court has received briefing that the Court --

5 THE COURT: Anyway, I'm not going to do it. I mean,  
6 the long and short of it is I can't tell you the irony that --  
7 I mean, it doesn't even escape me that a witness would spend a  
8 longer time in custody than the defendant would spend if  
9 convicted.

10 And by the way, that is an irony that is not lost on  
11 the prosecution either. They haven't sought -- they have said  
12 at the beginning of this process and they continue to say  
13 today, that these witnesses should not be confined, that is  
14 their position. I think it's in fairness to them they are  
15 taking that position as to this proceeding today.

16 And so I don't think it ought to be raised.

17 Okay. Even though I may have the power to do it.

18 MR. BEVAN: Just to confirm, Your Honor, at this  
19 time we are not asking Your Honor to find these witnesses in  
20 criminal contempt.

21 THE COURT: Okay. And I'm not going to do it.

22 MS. HEADLEY: May I invite Mr. Bevan to clarify for  
23 my purposes, so I don't waste any more of the Court's time,  
24 whether or not he has intentions of filing a separate criminal  
25 case based on today's events?

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1 THE COURT: Okay. I'm not going to -- I don't think  
2 that is a question that -- the prosecution can answer it if  
3 they wish to but they are under no obligation to do so.

4 MR. BEVAN: That is an inappropriate question.

5 THE COURT: I think it is inappropriate.

6 MR. BEVAN: It's premature. And I don't know what  
7 is going to happen next week. And whether or not there is a  
8 criminal proceeding is -- will be determined at some future  
9 point.

10 MR. PANZER: William Panzer on behalf of  
11 Ms. Goldsberry.

12 I want to thank the Government for taking a fair and  
13 measured and reasonable position here today. Regarding  
14 Ms. Goldsberry, I would advise the Court that I have spoken  
15 with my client and I am a thousand percent sure that  
16 incarceration would not make her change her mind.

17 THE COURT: Okay.

18 MR. PANZER: I would advise the Court, Tuesday  
19 morning will be a very difficult --

20 THE COURT: Let me tell you, that argument I don't  
21 care what anybody is doing Tuesday morning. I really don't  
22 care. I -- because of what I'm doing Tuesday morning. So the  
23 Court is being somewhat selfish because I have 14 jurors coming  
24 in, I have a defendant on trial, and I have the prosecution  
25 all -- I don't know, I forgot what this number is, 1, 2, 3, 4,

1387

1 5, 6, and the person out in the -- Ms. Capetti, 7 will be  
2 ordered to be here at 8:00 a.m. on Tuesday. And not to be  
3 late.

4 Okay.

5 MR. PANZER: Your Honor, is counsel ordered too?

6 THE COURT: Am I ordering the attorneys? Well, it's  
7 probably a help to order the attorneys.

8 MS. HEADLEY: Yes, it is.

9 THE COURT: Yes, of course.

10 MR. PANZER: Thank you.

11 THE COURT: I don't care what is being tried  
12 somewhere else. It will be a -- well, depends. Now let me  
13 explain what I'm doing: As to each of the named individuals  
14 who are standing before me, I am finding you in civil contempt.

15 I am not imposing any sanction on you at this time,  
16 other than you've been found in contempt. You may purge your  
17 contempt, that is eliminate it, I don't know what the right  
18 word is. Set it aside, if you change your mind and testify.

19 I want you to do a couple of things, and I know how  
20 strongly you all feel about it. I don't even think there is  
21 any question as to the sincerity of the beliefs that you hold,  
22 all right?

23 I want you to think about it. I want you to  
24 carefully consider it. I want you to talk to the lawyers and  
25 then I want you to make a decision. And please you must appear

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1 Tuesday at 8:00 o'clock in the courtroom. And advise me as to  
2 what you will do.

3 If, in fact, you choose to testify, the questions  
4 will be limited to basically the proffer presented by the  
5 Government. So you know what the scope of the examination will  
6 be at least on direct. I can't predict the scope of testimony  
7 on cross, obviously.

8 So are there any unanswered questions from the  
9 Court?

10 MR. PANZER: No.

11 THE COURT: I want to thank you.

12 MS. REGAN: I'll apprise you that I do have a

13 Federal Court sentencing in Eugene, Oregon on Tuesday at 9:00  
14 o'clock in the morning.

15 THE COURT: Well, then, you better make arrangements  
16 for other counsel to be here. Okay? That is your obligation.  
17 And I'm advising you that your client has to be represented in  
18 these proceedings. And it's your obligation to find a lawyer  
19 who will come in and appear on your -- representing your  
20 client.

21 In front of Judge Hogan?

22 MS. REGAN: Judge Akin.

23 THE COURT: Judge Akin has longevity over me so  
24 Judge Akin will take precedence. But, anyway, that is the  
25 order of the Court.

1389

1 I also want to express these are sensitive issues  
2 which are held very strongly. I will say that the decorum  
3 today was excellent. I think that if something comes out of it  
4 as everyone should look, you can see that you can express your  
5 views in a -- in a civilized, which I call an appropriate way  
6 of decorum in a courtroom that actually adds dignity to the  
7 views that you express.

8 All right. Thank you very much. This proceeding is  
9 concluded but I need to talk to counsel in the case.

10 MR. PANZER: Thank you, Your Honor.

11 MS. HEADLEY: Thank you, Your Honor.

12 THE COURT: All right, let the record reflect the  
13 parties are still present. The session will continue.

14 I need to know from the defense, assuming that none  
15 of these people testify, and I think that at least the

16 indication is that they will not testify, the Government then  
17 will rest; is that correct?

18 MR. BEVAN: It is, Your Honor. We actually -- we  
19 have subscriber information from the telephone company that I  
20 would actually reference when I went through all the  
21 stipulations of the parties and told the jury that there were  
22 records from Cingular that was still outstanding, I misspoke.  
23 It was Verizon, a signature card or subscriber information. I  
24 would offer that, but with that the United States would rest.

25 THE COURT: Okay.

1390

1 All right, so then the question is what is the  
2 position of the defense in terms of both witnesses and  
3 Mr. Rosenthal?

4 MR. AMPARAN: I believe that the defense will rest.

5 THE COURT: Okay. And they will rest --  
6 Mr. Rosenthal, if you'll come forward, please. I think I have  
7 to do this again.

8 (Defendant steps forward.)

9 MR. AMPARAN: Your Honor, the sunglasses are not  
10 meant to be disrespectful to the Court, he suffered an eye  
11 injury.

12 THE DEFENDANT: Not violent, it was in --

13 THE COURT: Okay. Mr. Rosenthal, your counsel has  
14 indicated that you will not testify in this case. You have an  
15 absolute right to testify, an absolute right not to testify.  
16 Is it your desire to not testify in this case?

17 THE DEFENDANT: I can only testify if I'm allowed to  
18 have my corroborating witnesses, and since you have not allowed  
19 me to have my corroborating witnesses, you are not allowing me

20 to testify in effect. Thank you.

21 THE COURT: Okay. Well --

22 THE DEFENDANT: And you -- no matter what you say  
23 about it, you are not allowing me to testify because I cannot  
24 have corroborating witnesses. And that's the way it is.

25 THE COURT: And the Court has already spoken on this  
1391

1 subject as to which witnesses would be allowed to testify in  
2 support of Mr. Rosenthal.

3 THE DEFENDANT: You know, Your Honor, why didn't you  
4 do that to the Government's case and just cut up the  
5 Government's case and say you can't have this guy and that guy  
6 and that guy and then they would have no case?

7 THE COURT: The Court has indicated which witnesses  
8 it would permit and which witnesses it would not permit. And I  
9 think the record is clear on that.

10 All right, so let's talk about instructions.

11 MR. AMPARAN: The defense has one request.  
12 Mr. Rosenthal has asked me to request that he be allowed to  
13 associate as like a pro per and participate in his own closing  
14 argument. I said that that was strange, but I thought in  
15 respect to the client's wishes, I would make that request of  
16 the Court.

17 THE COURT: Right. And that request is denied.

18 THE DEFENDANT: So I can't even speak for myself in  
19 my own close, right, that is what you are saying? I just want  
20 that on the record, too, so that the whole world can hear it.

21 THE COURT: Yeah.

22 THE DEFENDANT: Is that correct, Your Honor? That

23 is what you are telling me that I cannot even speak in my own  
24 close? I can't even speak at my own trial? Is that -- that is  
25 what you're saying? Thanks.

1392

1 THE COURT: Actually, I didn't say that.

2 THE DEFENDANT: Yes, you did. You said I could not  
3 do my own close.

4 THE COURT: I said that.

5 THE DEFENDANT: Yes, thank you.

6 THE COURT: But I didn't say you could not speak at  
7 your own trial.

8 THE DEFENDANT: Why speak if I can't prove that what  
9 I'm saying is true?

10 THE COURT: I think --

11 THE DEFENDANT: You got it? Okay.

12 THE COURT: All right. The record is clear.

13 MR. AMPARAN: He will not be participating in the  
14 closing argument.

15 THE COURT: Sorry?

16 MR. AMPARAN: Just so the record is clear, the Court  
17 is saying he cannot participate.

18 THE COURT: Cannot.

19 MR. AMPARAN: Cannot.

20 THE COURT: That's correct.

21 MR. AMPARAN: Okay.

22 THE COURT: Okay. So let's see.

23 MS. GREENBERGER: Jury instructions?

24 THE COURT: Jury instructions.

25 All right. I sent out -- I'm looking for my set,

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1 who knows where they are.

2 Mark, do you know where my instructions are?

3 I sent out a proposed set of jury instructions.

4 THE DEFENDANT: Can I get one of these?

5 THE COURT: Why don't we take five minutes.

6 THE DEFENDANT: Can we get some extra copies of  
7 these, Your Honor?

8 THE COURT: I'll see what I have.

9 Ten minutes.

10 (Recess taken at 3:49 p.m.)

11 (Proceedings resumed at 3:55 p.m.)

12 THE COURT: Okay. Let the record reflect all  
13 parties are present. The defendant is present.

14 So I sent off, I think, a couple of days ago the  
15 proposed jury instructions. They are a compilation of a number  
16 of the instructions in an effort not to duplicate the case.  
17 What I need to know from the parties is do they have an  
18 objection as to any particular instruction?

19 MR. BEVAN: Your Honor, I have --

20 THE COURT: Yes.

21 MR. BEVAN: -- some suggested --

22 THE COURT: Fine.

23 MR. BEVAN: -- corrections.

24 THE COURT: Okay.

25 MR. BEVAN: I would just -- my -- I don't have any

1394

1 comments or corrections up to the testimony of the witness  
2 pleading guilty and receiving benefits.

3 THE COURT: Okay, let me go.

4 MR. AMPARAN: What page?

5 THE COURT: Let me do it this way: Then we don't  
6 have to go back and forth, I'm just going to go through each  
7 one and often then if somebody has an objection, let me know.

8 Okay, duty of jury to find facts.

9 MR. BEVAN: No objection.

10 MR. AMPARAN: No objection.

11 THE COURT: You don't have to say anything, just  
12 stop me when I get to something that creates a problem.

13 Charge against defendant. Presumption of innocence.  
14 Defendant's decision not to testify. Reasonable doubt. What  
15 is evidence. What is not evidence. Direct and circumstantial  
16 evidence. Credibility of witnesses. Testimony of witness  
17 under grant of immunity. I put down Mr. Tyler and Mr. Martin.  
18 Were there any other people who testified?

19 MR. BEVAN: Harvey Rudman testified under grant of  
20 immunity, but that fact was not elicited in front of the jury,  
21 so I don't think he should be mentioned in that group.

22 THE COURT: That fact was not elicited?

23 MR. BEVAN: Neither side elicited that he was  
24 testifying under grant of immunity.

25 THE COURT: So no evidence of it.

1395

1 MR. BEVAN: It is true that he was immunized.

2 THE COURT: What is the defense's position?

3 MR. AMPARAN: I believe that I would ask that his  
4 name be included.

5 THE COURT: I'm going to include it.

6 Nathan Tyler, Robert Martin and -- sorry.

7 MR. BEVAN: Harvey Rudman.

8 THE COURT: And Harvey Rudman. Okay.

9 The testimony of a witness pleading guilty and  
10 receiving benefits, Mr. Halloran and Mr. Watts. Anybody else?

11 MR. BEVAN: No, Your Honor. I have a suggestion.  
12 Correction, though.

13 THE COURT: Yeah.

14 MR. BEVAN: In the second paragraph, the second  
15 sentence reads that, "In particular, the Government promised to  
16 recommend a reduction and has promised to recommend a  
17 reduction" --

18 THE COURT: No, that's not true.

19 MR. BEVAN: -- "of their sentences, if you should  
20 find" --

21 THE COURT: I should take out that sentence.

22 MR. BEVAN: -- "assistance of the Government" --

23 THE COURT: No, it's all done. No. 1, it's done.

24 MR. BEVAN: As to Halloran, it's done. As to Watts  
25 it's not true. He pled to a plea agreement.

1396

1 THE COURT: I'm taking out that sentence in its  
2 entirety.

3 MR. AMPARAN: Your Honor, I would ask that it be in  
4 there. Specifically because it was brought up multiple times  
5 in relation to Mr. Halloran.

6 THE COURT: You can argue that they got benefits.  
7 That's what I'm leaving in. The particular benefit I'm taking  
8 out because, No. 1, it's not true, as to one.

9 And No. 2, you can argue anything you want to in  
10 terms of what the evidence shows this is the benefits that they

11 got.

12 MR. BEVAN: That's fine.

13 THE COURT: This sentence, by the way, is in there  
14 because it's prospective.

15 The testimony of an accomplice.

16 Are these people accomplices?

17 MR. AMPARAN: They were charged as --

18 THE COURT: Are they charged --

19 MS. GREENBERGER: Watts was.

20 THE COURT: Why isn't it -- why doesn't it fall  
21 within the last instruction?

22 MR. BEVAN: Well, I think that it does. I think  
23 this overlaps what is already uncovered, the fact is that it is  
24 clearer in the record that Watts was charged with  
25 Mr. Rosenthal. He is named in a count that the jury is going

1397

1 to be deliberating on.

2 And Mr. Halloran was not an accomplice. He was in  
3 the sense that he purchased marijuana from Mr. Rosenthal during  
4 the period in question, but here again, does that make him an  
5 accomplice?

6 THE COURT: Well, does it or doesn't it? I think it  
7 does, doesn't it?

8 MR. AMPARAN: I think it does. Otherwise, it would  
9 be to shield the Government's witnesses from the proper  
10 scrutiny.

11 THE COURT: Well, okay. I'm going to leave it in.

12 Evidence of other acts of defendant or acts and  
13 statements of others. I don't know to what extent we have this

14 here. But it's sort of a cautionary instruction.

15 Opinion evidence. Expert witnesses. Use of  
16 undercover agents and informants. Evidence of financial  
17 transactions limited purpose.

18 MR. AMPARAN: Your Honor, as to -- because of the  
19 language that has been used in the trial, the one that is on  
20 page 14 of 35, Government's use of undercover agents and  
21 informants, we would ask to just have it conform with testimony  
22 that has been adduced at trial, to have it be undercover agents  
23 and confidential sources. Because --

24 THE COURT: What do you want taken out?

25 MR. AMPARAN: In terms of the title, rather than --

1398

1 because there were no informants, there was testimony.

2 THE COURT: You want the word "and informants" taken  
3 out?

4 MR. AMPARAN: Out. And replaced with "confidential  
5 source" or whatever it is that the Government referred to it  
6 as.

7 MR. BEVAN: Fine.

8 THE COURT: "Use of undercover agents and  
9 confidential sources."

10 MR. BEVAN: Fine.

11 MR. AMPARAN: It's in the body, in the title and in  
12 the body, midway.

13 THE COURT: Okay.

14 All right.

15 Well, do you want me to give the financial  
16 transactions or not? I'm asking the defense.

17 I think I probably should.

18 MR. AMPARAN: I don't.

19 THE COURT: There has been plenty of evidence in  
20 that regard.

21 MR. AMPARAN: I think it may cause confusion, Your  
22 Honor.

23 MR. BEVAN: And actually, Your Honor, I don't think  
24 the last sentence is accurate because we have introduced  
25 financial transactions pertaining --

1399

1 THE COURT: Both sides want me not to give it?

2 MR. BEVAN: Correct.

3 MR. AMPARAN: Correct.

4 THE COURT: Thank you. I won't give it.

5 Okay. Evidence of medical marijuana. That should  
6 be "on the issue."

7 MR. BEVAN: Actually, Your Honor, the first sentence  
8 I don't believe is accurate.

9 THE COURT: Certain evidence has been received  
10 concerning the cultivation or distribution of marijuana for  
11 medical purposes.

12 MR. BEVAN: I think there has been reference and  
13 certainly there has been reference in the testimony that there  
14 is medical marijuana.

15 THE COURT: Well, how would one say it?

16 MR. BEVAN: I would simply say that there has been  
17 references during the trial to medical marijuana. This  
18 reference should not be considered by you.

19 THE COURT: Okay, certain evidence has been received  
20 concerning the cultivation or distribution of medical

21 marijuana? Instead of for medical purposes? I'm just trying  
22 to craft it.

23 MR. AMPARAN: Well, I'm concerned -- is the Court  
24 going to give this instruction plus some kind of instruction  
25 that --

1400

1 THE COURT: I'm not intending to give any more  
2 instructions than what I've just now given.

3 MR. BEVAN: I think this instruction conflicts, Your  
4 Honor, with what you advised the jury this past Wednesday, not  
5 to consider medical marijuana at all.

6 THE COURT: Well, here is the problem. Let me  
7 explain why I even, quote, let in, any evidence about medical  
8 marijuana.

9 First of all, it gave some completeness and context  
10 to a person's testimony. It would have been very difficult  
11 witness by witness by witness to cut them off when they were  
12 talking about clubs or dispensaries or any of those things. It  
13 made the testimony -- in my view, it allowed it to be complete  
14 from a common sensical point of view. However, it also was  
15 inculpatory. Inculpatory because to the extent that it  
16 explained what the defendant was doing, why he was doing what  
17 he was doing. While it's not a legal defense, it is  
18 inculpatory.

19 In other words, if this was a medical -- if it was a  
20 medical marijuana operation tended to show that he was involved  
21 in it, whereas if it was simply a commercial enterprise for  
22 nonmedical purposes, as an example though, you might not agree  
23 with that or maybe that's what you think it was, that may be  
24 exculpatory, that may be exculpatory.

25

So it was -- it had some relevance in the case, what

1401

1 it doesn't have any relevance as and is true for so much of  
2 evidence that comes in for a limited purpose is that it can't  
3 be considered for other purposes.

4 So I think it's actually a correct statement that I  
5 have to address.

6 Now, just so the cards are on the table; No. 1, I  
7 intend to give the instructions at the conclusion of the  
8 argument by counsel.

9 No. 2, if arguments are made during the course of  
10 the argument, suggestions made that I consider to be improper  
11 as a matter of law, I will give further instructions in that  
12 regard.

13 MR. BEVAN: And I -- I fully intend to enforce Your  
14 Honor's orders having to do with no jury nullification argument  
15 being made. And I would hope that the defense has every  
16 intention to abide by the order.

17 I know during the trial --

18 THE COURT: Yeah, I think what I would say is the  
19 following: I don't think the Government should make any  
20 reference in their opening to jury nullification.

21 MR. BEVAN: We are not going to.

22 THE COURT: Pardon?

23 MR. BEVAN: I wasn't going to.

24 THE COURT: Right. And I would instruct, and I am  
25 instructing the defense, I don't know who is going to make the

1402

1 closing argument.

2 MR. AMPARAN: (Raising hand.)

3 THE COURT: Mr. Amparan, I'm instructing you to make  
4 no argument suggesting directly or indirectly that the jury has  
5 the power to nullify, to disregard the law and nullify a  
6 verdict. And I'm instructing you not to make that argument.

7 So we'll see. I haven't said anything in -- in  
8 these instructions that single out the issue of jury  
9 nullification, I hope it won't come up. If it comes up I have  
10 to deal with it. The Government says it's not going bring it  
11 up. I'm not going to bring it up. But I will bring it up, if  
12 in fact, I felt it was warranted under the circumstances. So I  
13 say at the outset so people know what I'm considering.

14 Since I am going to have the last word in the case,  
15 the fact of the matter is that I will be able to instruct the  
16 jury after argument.

17 MR. BEVAN: Your Honor, in point of fact, I think  
18 the only time during the trial that you gave a limiting  
19 instruction on the issue of medical marijuana or touched on it  
20 was when Exhibit 25M came into evidence, where it says --

21 THE COURT: Says medical list or medical something.

22 MR. AMPARAN: Your Honor, there was plenty of  
23 testimony --

24 MR. BEVAN: Testimony but --

25 MR. AMPARAN: Excuse me, Counsel.

1403

1 MR. BEVAN: Sorry, go ahead.

2 MR. AMPARAN: There was the testimony of Rick Watts  
3 who repeatedly referred to patients. There is plenty of  
4 evidence of a medical nature in the record.

5 THE COURT: Right. But it came in for a limited  
6 purpose, to show what the marijuana was being cultivated for in  
7 terms of what the witness said the marijuana was being  
8 cultivated for.

9 MR. AMPARAN: I think the instruction is  
10 appropriate.

11 THE COURT: Okay. All right.

12 Charts and summaries and evidence. Do we have any?  
13 I guess we have all sorts of charts and summaries.

14 Activity not charged. Separate consideration of  
15 multiple counts. Then we get to the substantive count, count  
16 1, conspiracy. Count 2, conspiracy.

17 MR. BEVAN: The count 2 --

18 THE COURT: Did I get all mixed up?

19 MR. BEVAN: The next page, 21 of 35 on the E-file  
20 printout, I believe what you've described here as count 2 is  
21 really count 3. And what you described in the following  
22 instruction as count 3, should be count 2.

23 THE COURT: Okay. I see count 3 using a place for  
24 the manufacture of controlled substance, San Francisco, is that  
25 not count 3?

1404

1 MR. AMPARAN: No.

2 MR. BEVAN: That's count 2.

3 THE COURT: That's count 2?

4 MR. AMPARAN: In the jury instructions you refer to  
5 count 2 being at Oakland manufacturing of marijuana, which  
6 would be Mandela Parkway, I assume.

7 THE COURT: So what is count 2?

8 MR. BEVAN: Count 1 and 2 pertain to the Harm

9 Reduction Center. And what you have described, Your Honor, as  
10 count 3 is really count 2, and what you have described as count  
11 2 is really count 3.

12 THE COURT: Maybe I should start at the beginning.

13 MR. BEVAN: Okay.

14 THE COURT: Count 1, conspiracy.

15 MR. BEVAN: No objection.

16 THE COURT: Conspired with Kenneth Hayes, Richard  
17 Watts and using a place in San Francisco, that is count 1.

18 MR. BEVAN: Correct.

19 THE COURT: What should be count 2?

20 MR. BEVAN: What you have described as --

21 THE COURT: Count 3?

22 MR. BEVAN: -- count 3.

23 THE COURT: Okay. Using a place for the manufacture  
24 of controlled substance, San Francisco.

25 MR. BEVAN: That's count 2.

1405

1 THE COURT: Okay.

2 Now, then there is something that I have called  
3 count 2, what is that?

4 MR. BEVAN: Count 3.

5 THE COURT: That's count 3.

6 MR. BEVAN: What you have described as count 4, is  
7 count 5. And what you have --

8 THE COURT: Okay. Count 4 is count 5. And what  
9 I've described as count 5 is count 4.

10 MR. BEVAN: Correct.

11 Those are the only changes.

12 THE COURT: That's bad enough, okay. Count 4, count  
13 5. Okay.

14 Knowingly. Well, there may be some discussion about  
15 knowingly. This is the standard instruction. It's the  
16 instruction -- and I was debating in my mind because the  
17 knowing part of it -- I think we ought to have it out now, so I  
18 don't hear an argument about it.

19 MR. BEVAN: I think Your Honor should conform this  
20 instruction to the way Your Honor articulated when you went  
21 through the defense's special instructions and you defined it  
22 as essentially knowing that it's marijuana or knowing that what  
23 you are doing -- I forget the way you phrased it, but I felt it  
24 was perfect to describe the conduct for the knowing  
25 requirement.

1406

1 And it takes out the issue of the word "unlawful,"  
2 which I think is in the context of this case is contrary to --

3 THE COURT: I'm wondering whether I have to give an  
4 instruction which says -- I could see an act is done knowingly  
5 if the defendant is aware of the fact, and then the words and  
6 does not act through ignorance, mistake or accident.

7 First of all, of course, the defense doesn't have to  
8 do anything, you understand that. The question is whether to  
9 explain knowingly, you have to explain that it's not done  
10 through ignorance, mistake or accident. You see in the -- in  
11 the context of this case, one could say, you know, he was  
12 mistaken. He thought that he had the right to do this. You  
13 know? Because he was deputized by Oakland and on and on and  
14 on, so he thought -- he was just mistaken.

15 We could call this a mistake, and by the way, that

16 is what he thought. Or the Government hadn't shown that is not  
17 what he thought.

18 I don't know how the argument would come up, but  
19 that is not the mistake we are talking about. That is not why  
20 I'm going to give a mistake of law instruction.

21 Seems to me that the knowingly is that he knows it's  
22 marijuana, that is what he knows. Is there something else that  
23 the Government has to prove?

24 MR. AMPARAN: I think the Court has said it's going  
25 to follow the Ninth Circuit instructions on the issue, and we

1407

1 would just ask the Court continue to do so without structuring  
2 the instructions in anticipation of what the defense may do in  
3 its closing argument.

4 THE COURT: But you see in this case -- by the way,  
5 I have no problem giving a, quote, defense theory of the case,  
6 but the theory of the defense case, so it's clear, is that the  
7 evidence is insufficient, that is the theory of the defense's  
8 case, nothing else is.

9 MR. AMPARAN: But the discourse the Court just went  
10 through in the case, well, this is the defense may do this in a  
11 way to subvert or to short circuit the defense from doing that,  
12 I'm going to address this. I'm going to say --

13 THE COURT: No, what I'm saying is the words,  
14 "ignorance, mistake or accident," have no bearing on the  
15 evidence which has come in in this case, so why would I -- you  
16 know, I can always tailor an instruction, even a Ninth Circuit  
17 instruction, to exclude statements which have no -- for which  
18 there is no evidence and no claim. When I say claim, I have to

19 say legal claim, that is a claim of a legitimate defense, to  
20 that issue.

21 MR. AMPARAN: But the Court should not preclude that  
22 evidence that shows ignorance, mistake or accident and then  
23 feign it doesn't exist.

24 THE COURT: What evidence is there?

25 MR. AMPARAN: Well, the Court is aware that is why 1408

1 the Court sentenced Mr. Rosenthal to one day in its written  
2 opinion. It expressed certain views and beliefs and found that  
3 Mr. Rosenthal was operating in good faith in reliance upon the  
4 deputization.

5 THE COURT: Right.

6 MR. AMPARAN: And that he had been told --

7 THE COURT: Absolutely correct.

8 MR. AMPARAN: -- that he was going to receive some  
9 kind of prophylactic treatment based upon that deputization.

10 THE COURT: And I said that is relevant to  
11 sentencing, but would not be relevant to liability.

12 MR. AMPARAN: But that is still aspects of the  
13 mental state that -- and that caused Mr. Rosenthal to engage in  
14 a manner that he did, and to pretend that -- to pretend that  
15 that is absent here would appear to be dishonest to the jury.

16 THE COURT: Well, first of all, there is no evidence  
17 of it in this case. There is no evidence because I wouldn't  
18 allow evidence in. I mean, I'm not saying you never presented  
19 any or tried to present some. I said what I would allow and  
20 what I wouldn't.

21 Having said that, there is no evidence, is there, of  
22 ignorance, mistake or accident?

23 MR. AMPARAN: Not when you preclude it.

24 THE COURT: Can the jury find based upon the  
25 evidence that the Government presented that the defendant acted  
1409

1 through ignorance, mistake or accident? I don't know what it  
2 would be. I don't know what it would be.

3 Anyway, I may take out those three words. I have to  
4 think about it. I'll let you know before you argue, obviously.

5 Manufacture of controlled substance. The purpose of  
6 cultivation and manufacturing. On or about, doesn't  
7 necessarily approve. And then the standard that you need to  
8 deliberate. Consideration of the evidence. Communication of  
9 the Court. Jury consideration of punishment. Verdict.

10 Okay. Those are what the Court would do. I have  
11 looked at the further instructions requested by the defense and  
12 I would -- I'm not prepared to give any of them.

13 So anything further?

14 MR. BEVAN: Not from the Government, Your Honor.

15 MR. AMPARAN: No.

16 THE COURT: All right. So we'll -- at 8:00 o'clock  
17 we have these individuals who are coming in. And they'll  
18 either testify or not. And if they don't, then we start at  
19 8:30.

20 In any event, we start at 8:30. If they do, we  
21 start at 8:30 with whatever witness is going to testify. And  
22 if no witnesses testify, then we'll start with closing argument  
23 at 8:30.

24 MR. BEVAN: I'm going to -- I would proffer that  
25 telephone record.

1 THE COURT: Right. Is there any objection to that  
2 telephone record?

3 MR. AMPARAN: Is this the one you talked about?

4 MR. BEVAN: I faxed it to Ms. Gold- --

5 MR. AMPARAN: Green --

6 MR. BEVAN: Greenberger.

7 MR. AMPARAN: Did you ask to admit that chart?

8 MS. GREENBERGER: Has been admitted.

9 THE COURT: That is in evidence, right?

10 MS. GREENBERGER: Yes.

11 THE COURT: Okay.

12 MS. GREENBERGER: I just have a quick question with  
13 regard to deliberations. Some people have been asking what the  
14 requirements are going to be in terms of the lawyers will  
15 probably stay in the building, but as for Mr. Rosenthal.

16 THE COURT: He must stay in the building.

17 MS. GREENBERGER: All right.

18 THE COURT: And I only need -- obviously, you are  
19 all three welcome, but I only need one defense lawyer to -- the  
20 Government must be here as well.

21 Right. If questions come out, I need to consult  
22 immediately and Mr. Rosenthal must be present. It's actually  
23 error not to have him present.

24 MR. AMPARAN: Understood.

25 THE COURT: Yeah.

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1 MR. AMPARAN: Have a good weekend, everyone.

2 THE COURT: All right. Thank you.

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MR. BEVAN: Thank you, Your Honor.

(Proceedings adjourned at 4:19 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 25, 2007