

INTRODUCTION

Since appellant filed his opening brief, this Court decided *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), a decision which, in Rosenthal's view, would control decision of his claim that this prosecution was brought in violation of the constitutional constraints of the Commerce Clause. Only last week, however, the Supreme Court agreed to review the *Raich* decision.

In another case, this Court might be confronted by the choice of whether to decide this matter under *Raich*, risking the possibility that the Supreme Court takes a different view of the application of the Commerce Clause in the medical marijuana context, or awaiting what might be a year until the high court decides *Raich* for itself. There are, however, other alternatives available to the Court, which recently has issued other opinions bearing on the claims raised herein by Rosenthal, most prominently those involving the entrapment by estoppel defense and jury misconduct. Based on these new precedents and previous case law, the Court can and should reverse appellant's convictions even without reaching his Commerce Clause claim.

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ARGUMENT

I. CONSISTENT WITH *RAICH*, THE POWER TO REGULATE INTERSTATE COMMERCE DOES NOT INCLUDE THE POWER TO PROSECUTE LOCAL GOVERNMENT OFFICIALS WHO CULTIVATE MEDICAL MARIJUANA PURSUANT TO A LOCAL GOVERNMENT DISTRIBUTION PROGRAM; THE PROSECUTION OF SUCH OFFICIALS ALSO VIOLATES THE TENTH AMENDMENT

A. Introduction

Despite the absence of any empirical evidence suggesting *any* effect on interstate commerce from California's Compassionate Use Act, Cal. Health & Safety Code § 11362.5, the federal government claims the authority to prosecute California citizens who exercise their state-conferred right to use marijuana for medical purposes under its limited authority to regulate "commerce among the states." Since this appeal was filed, this Court held in *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted by Ashcroft v. Raich*, -- S.Ct. --, 2004 WL 875062 (June 28, 2004), that individuals who cultivate marijuana for their personal medical use on the recommendation of a physician in accordance with California law have demonstrated a strong likelihood of success on their claim that the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (hereafter "CSA"), is an unconstitutional exercise of Congress' Commerce Clause authority as applied to them. *Id.* at 1227. In *County of Santa Cruz v. Ashcroft*, -- F.Supp.2d --, 2004 WL

868197 (N.D. Cal. April 21, 2004), the district court extended this holding to a non-profit cooperative which cultivates marijuana for distribution to its approximately 250 members. Like *Raich* and *Santa Cruz*, this case involves the narrow class of activity of medical marijuana cultivation. This case, however, is a *criminal* case, so the federalist principles underlying these two recent decisions have even more compelling relevance here.

Seeking to distinguish this case from *Raich*, the government contends that Rosenthal's conduct falls outside its "narrow limits" because he cultivated medical marijuana for distribution through a cannabis club, which, it contends, lies outside the limits of California law. (Brief of Appellee/Cross-Appellant [hereafter referred to as "GB," for Government's Brief], at 21) No court, however, has found the precise conduct at issue here -- the state-sanctioned cultivation of marijuana for distribution to sick and dying patients through a local government program -- illegal. See *People ex rel. Lungren v. Peron*, 59 Cal.App.4th 1383, 1402 (Kline, J., concurring) (noting that this issue is likely to arise in the future, but is not presently before the court). Because the Compassionate Use Act expressly "encourage[s] . . . state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana," Cal. Health & Safety Code § 11362.5(b)(1)(C), and Rosenthal was

deputized by the Oakland City Council to do this, he would have defenses available to him in the unlikely event of a state court prosecution which were not available to the defendants in the wholly private distribution cases cited by the government. (*See* GB 24) As this case dramatically illustrates, these defenses would include that of entrapment-by-estoppel. Furthermore, the Supreme Court of California recently affirmed the dismissal of a prosecution of five members who operated a for-profit cannabis club “in the interests of justice.” *See People v. Konow*, 32 Cal.4th 995, 1004 & 1027-28 (2004)(lower court noting that “there are at least four cities of this state which have implemented [Proposition 215] in such a way as would make these defendants’ operation completely legal in their communities”). Notwithstanding the government’s bold assertions, Rosenthal’s conduct accords with state law, which is likely what prompted California’s chief law enforcement official to declare his support for Rosenthal. (*See* ER 303-04) In any event, state law cannot supply the missing nexus to interstate commerce, which is lacking here.

The *Raich* case established that the court must consider the precise activity or conduct in question and determine whether *this* activity (as opposed to the broader market for recreational marijuana) substantially affects interstate commerce. *Compare Raich*, 352 F.3d at 1227 (“none of the cases in which the

Ninth Circuit has upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes”) *with* GB 20 n.6 (citing such cases). The evidence at trial established, and the district court found that Rosenthal’s activity consisted of his good-faith cultivation of marijuana for medical use while deputized as a City official in accordance with state and local law. (*See* ER 319)

B. Neither Empirical Evidence Nor Logic Indicates That Rosenthal’s Conduct Has a Substantial Affect on Interstate Commerce

1. The CSA Is Not Designed to Regulate Commerce, Nor Does the *Wickard* Aggregation Principle Apply

Although Rosenthal’s non-profit activity might be termed “commerce” in its technical sense, the CSA was not designed to regulate commerce, but, instead, to address perceived moral and health concerns of Congress. *See* 21 U.S.C. § 801(2). Judge Kosinski aptly observed in *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), that this may be “an admirable goal, but [it is] not a commercial one.” *Id.* at 1137; *see also United States v. Contrades*, 196 F.Supp. 803, 811-12 (D. Hawaii 1961) (“The Federal decisions in which the constitutionality of this type of legislation has been raised contain numerous statements expressly or tacitly holding or assuming that Congress would be without power to prohibit or regulate

a purely intrastate transaction in narcotics not linked in some way with foreign or interstate commerce or taxation”).

The aggregation principle of *Wickard v. Filburn*, 317 U.S. 111 (1942), does not apply to the facts of this case. In *Wickard*, the Court found that locally grown wheat, when replicated on a large scale nationwide, substantially affects interstate commerce because the empirical evidence showed that the national price of wheat fluctuated dramatically as local wheat farmers dumped their surplus into the open market or, alternatively, purchased large quantities when prices were low. *See Wickard*, 317 U.S. at 115 & 127-29; *see also id.* at 128 (noting that empirical evidence revealed an “undeniable” “substantial influence on market conditions” from homegrown activity). Because wheat moves freely across state lines, the Court found that Congress could tax wheat exceeding the declared quota, as such regulation was necessary to control the national price of wheat. *See id.; cf. Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) (Congress may “regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy”).

Here, by sharp contrast, there is no single national marijuana market and, even if there were, prices would not fluctuate significantly in response to local production, since due to strict legal barriers marijuana does not move freely across

state lines. *See, e.g.*, 21 U.S.C. § 1952(a)(3)(A). Furthermore, many medical marijuana patients would forego their medicine if they were required to search out an illegal source of supply, so marijuana grown for this limited purpose will have even less of an effect on the broader market for marijuana than would a staple commodity like wheat. *Cf. United States v. Stewart*, 348 F.3d 1132, 1137-38 (9th Cir. 2003) (providing similar analysis with respect to homemade guns). Because the assumptions underlying the *Wickard* aggregation principle do not apply under these circumstances and Congress is not seeking to regulate commerce, this factor counsels against the constitutionality of the CSA as applied.

2. There Is No Express Jurisdictional Element That Might Limit the CSA's Reach

Nor, unlike *Wickard*, does the CSA contain a “jurisdictional hook” that would limit the statute’s reach to a discrete set of cases that substantially affect interstate commerce. *See Raich*, 352 F.3d at 1231; *compare Wickard*, 317 U.S. at 118-19 (marketing quotas only include wheat which is fed to poultry or livestock sold, bartered or exchanged or whose products are sold, bartered or exchanged). This factor also favors a finding that Congress has exceeded its Commerce Clause powers. *Raich*, 352 F.3d at 1231.

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3. Neither The CSA Nor Its Legislative History Contain Express Congressional Findings Regarding the Effects of Medical Marijuana upon Interstate Commerce

In *Raich*, this Court observed that while Congress has made findings with respect to drug trafficking generally, those findings are not specific to marijuana, much less to medical marijuana. These findings, therefore, “do[] not speak to the subject matter of [the conflict].” *See Lopez*, 514 U.S. at 563 (dismissing findings regarding the commercial effects of firearm possession generally because they do not speak to precise issue before court); *cf. Raich*, 352 F.3d at 1231 n.5 & 1232 (“there is no indication that Congress was considering anything like the class of activities at issue here when it made its findings”).

To fill this void, the government points again to the same generic findings discussed by *Raich*, including its pronouncement that the illegal use of controlled substances has a “substantial and detrimental effect on the health and general welfare of the American people.” (GB 26 [citing 21 U.S.C. § 801(2)]) It also notes that Congress has reiterated its opposition to the legalization of marijuana for medical use since the passage of Proposition 215. (GB 27 [citing 21 U.S.C. § 801(2) & Pub.L.No. 105-277, Div. F, 112 Stat. 2681-761]) These findings undermine, rather than bolster, the government’s position.

The former finding reveals explicitly that Congress was motivated to prohibit marijuana cultivation for public health and safety reasons, not as a means to regulate commerce. *Cf. Linder v. United States*, 268 U.S. 5, 17 (1925) (“Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the federal government”); *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (“should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government,” Court would be bound to hold law invalid). Congress’s reiteration of its opposition to marijuana, even for medical use, without the requisite findings of a link between medical marijuana and interstate commerce exposes Congress’ inability to make these requisite findings, despite its awareness that it was incumbent upon it to do this after *Lopez*. *Compare Perez v. United States*, 402 U.S. 146, 147-48 n.1 & 153-55 (1971) (noting congressional findings regarding substantial effects of extortionate credit transactions on interstate commerce supported by reports and hearings commissioned by Congress showing that millions of dollars are funneled to national criminal organizations through loan sharking each year). The government is essentially asking this Court to make findings which Congress itself could not make. Absent such findings supported by empirical evidence, this factor weighs

against the constitutionality of the statute. *See Lopez*, 514 U.S. at 563 & 567-68.

4. The Link Between the Regulated Activity and a Substantial Effect on Interstate Commerce Is Very Attenuated

The likely reason that Congress did not make the requisite findings is that the empirical evidence does not warrant them. *First*, medical marijuana use represents only a miniscule fraction of all marijuana use, comprising only approximately 0.27 percent of the national marijuana-using population. *See* CR 80, at 9 n.6. *Second*, there are legal and economic barriers to interstate marijuana transportation, as most states have laws against marijuana cultivation and distribution, even for medical use, and the interstate transportation of medical marijuana remains illegal under federal law. *See, e.g.*, 21 U.S.C. § 1952(a)(3)(A) (providing for terms of imprisonment of up to five years for transporting marijuana across state lines to facilitate its unlawful use or distribution). Lest one be lured by the promise of economic gain to attempt to risk prosecution under these laws by transporting medical marijuana into California, the state has taken the profit out of the activity by requiring suppliers to sell for no more than “actual expenses, including reasonable compensation incurred for services provided. . . .” Cal. Health & Safety Code § 11362.765(c). It thus is hardly surprising that there is no empirical evidence showing an increase in interstate marijuana

transportation, nor a marked difference in its national price attributable to medical marijuana, in the more than seven years since the passage of the Compassionate Use Act. Pure speculation cannot justify a finding of a “substantial effect” on interstate commerce in the face of established barriers to interstate trafficking. *Cf. McCoy*, 323 F.3d at 1129-30 (“Such uninformed speculation runs afoul of the warning in *Lopez* and *Morrison* about piling ‘inference upon inference’ in order to justify the exercise of federal power in an area expressly reserved to the states”); *United States v. Moghadam*, 175 F.3d 1269, 1275 (11th Cir. 1999) (to pass the substantial affects test, statute “must bear more than a generic relationship several steps removed from interstate commerce, and it must be a relationship that is apparent, not creatively inferred”); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Opinion of Holmes, J.) (“If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.”); *United States v. Lynch*, 282 F.3d 1049, 1053 (9th Cir. 2002) (even for statutes containing a jurisdictional element that requires only a *de minimis* impact on interstate commerce, the test “reserves to the States the prosecution of robberies and extortionate acts that have only a speculative, indirect effect on interstate commerce”). “It is unreasonable to believe that use of medical marijuana by this discrete population for this limited

purpose will create a significant drug problem.” *Conant*, 172 F.R.D. at 694 n.5.

Proving yet again that “the government’s fears in [medical marijuana] case[s] are exaggerated and without evidentiary support,” *see Conant*, 172 F.R.D. at 694 n.5, the government contends that cannabis clubs are in “direct competition” with “real” drug traffickers because an informant and an undercover agent were able to buy marijuana from HRC. (GB 28 [citing PSR (paras) 7 & 9]) Aside from the fact that Rosenthal did not know about any of this, the government fails to mention that the undercover agent had to obtain a doctor’s recommendation to purchase marijuana from HRC, PSR ¶8, and the sale of marijuana to the confidential informant occurred at a codefendant’s house, not the dispensary, PSR ¶7. Moreover, there is no evidence that any of the marijuana cultivated by Rosenthal was so diverted, nor that such diversion was more than *de minimis*. *Cf.* ER 312 (“the government acknowledges that many of the plants at HARM came from sources other than the defendant”).

Even if there was some small leakage of marijuana produced for medical use to the broader market for marijuana, this does not amount to a “direct competition” between the two. “Congress may [not] use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.” *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197

n.27 (1968)); *cf. Rewis v. United States*, 401 U.S. 808, 812 (1971) (holding that defendants who ran illegal gambling operation near state lines could not be convicted of violating Travel Act simply because their operation was frequented by out-of-state bettors); *see also Morrison*, 529 U.S. at 617-18 (“The Constitution requires a distinction between what is truly national and what is truly local”); *Lopez*, 514 U.S. at 556-57 (substantial effects test “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government”).

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C. This Prosecution Violates the Federalist Principles of the Constitution and the Tenth Amendment Because It Intrudes Upon the Sovereign Powers of the State of California

The government's weak economic justifications, coupled with the extremely punitive means employed here -- a federal prosecution with penalties ranging from five years to forty years in prison -- betray the government's true intent to usurp California's traditional police powers and prevent the states from experimenting with a competing approach. *Cf. Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (noting disturbing trend of "Congress appropriating state police powers under the guise of regulating commerce"); *United States v. Constantine*, 296 U.S. 287, 296 (1935) ("under the guise of a taxing act the purpose is to usurp the police powers of the state"). Lest there be any doubt on this score, the CSA expressly states this, *see* 21 U.S.C. § 801(2), and Congress recently affirmed that it is maintaining the ban on medical marijuana because "the ambiguous cultural messages about marijuana use are contributing to a growing acceptance of marijuana use among children and teenagers," House Joint Res. 117 (Sept. 15, 1998). These, however, are matters for the state, not the federal, government to decide. *See Morrison*, 529 U.S. at 618 & n.8 ("the Founders denied the National Government [the police power] and reposed [it] in the States" "the Constitution

reserves the general police power to the States”); *Lopez*, 514 U.S. at 566 (“The Constitution . . . withhold[s] from Congress a plenary police power”); *Linder v. United States*, 268 U.S. 5, 18 (1925) (“Obviously, direct control of medical practice in the states is beyond the power of the federal government”); *see also Lopez*, 514 U.S. at 580 & 581 (Kennedy, J., concurring) (noting that federal courts have “a particular duty to ensure that the federal-state balance is not destroyed” when Congress “seeks to intrude upon an area of traditional state concern”).

Because the federal government is intruding upon core areas of state concern through the prosecution of a local official, this prosecution violates the federalist principles of the Constitution and the Tenth Amendment. The Tenth Amendment works in tandem with the Commerce Clause to ensure that the federal government legislates in areas of truly national concern. *Conant*, 309 F.3d at 647 (Kozinski, J., concurring). As with the Commerce Clause, the guiding principle of the Tenth Amendment inquiry is individual liberty, *see United States v. Wilson*, 880 F.Supp. 621, 633 (E.D. Wis. 1995), and its fundamental purpose is to empower states to protect the rights and liberties of its citizens from encroachment by a foreign centralized government. *See, e.g., New York v. United States*, 505 U.S. 144, 181 (1991) (“State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of

sovereign power”) (quotation omitted).

The government is seeking to displace a liberty-enhancing policy of the State of California through compulsion directed at a local official, precisely what the “dual sovereignty” principle of the Tenth Amendment forbids. The Compassionate Use Act was expressly enacted “pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution,” *see* S.B. 420, Section 1(e) (Sept. 11, 2003), to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes,” Cal. Health & Safety Code § 11362.5(b)(1)(A). Since 1996, however, the federal government has engaged in concerted efforts to deprive Californians of this state-conferred right: first, through threats directed at California physicians, *Conant v. McCaffrey*, 172 F.R.D. 681 (N. D. Cal. 1997); then, through a civil suit directed at the cooperatives, *United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086 (N.D. Cal. 1998); and, now, through criminal prosecutions like this one.

This most punitive tactic, like the others designed to put an end to California medical marijuana policy, violates the principles of federalism embodied by the Tenth Amendment. *Cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (noting that federal sentence of 35 years for crime

with maximum state sentence of 10 years “illustrates how a criminal law like this may effectively displace a policy choice made by the State”); *Hayden v. Keane*, 154 F.Supp.2d 610, 615 (S.D.N.Y. 2001) (noting that federal agency’s attempt to nullify bail decisions of state court by issuing parole violation warrant on eve of bail hearing would undermine state autonomy and violate principles of federalism); *see also Printz v. United States*, 521 U.S. 89, 923-24 (1997) (“When a ‘Law ... for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty ... it is not a ‘Law ... proper for carrying into Execution the Commerce Clause, and is thus, in the words of The Federalist, ‘merely [an] act of usurpation’ which ‘deserves to be treated as such’”); *National Federation of Republican Assemblies v. United States*, 218 F.Supp.2d 1300, 1352 (S.D. Ala. 2002) (“even when the taxing power authorizes Congress to legislate in an area otherwise reserved to the states, a statute still violates the Tenth Amendment if it was not enacted pursuant to that power”). “[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.” *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

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II. THE DISTRICT COURT ERRED IN DEPRIVING ROSENTHAL OF THE IMMUNITY CONFERRED UPON HIM BY § 885(d)

The reason that Rosenthal thought his conduct was immunized from a prosecution like this one is that 21 U.S.C. § 885(d) “literally” tells him this. (*See* ER 81.1-81.2) Even the government does not dispute this. Instead, it contends that Rosenthal does not qualify for the protections of § 885(d) because he was not a duly authorized officer of the City of Oakland, since the City Attorney expressed skepticism that medical marijuana providers could qualify for such designation under the City Charter. (GB 32 & 34 [citing SER 5]) The Oakland City Council, however, apparently either rejected this legal advice, or assuaged the City Attorney’s concerns when it unanimously passed the Ordinance with the deputization provision modified, but intact. (ER 9; *see* ER 320) Irrespective of the authority to appoint public officials contained in the City Charter, Government Code § 36505 expressly authorizes the City Counsel to “appoint such *other* subordinate officers as it deems necessary.” (emphasis added) This is precisely what the City Counsel did, which made Rosenthal a “duly authorized official” for purposes of § 885(d).

In any event, California employs a functional test to determine whether one qualifies as a public officer, and Rosenthal most assuredly qualifies as one under

this appropriate test. The test does not rely on any indispensable characteristics of public office, as the government implies, *see* GB 34 n.8; *Chapman v. Rapsey*, 16 Cal.2d 636, 640, 107 P.2d 388, 390-91 (1940) (quotation omitted), although the legislative branch’s intent in creating the position is highly relevant to this inquiry, *Ryan v. Riley*, 65 Cal.App. 181, 191-92 (3d Dist. 1924). Instead, the test for “public office” turns on whether the person, in fact, exercises duties pertaining to the public and whether those duties are for the public benefit. *See Coulter v. Pool*, 187 Cal. 181, 185 (1921); *see also Vaughn v. English*, 8 Cal. 39, 42 (1857) (“[E]very man is a public officer, who hath any duty concerning the public, and he is not the less a public officer, where his authority is confined to narrow limits, because it is the duty of his office and the nature of that duty which makes him a public officer, and not the extent of his authority”). Rosenthal’s cultivation of marijuana under Oakland’s Medical Cannabis Program clearly pertains to the public, since Rosenthal was assisting in the execution of the police powers delegated to the City of Oakland. *See* Cal. Const., Art. XI, § 7 (empowering cities to legislate for the safety, health and welfare of its inhabitants). As any of the seriously ill persons who have benefited from the medicine provided by Rosenthal would attest, he was doing this for the benefit of the public. As a city official “lawfully engaged in the enforcement of . . . [a] municipal ordinance relating to

controlled substances,” Rosenthal was entitled to the protections of § 885(d).

To overcome this straightforward application of § 885(d), the government offers the following interpretation -- for an individual to be protected by the immunity provision, “the underlying law enforced [must itself] be consistent with the CSA.” (GB 35) How the government or the district court divined such interpretation from the statutory language protecting one “lawfully engaged in the enforcement of *any* law or municipal ordinance relating to controlled substances” is beyond counsel for Rosenthal. Congress would have chosen language more consistent the government’s interpretation, if this were truly its intent. (*See* Appellant’s Opening Brief (“AOB”) 17-19)

To insulate its novel interpretation of the statute from the application of the rule of lenity, the government contends that § 885(d) is not ambiguous because Congress has prohibited the cultivation of marijuana for any purpose. (GB 37). The question is not whether the laws prohibiting marijuana cultivation are ambiguous (they are not), but, rather, whether § 885(d), which immunizes Rosenthal from those laws, can be reasonably read to support Rosenthal’s position. In addition to all of the tools of statutory construction cited by Rosenthal in his

opening brief (AOB 17-20),¹ the fact that the government relies on the purpose served by the CSA to displace the express language of the statute demonstrates convincingly that the statute is not unambiguous and that the rule of lenity applies. *See* AOB 20-21 (citing cases); *see also Chappel v. United States*, 270 F.2d 274, 278 (9th Cir. 1959) (“[A Penal statute] cannot be enlarged by analogy or expanded beyond the plain meaning of the words used”).

Finally, the government urges this Court not to consider Rosenthal’s citation to *United States v. Lanier*, 520 U.S. 259, 270-71 (1997) and *Anderson v. Creighton* 483 U.S. 635, 641 (1987) and related argument concerning the Supreme Court’s equation of “good faith” or “qualified immunity” and the “fair warning” doctrine. The government first argues that the contention is “raised for the first time on appeal, and thus should be deemed waived.” (GB 39). This assertion is simply untrue. Rosenthal raised his claim of immunity both in pre-trial and post-trial motions. As the government is forced to admit (GB 39 n. 9), the *Lanier* citation and related argument were offered in support of Rosenthal’s immunity claim in Rosenthal’s new trial motion, although the district court declined to

¹ In arguing that Rosenthal’s interpretation disturbs the federal-state balance (GB 36), the government overlooks the obvious response -- this balance would have been preserved if it had honored the plain language of § 885(d) and not sought out to prosecute Rosenthal.

address it on its merits.

At most, the *Lanier* argument added another legal theory to the pretrial immunity claim. See *United States v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987) (issue preserved where only legal theory was different on appeal); *Hilderbrand v. United States*, 261 F.2d 354, 357 (9th Cir. 1958) (although precise ground for attacking jurisdiction of indictment was not alleged in proceedings below, the issue was properly preserved because it was of the “same general nature” as jurisdictional argument raised below). The district court had “a timely opportunity” to rule on the *Lanier* theory. *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985) (Issue is adequately preserved by being “brought to the attention of the trial court and a timely opportunity...given to rule on such issues.” citing Fed. R. Evid. 103 advisory committee note; 5A *J. Moore & J. Lucas, Moore’s Federal Practice* para. 46.02 (2d ed. 1982).

The government also argues that no decision in a criminal case has held the doctrine of “qualified immunity” applicable to a public official accused of a crime, but, as the government concedes, Lanier was a criminal case and it indeed held that the qualified immunity that a public official enjoys from a civil suit claiming a violation by that official of a citizen’s federal constitutional rights is equaled in the

criminal context; indeed, the very source of a public official's immunity from civil liability is the due process protection provided against criminal prosecution under a vague or ambiguous statute. 520 U.S. at 270-71.

The government further argues that Rosenthal was not a public official (GB 40); as demonstrated above, Rosenthal indeed was a public official, as that term is functionally defined.

Finally, the government challenges Rosenthal's argument "that he was immune...because it had not 'been made clear by...[an] interpretative gloss judicially provided that the statute [§ 885(d)] would not apply to him.' AOB 21."

(GB 40) The government argues:

The day before Jeffrey Jones, the executive director of the OCBC, deemed defendant an "officer" of the City of Oakland, Judge Breyer issued a ruling in a separate civil case in which OCBC was a party, holding that § 885(d) did not immunize from federal liability the OCBC's manufacture or distribution of marijuana.

(GB 40-41).

The government's reliance on Judge Breyer's ruling in the OCBC case as a basis for an argument that Rosenthal was clearly on notice that § 885(d) provided him no immunity despite his deputization as an Oakland official must be considered disingenuous. It was none other than Judge Breyer who found that, his

decision in the OCBC case notwithstanding, a reasonable person in Rosenthal's position at the time of the charged offenses would believe "that his conduct would be immunized from federal prosecution" under § 885(d). (ER 319, cited at GB 81).

This case may prove the vehicle by which "the interpretive gloss [is] judicially provided" to 885(d) enabling local officials to have clear notice as whether the provision of medical marijuana to sick patients under a municipal statute is immunized from federal prosecution. Lacking that guidance at the time of the charged offenses, however, Rosenthal must be deemed to have been so immune.

III. THE DISTRICT COURT COMMITTED CONSTITUTIONAL ERROR IN EXCLUDING ROSENTHAL'S ONLY VIABLE DEFENSE

A. *Batterjee* Controls The Present Case

In its brief, the government concedes that an "authorized government official tells the defendant that certain conduct is legal and the defendant believes the official." (GB 41, citing *United States v. Hancock*, 231 F.3d 557, 567 (9th Cir. 2000)). In this case, there is no doubt that Rosenthal was told by government officials, both verbally and through the passage of a municipal ordinance, that his conduct in cultivating medical marijuana was legal and that he believed them; indeed, the district court found that Rosenthal's belief was both actually and reasonably held. (ER 319). On these facts, Rosenthal was and is entitled to a

directed verdict of acquittal, but instead he was deprived of an opportunity to even present his defense to the jury.

Following the submission of the opening briefs of the parties, this Court decided *United States v. Batterjee*, 361 F.3d 1210 (9th Cir. 2004), which bears directly on the present case. The defendant, a Saudi citizen lawfully in the United States on a non-immigrant visa, purchased a gun from a licensed gun dealer in April of 2001 after being told by the dealer that the purchase was entirely legal. Unknown to either the defendant and the dealer, Congress had proscribed purchases by persons in Batterjee's visa category in 1998, but the ATF had failed to amend purchase form 4473, upon which the defendant and dealer relied to determine the legality of the purchase, to reflect that legal change until after the time of the alleged offense.

This Court reversed Batterjee's resulting conviction, finding that the defendant had carried the burden of establishing the defense of entrapment by estoppel, which it defined as "the unintentional entrapment by an official who mistakenly misleads a person into a violation of the law." 361 F.3d at 1216. The Court noted that the defense "rests upon principles of fairness" (*id.*, at 1218), and that "the Due Process Clause of the Constitution ...prohibits convictions based on misleading actions by government officials." *Id.*, at 1216.

Rather than responding with fairness or logic, the government contends reliance on § 885(d) for Rosenthal’s belief in the legality of the cultivation of medical marijuana cannot be reasonable “[b]ecause § 885(d) does not explicitly immunize large-scale marijuana cultivation from federal prosecution.” (GB 41) This Court rejected a similar argument in *Batterjee*, where “the government asserted] that Form 4473 did not affirmatively inform Mr. Batterjee that a legal alien on a non-immigrant visa could purchase a firearm.” 361 F.3d at 1218. The Court noted that (1) the form stated conditions on which an alien could not buy a gun while leaving visa status out; and (2) the authorized dealers had “affirmatively represented” to the defendant that his conduct was legal. *Id.*

Section 885(d) affirmatively states that “no civil or criminal liability shall be imposed” against persons in Rosenthal’s position. If Rosenthal’s conduct was not in fact immunized from prosecution by § 885(d), he was certainly and reasonably led to believe so by “the misleading actions by government officials.” *Batterjee*, at 1216. Here, the trial judge agreed that Rosenthal’s conduct was reasonable; in any case, if there is doubt about the reasonableness of the defendant’s conduct, the question is one for the jury. *United States v. Evans*, 928 F.2d 858, 860 (9th Cir. 1991) (whether defendant reasonably believed his actions were authorized is a jury question. Under *Batterjee*, the denial to Rosenthal of his

entrapment by estoppel defense offended the Due Process Clause

B. The District Court Erred in Ruling that Rosenthal's Entrapment By Estoppel Defense Could Not Be Based on Information Provided Appellant By The Oakland Ordinance And Local Officials

Both the CSA on its face and a contractual agreement between the federal government and the City of Oakland authorized the City to assist in the enforcement of state *and federal* narcotics laws. (AOB at 30-32; *see* ER 83-85) Furthermore, § 885(d) expressly delegates responsibility to municipalities to appoint persons and draft ordinances that will provide immunity from the federal narcotics laws to local officials. This is more than sufficient to render the Oakland officials authorized federal agents for purposes of the entrapment-by-estoppel defense. *See United States v. Tallmadge*, 829 F.2d 767, 775 (9th Cir. 1987).

Rather than discuss the applicability of the binding and persuasive authorities cited by Rosenthal (AOB 31-33), the government contends that the local public officials who assured Rosenthal that he was immune from liability were not authorized to do this because they were not explicitly given permission to speak for the federal government by any federal official and Assistant City Attorney Barbara Parker recognized that she was not purporting to speak for the federal government. (GB 42-43) The proper inquiry under *Tallmadge* and its

progeny is not whether the advising official (or firearms dealer) received express instructions from federal officials or purported to speak on their behalf, but, rather, whether they were authorized by their relationship to the enforcement scheme to render advice about its provisions. *Cf. Tallmadge*, 829 F.2d at 770-75 (finding that firearms dealer was authorized federal official for purposes of entrapment-by-estoppel defense, although no evidence was presented that he held himself out to the public as federal agent or was given permission to speak on the federal government's behalf by a federal official). Under *this* proper legal standard, the Oakland City officials who gave assurances to Rosenthal were authorized to do this by the CSA, a contract with the federal government, and § 885(d).

As *Batterjee* holds, the scope of the entrapment by estoppel defense is determined by “principles of fairness.” *Id.*, at 1218. The district court expressly found that Rosenthal acted reasonably in relying “on the actions of the Oakland City Council in enacting the Ordinance” to conform his conduct to the law. If Rosenthal's actions were reasonable, then it was inconsistent with “principles of fairness” to deny the jury the opportunity to consider that fact in determining whether appellant was guilty of the criminal conduct with which he was charged. Because “the Due Process Clause of the Constitution ...prohibits convictions based on misleading actions by government officials,” the trial court erred in denying

appellant his entrapment by estoppel defense.

C. The District Court Erred in Precluding Rosenthal from Relying on Assurances Made By a DEA Agent

After the district court precluded any mention of § 885(d) at trial, it became increasingly clear that it would not permit Rosenthal to present an entrapment-by-estoppel defense, no matter what proffer he made in support of it. Although Mary Pat Jacobs testified that DEA Agent Michael Heald (“Heald”) assured her that the DEA was not interested in interfering in county efforts to implement state medical marijuana law and Rosenthal’s counsel made an offer of proof that such assurance extended “generally[,] not just in the Sonoma County, but throughout the State of California” (AOB 29; ER 160-61), the district court refused to consider such proffer, or even to listen to Jacobs’ or Heald’s account, because the pretrial proffer was “inadmissible hearsay, untimely, irrelevant, or never proffered.” (GB 44 n.11)

The district court, however, was bound at least to consider the proffer. The proffered testimony of Jacobs and Heald was not hearsay or irrelevant, since it was not offered for the truth of the matter asserted, but to demonstrate Rosenthal’s state of mind, which is relevant to the entrapment-by-estoppel defense. *See United States v. Quinn*, 123 F.3d 1415, 1420 (11th Cir. 1997) (statement defendant made to police officer not hearsay because it was offered to support public authority

defense, not for the truth of matter asserted); *United States v. Branham*, 97 F.3d 835, 851 (6th Cir. 1996) (conversations between government informant and defendant were not hearsay because they were offered to support defendant's entrapment defense, not for their truth). The district court even recognized this at an earlier time when it overruled precisely such objections by the prosecutor. (ER 90-91 ["If it goes to his state of mind, I'll allow it"])

Nor was the pretrial proffer untimely, since it was made more than a week before the defense started its case; it merely supplemented an initial proffer regarding Jacobs' testimony made more than a month and a half earlier, and it violated no order of the court. *Compare Nelson v. Nelson*, 171 F.2d 1021, 1021 (D.C. Cir. 1944) (per curiam) (court may disallow offer of proof made after close of evidence). The proffer more than adequately revealed the substance of the proposed testimony, which preserves the issue for appellate review. *See* F.R.E. 103(a); *United States v. Ballis*, 28 F.3d 1399, 1406 (5th Cir. 1994). The government does not deny that this proffer, if accepted, establishes Rosenthal's right to present his defense. (*See* AOB 28-30)

And the same is true even if the proffer is limited to the four corners of Jacobs' declaration. Agent Heald's assurance that the DEA was not interested in interfering in county efforts to provide marijuana to the seriously ill (ER 5),

establishes the first prong of the entrapment-by-estoppel defense -- affirmative misleading. Whether Rosenthal reasonably relied on this assurance, as conveyed to him by Jacobs, to cultivate medical marijuana for the seriously ill is a question of fact for the jury. *See, e.g., Commonwealth v. Twitchell*, 617 N.E.2d 609, 619-20 (Mass. 1993). The district court, once again, erred in depriving Rosenthal the opportunity to present this evidence to the jury and on that basis to instruct on the defense of entrapment by estoppel.

IV. MISCONDUCT IN THE GRAND JURY PROCEEDINGS REQUIRES REVERSAL

A. The Government Seeks to Distract This Court from the False Assurances the Prosecutor Made to the Grand Jury

Rosenthal contends the prosecutor misled the grand jury by falsely assuring it that the federal government had not sought to shut down the operations of the cannabis clubs. Whereas Rosenthal clearly identified the “blatant misleading” as the prosecutor’s statements at *page 46* of the grand jury transcript (ER 236) that “[w]e have not sought to shut down the operations of the club,” (AOB 36), the government seizes upon a “see also” cite to a similar passage found at *page 43* of the transcript (ER 233) to argue that, with respect to the *latter* statement, the prosecutor was merely “referring to what the state authorities were doing,

however, not what the federal authorities were doing.” (GB 47-48)

The relevant sequence of events was this. After the prosecutor made the statement cited by the government at page 43 of the grand jury transcript (ER 233), one astute grand juror specifically asked: “Is this the first case where the *federal* government is going after the Cannabis clubs?” (ER 236) (emphasis added) In response to this specific question, the prosecutor told the grand jury that “the proposed indictment does not include the Harm Reduction Center, LLC” and that “*we* have not sought to shut down the operations of *the* club. . . . It is operating.” ER 236 (emphasis added) The prosecutor was clearly talking about the federal government at *this* point, not just the state authorities.

Rather than admit that this description of events is incompatible with the truth, since the DEA had, in fact, sought to shut down the operations of the club (*see* ER 259), the government contends that the grand jury had been made aware of the scope of its enforcement activities because the February 12, 2002, search of HRC had been previously disclosed. (GB 47) This “disclosure,” however, was grossly deficient. Although the prosecutor had earlier revealed to the grand jury that the federal government had executed search warrants at HRC and seized “approximately 714” marijuana plants, he omitted the crucial facts that the DEA also stripped HRC of the remainder of its inventory and records, and had

padlocked its doors. (*See* ER 259) Thus, rather than cure the misleading impression the prosecutor's had created -- that the operations of the club were not seriously impeded by the arrest and prosecution of Rosenthal and the seizure of his plants -- the partial disclosure by the prosecutor continued to deceive the grand jury. The grand jury had expressed its concerns that the gravely ill would not be able to obtain their medicine from the clubs if they were to indict persons like Rosenthal. (*See* AOB 35-36) The prosecutor's false assurances, together with his incomplete disclosures, were obviously designed to overcome the grand jury's concerns about the continued availability of medical marijuana through the cannabis clubs, and the district court so found (*see* ER 293 n.5) To salvage the grand jury's proceedings from the district court's finding that the prosecutor's statements to the grand jury were "false and calculated to overcome grand jurors' concerns," (ER 293 n.5), the government contends that the grand jury properly understood its role, since one grand juror acknowledged that they must abide by federal law. (GB 48-49) Rather than "attest to the very independence defendant claims was overcome" (GB 49), the grand juror's statement that their hands were tied exhibits both a lack of independence and, simultaneously, a sense of frustration at what it was being asked to do. The prosecutor's false assurances to the grand jury that an indictment of Rosenthal would not affect the operation of

the club likely pushed it over the edge. Such coercion invalidates the indictment. *See United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979); *cf. United States v. Cedarquist*, 641 F.2d 1347, 1353 (9th Cir. 1981) (dismissal of indictment is proper where “prosecutor’s conduct significantly infringed upon the ability of the grand jury to exercise its independent judgment”).

Nor does it make any difference that courts have *elected not to dismiss indictments* (affirmed convictions) under *other* “egregious” circumstances. (AB 49-50) None of the cases cited by the government *addressed* (involve) the grand jury’s power to “reject an indictment that, although supported by probable cause, is based on government passion, prejudice, or injustice.” *United States v. Marcucci*, 299 F.3d 1156, 1164 (9th Cir. 2002). Rather, these cases involve errors which *the court found not to* affect the grand jury’s determination of probable cause. *See United States v. Sears, Roebuck and Company, Inc.*, 719 F.2d 1386, 1393-94 (9th Cir. 1981) (“we cannot conclude that the prosecutor’s treatment of Sears’ employees undermined the grand jury’s ability to exercise independent judgment on the question of probable cause”); *Coppedge v. United States*, 311 F.2d 128, 132 (D.C. Cir. 1962) (noting sufficient competent evidence to sustain indictment); *cf. United States v. Isgro*, 974 F.2d 1091, 1098 (9th Cir. 1992) (prosecutor’s failure to present exculpatory evidence is insufficient to sustain a

dismissal of an otherwise valid indictment).”

Because the petit jury’s subsequent convictions at trial demonstrate conclusively that probable cause exists, errors which affect only the probable cause determination are rendered harmless by the petit jury’s verdict. *See, e.g., Mechanik v. United States*, 475 U.S. 66, 70 (1986). The misconduct occurring before the grand jury in this case, by sharp contrast, deprived it of its historical power to reject “unfounded” prosecutions. *See Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972). This error cannot be rendered harmless by a subsequent conviction. *Cf. United States v. Taylor*, 798 F.2d 1337, 1340 (10th Cir. 1986) (*Mechanik* does not preclude post-conviction review of claims that “the government attempted to unfairly sway the grand jury or to otherwise affect the fairness of the accusatory process); *accord United States v. Spillone*, 879 F.2d 514, 521-22 (9th Cir. 1989). The indictment is incurably tainted by the prosecutor’s false assurances to the grand jury about the government’s intent and the continued availability of medical marijuana through the HRC.

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN REJECTING NECESSARY REBUTTAL EVIDENCE

The government does not dispute that its portrayal of Rosenthal as a profiteering drug dealer was “a highly inflammatory trial tactic which innately

prejudiced Appellants' right to a fair trial." (AOB 40 [quoting *United States v. Green*, 548 F.2d 1261, 1271 (6th Cir. 1977)]). Nor does it address or even acknowledge the binding precedent cited by Rosenthal requiring reversal of his convictions because he was prevented from rebutting this extremely prejudicial evidence. (AOB 40-41) Instead, the government argues that the district court enjoys discretion to exclude evidence under the Federal Rules and that it properly exercised this discretion by issuing a limiting instruction, rather than permitting Rosenthal to present evidence in rebuttal. The district court's discretion does not extend so far.

As an initial matter, Rosenthal notes that there is some question about the proper standard of review of the district court's erroneous exclusion of evidence. While a district court's decision to admit or exclude evidence is ordinarily reviewed for an abuse of discretion (*United States v. Leon-Reyes*, 177 F.3d 816, 819 (9th Cir. 1999)), "[t]his discretion is limited by the appellant's due process right to present a defense and his Sixth Amendment right of confrontation," *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985). Because this Court reviews *de novo* whether these constitutional rights were violated (*see, e.g., United States v. Lewis*, 979 F.2d 1372, 1374 (9th Cir. 1992)), the district court's erroneous exclusion of evidence is subject to *de novo* review where it amounts to a

deprivation of a defendant's due process right to a fair trial.

Regardless of the appropriate standard of review, the district court committed reversible error. That it failed to exercise its discretion properly is evidenced by its unequal treatment of the parties. Whereas the district court stated that it would permit the government to introduce evidence of profit if Rosenthal attempted to introduce evidence of a non-profit motive (SER 182), it refused to extend this same courtesy to Rosenthal, even after the government tarred him with evidence of profiteering and backroom power struggles. Likewise, when the government "opened the door" to rebuttal evidence regarding Rosenthal's efforts to conceal (or not conceal) his activities, the district court essentially abdicated its control of the proceedings to the prosecutor -- after the prosecutor objected to the district court's proposed limiting instruction on this score, the district court stated: "[t]he government is going to have to decide what they are going to do." (RT 1173-74; RT 1/29/03) The choice, however, was not for the government to make; it is the district court's responsibility to determine whether the door has been opened. The district court let the government have its way in determining the scope and breadth of the evidence presented, rather than seriously considering the prejudice to Rosenthal from this evidence or whether a limiting instruction was up to the task of curing the taint. The district court did not exercise its discretion in a

proper manner and it erred in forbidding Rosenthal from introducing *any* evidence to rebut the government’s highly misleading and inflammatory evidence of profit. (See AOB 40-41 [citing cases])

VI. JUROR MISCONDUCT REQUIRES REVERSAL

A. The District Court Erroneously Required Rosenthal to Demonstrate Actual Prejudice

In his opening brief, Rosenthal argued that he was entitled to a presumption of prejudice from an outside attorney’s erroneous instruction to Juror Craig that she would “get into trouble if [she] tried to do something outside [the judge’s] instructions.” (ER 261; AOB 44-49) Seeking to switch the burden to Rosenthal to demonstrate actual prejudice, the government contends that such legal advice was innocuous because it was “the same instruction [as was] given to the jurors by the court.” (GB 59) Even if the attorney’s advice injected extraneous information into the case, the government contends that Rosenthal is not entitled to a presumption of prejudice. (GB 58)

While the government is correct in noting that a presumption of prejudice may arise in cases involving either extraneous information or *ex parte* contacts (GB 57), it fails to acknowledge that this presumption is *customarily* applied in the former cases, *see Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Service Co.*, 206

F.3d 900, 906 (9th Cir. 2000). That this case involves extraneous information requiring application of the presumption of prejudice, rather than a mere *ex parte* contact “not pertaining any fact or law applicable to the case” (GB 57), is demonstrated convincingly by two recent decisions of this Court.

In *United States v. Brande*, 329 F.3d 1173 (9th Cir. 2003), the defense learned after trial and conviction that a member of the district court’s staff, responding to concerns by some jurors about another juror’s ability to convict due to that juror’s religious principles, apparently questioned that juror about his impartiality without notifying counsel. The district court refused to hold a hearing on the matter. On appeal, the government argued the contact was minimal, while the defense contended that it “‘may have influenced and disturbed [the juror] in the untrammelled exercise of his judgment as a juror.’ (quoting *Remmer v. United States*, 350 U.S. 377, 382, 76 S.Ct. 425, 100 L.Ed. 435 (1956) (*Remmer II*)).” *Brande*, 329 F.3d at 1177. This Court reversed, finding the alleged contact substantive rather innocuous because, inter alia, “the communication concerned the central duty of a juror--deciding guilt--and may have had the effect, intended or not, of influencing the juror's exercise of that duty. See *United States v. Plunk*, 153 F.3d 1011, 1023 (9th Cir.1998) (distinguishing "substantive contact" from contact related to providing for physical needs of jurors).” 329 F.3d at 1177.

In *Caliendo v. Warden*, 365 F.3d 691, this Court granted habeas relief to a California state prisoner because a state court had not applied the presumption of prejudice to a twenty minute hallway conversation between a chief prosecution witness and some jurors, stating:

The *Mattox* rule applies when an unauthorized communication with a juror crosses a low threshold to create the potential for prejudice. A communication is possibly prejudicial, not *de minimis*, if it raises a risk of influencing the verdict. *Prejudice is presumed under these circumstances*, and the defendant's motion for a new trial must be granted unless the prosecution shows that there is no reasonable possibility that the communication will influence the verdict. *See O'Brien*, 972 F.2d at 14; *United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir.1999).

Id., at 697 (Emphasis added).

Because, as in *Brande*, the unauthorized communication between juror Craig and the attorney she contacted “concerned the central duty of a juror–deciding guilt,” it met the “low threshold” which triggers the presumption of prejudice. *Caliendo*, at 697.

The government argues that the communication was insignificant because the attorney’s advice resembled the instruction given to the jurors by the district court (GB 59). The legal instructions conveyed to the jurors, however, were not merely duplicative of the district court’s instructions; they erroneously denied the

ability of jurors (a) to exercise independent thought and (b) to cause hung juries absent express authorization from the court. The outside attorney not only failed to inform Juror Craig that she need not surrender her consciously held beliefs, as the law requires (*see* AOB 47-48), but, worse still, he erroneously raised the spectre of punishment if she did not strictly abide the district court's instructions. (*See* AOB 48-49) If extraneous information is conveyed to jurors when they "look[] things up in a dictionary or directory," *cf. Sea Hawk Seafoods*, 206 F.3d at 906, it most assuredly is conveyed to them when they are given legal answers to legal questions, which were not, and could not legally have been, given by the district court.²

In any event, Rosenthal is entitled to a presumption of prejudice from the outside attorney's instructions due to their coercive effect. In *Sea Hawk Seafoods*,

² *United States v. Maree*, 934 F.2d 196 (9th Cir. 1991) is not to the contrary. In *Maree*, one juror shared information about the case with her friends and they opined that the defendant was guilty based on what she related to them. *Id.* at 202. This Court found the friends' comments to constitute *ex parte* contacts, rather than extraneous information, because "other than their personal opinions, [the juror's] friends added no *information* about the defendant or the case. Their knowledge was limited to the evidence disclosed by [the juror]." *Id.* (emphasis in original). Here, by sharp contrast, the knowledge of the attorney-friend was not so limited -- he was learned in the law and Juror Craig consulted with him precisely for this reason. (*See* ER 261) Unlike the uninformed opinions of laypersons, the legal advice of an attorney injects new information about the applicable law into the case.

this Court established that even an *ex parte* contact will merit a presumption of prejudice where it is “inherently coercive . . . as where a judge instructs a juror *ex parte* regarding the verdict” or a third party tells a juror “how he should make” his decision in the case. *See Sea Hawk Seafoods*, 206 F.3d at 906 (citations omitted). This case involves instructions which are even more coercive than these examples, as the jurors were not only erroneously led to believe that they were foreclosed from causing a hung jury, but they were threatened with punishment if they attempted to do this. The district court applied the wrong legal standard in failing to accord Rosenthal a presumption of prejudice.

B. The Juror Misconduct Prejudiced Rosenthal

While essentially conceding that it cannot demonstrate that the outside attorney’s erroneous legal advice was harmless beyond a reasonable doubt, the government contends that Rosenthal cannot claim actual prejudice because the details of this advice are sufficiently vague to preclude such finding. (*See* GB 59-60) In making this contention, the government glosses over its own role in preventing a full disclosure of the conversation between the outside attorney and Craig. (*See* AOB 49) Several courts, including this one, have reversed convictions where the appellant established the fact of an *ex parte* communication without elucidating the details. (AOB 49-50)

Next, the government contends that the outside attorney’s advice was “prosaic” because he did not tell her how to vote or tell her she “could get into trouble” if she did not vote a particular way. (GB 59-60) Undue coercion, however, is not limited to situations where one is instructed to reach a particular verdict, but it also includes instructions to: reach a decision “one way or another,” *United States v. United States Gypsum*, 438 U.S. 422, 462 (1978); “reach a decision in this case,” *Jenkins v. United States*, 380 U.S. 445, 446 (1964) (per curium); consider counts in order, *Wheaton v. United States*, 133 F.2d 522, 526-27 (8th Cir. 1943); find the defendants either guilty or not guilty on each count, in response to a note inquiring whether the jury could be “undecided,” *Rice v. United States*, 356 F.2d 709, 715-18 (8th Cir. 1966); and to issue an *Allen* instruction without admonishing the jury not to surrender conscientiously held beliefs, *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981).

Rather than address these and the other authorities cited by Rosenthal wherein courts reversed conviction under far less egregious circumstances (*see* AOB 45-53), the government relies on the district court’s perfunctory conclusion that these cases are “plainly distinguishable,” since they involved court-sponsored instructions, rather than those from a third party. (GB 60 [citing ER 200 n.8]) The government’s approach, like the district court before it, not only fails to respond in

any way to the authorities cited by Rosenthal which involved instructions from third parties (*see* AOB 45 [citing *United States v. Bensinger*, 492 F.2d 232, 238 (7th Cir. 1974); *Wheaton v. United States*, 133 F.2d 522, 526-27 (8th Cir. 1943)], but it overlooks that instructions from third parties are even *more* offensive to our adversarial system of criminal justice than court-sponsored instructions because they deprive the defendant of *any* opportunity to comment upon them or otherwise to negate their prejudicial effect.³ The district court erred in distinguishing these cases.

Nor is a contrary outcome dictated by *United States v. Blumeyer*, 62 F.3d 1013 (8th Cir. 1995), wherein the court found no actual prejudice from an attorney's answer to a hypothetical legal question. Aside from the fact that the hypothetical question posed by the juror in *Blumeyer* involved an issue "that the jury was not required to answer to reach its verdicts," *id.* at 1017, so the case is distinguishable, the Eighth Circuit's approach in *Blumeyer* conflicts with the law

³ In *United States v. United States Gypsum*, 438 U.S. 422, 462 (1978), the Supreme Court observed: "[I]t is not simply the action of the judge in having the private meeting with the jury foreman, standing alone--undesirable as that procedure is--which constitutes the error; rather, it is the fact that the *ex parte* discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict, coupled with the fact that counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from this conversation, that we find most troubling."

of this Circuit. The *Blumeyer* court was bound by Eighth Circuit precedent which distinguishes legal from factual extraneous contacts and does not afford a presumption of prejudice to the former. *Id.* at 1016-17 (citing *United States v. Estrada*, 45 F.3d 1215 (8th Cir. 1995); *United States v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988)). Not only has this approach been sharply criticized for its “unconvincing” reasoning, *United States v. Williams-Davis*, 90 F.3d 490, 502 (D.C. Cir. 1996), but it conflicts with this Court’s holding that “unauthorized reference to dictionary definitions constitutes reversible error which the State must prove harmless beyond a reasonable doubt.” *Marino v. Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987); *compare Cheyenne*, 855 F.2d at 568 (defendant bears burden of demonstrating prejudice when a juror consults a dictionary). *Blumeyer* does not overcome the attorney’s unduly coercive instructions, and the district court erred in failing to order a new trial because of them.

VII. THE DISTRICT ERRED IN INSTRUCTING THE JURY NOT TO BRING ITS “SENSE OF JUSTICE” TO BEAR ON THE CASE

Once again ignoring the numerous binding and persuasive authorities cited by Rosenthal, the government contends that the district court did not err in instructing the jury not to bring its sense of justice to bear on the case. On the one hand, the government argues that the district court “reminded the jury that it must

decide the case according to its own conscience.” (GB 63. On the other, it contends that the district court was “within its discretion to try and prevent the jury from nullifying the law.” (GB 64). Neither contention has merit.

A. The Issue Was Adequately Preserved in the Proceedings Below

As an initial matter, the government contends that the disputed instruction must be reviewed only for “plain error” because Rosenthal did not object to it before the jury began its deliberations. (GB 61-62) Rosenthal, however, specifically objected to substantively similar charging language at the jury instruction conference (RT 1/29/03), at 24 [“objecting to model instruction “[y]ou must follow the law as I give it to you whether you agree with it or not”]); and he submitted a proposed jury instruction on jury nullification with appropriate citations in support of his position (RT 1/29/03), at 19-22), and the trial court ruled against the defendant (RT 1/29/03, at 25). This was sufficient to alert the court to the grounds for the objection raised herein, so the issue is adequately preserved. *Cf. United States v. Pedigo*, 12 F.3d 618, 625-26 (7th Cir. 1993) (defendant’s submission of written instructions with supporting case-law citations, coupled with trial court’s consideration of issue, preserved objection for record; “Rule 30 does not require a defendant to continue to argue with the court once the

issue has been presented to the court and ruled upon”); *United States v. O’Neill*, 116 F.3d 245, 247 (7th Cir. 1997) (having adequately presented his objections at jury instruction conference, appellant preserved his objection); *United States v. Martinez*, 988 F.2d 685, 698 (7th Cir. 1993) (“So long as the district judge is apprised of the grounds for the objection, however, a litigant is not required to adhere to ‘formalities of language and style’”) (quotation omitted); 2 Charles A. Wright, *Federal Practice and Procedure* § 484, at 699-701 (2d ed. 1982) (“[T]he requirement of objections should not be employed woodenly, but should be applied where its application will serve the ends for which it was designed, rather than being made into a trap for the unwary”).

Furthermore, the district court issued the disputed instruction *sua sponte* during closing argument, which made it far more difficult for counsel to object when the instruction was issued. *Cf. United States v. Nerone*, 563 F.2d 836, 848 (7th Cir. 1977) (“When a trial judge prevents the party from complying with the [contemporaneous objection] rule, the remedy should be appellate consideration of the claimed errors in instruction”); *United States v. DiDonato*, 301 F.2d 383, 386 (2d Cir. 1962) (defendant is not entitled to object to instruction in front of jury); *see also Carbo v. United States*, 314 F.2d 718, 746 (9th Cir. 1963) (excusing defendant’s failure to object to disputed instruction before deliberations where

trial court failed to inform counsel as to the precise form instruction would take). Likely for this reason, the district court took it upon itself to expressly note and comment upon the disputed instruction (*See* SER 195), which, once again, preserves the issue for appellate review. *See supra*. In any event, the district court committed “plain error” by removing the jury’s “sense of justice” from this case. *See United States v. Marin-Cuevas*, 147 F.3d 889, 892-93 (9th Cir. 1997).

B. The District Court Interfered with the Jury’s Well-Recognized Power to Acquit an Accused, Even of the Evidence of His Guilt Is Clear

Notwithstanding the government’s citation to out-of-circuit authorities for the proposition that the “court’s instructions in this case were consistent with the law and the court’s duty to prevent or forestall nullification,” (GB 65 [citing *United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1997); *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988)]), the law of *this* circuit is that “American judges have generally avoided such interference as would divest juries of their power to acquit an accused, even though the evidence of his guilt may be clear” (*United States v. Simpson*, 460 F.2d 515, 520 (9th Cir. 1972)), and “the comments of the judge should be carefully guarded, so that the jurors shall be free to use their independent judgment.” *Carney v. United States*, 295 F.2d 606, 607 (9th Cir. 1924); *see also Jenkins*, 380 U.S. at 446 (“the principle that jurors may

not be coerced into surrendering views conscientiously held is so clear as to require no elaboration”) (quoting Solicitor General’s brief). The district clearly violated these principles when it affirmatively instructed the jury not to bring its “sense of justice” to bear on this case.

Seemingly sensing the tension between its position and this binding precedent, the government contends that the district court did, in fact, “remind[] the jury that it must decide the case according to its own conscience.” AB 63. The record does not support this assertion. It is one thing for the court to remind the jury that it is not dictating a particular outcome, as the district court did. (SER 195-96) It is quite another for the court to remind the jury to decide the case according to its own conscience -- a difference which is made readily apparent by the court’s contemporaneous instruction that “[y]our verdict must be based solely on the evidence and the law as I have given it to you in these instructions.” (SER 195-96) Even if the district did not demand a particular outcome, it foreclosed the jury from refusing to reach an outcome based on its conscience.

It is precisely a case such as this one where this error is so glaring. The historical power of a jury “to acquit an accused, even though the evidence of his guilt may be clear” (*Simpson*, 460 F.2d at 520) is reserved for those exceptional cases where the jury elects to exercise this power without explicitly being

instructed of its existence. *United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972). That this is such a case is demonstrated by: the jurors' violation of their oaths by seeking guidance from an outside attorney whether they could refuse to convict for reasons of conscience; the jury's post-trial condemnation of its own verdict (*see* CR 207, at 14); the concerns expressed by the grand jury about the continued supply of marijuana to the sick and dying (AOB 35-36); and the district court's minimal sentence (ER 321). The "sense of justice" of the petit jury plays a vital role in our democratic system of government. The district court erred in silencing it. (*See* AOB 56-58).

VIII. THE DISTRICT COURT ERRED IN FAILING TO HOLD A FRANKS HEARING

The government next contends that there was probable cause to search the building at 1419 Mandela Parkway ("Mandela"), even if the DEA agent who applied for the warrant to conduct the search made deliberately false statements in his affidavit. In support of its claim that there was probable cause to conduct the search with the disputed facts redacted, the government places heavy reliance on the DEA agent's "expert conclusions" regarding a host of innocent facts. (GB 68-70)

Because the agent's veracity and credibility were called into serious question by Rosenthal's pretrial showing that the agent lied about the absence of windows at Mandela and his having smelled the strong odor of marijuana emanating from the building (AOB 60-61), it is a mistake to rely on his "expert opinions," absent an opportunity for Rosenthal to cross-examine the agent on them. This is precisely why a *Franks* hearing is needed. *Cf. United States v. Stofsky*, 527 F.2d 237, 245-46 (2d Cir. 1975) (noting standard jury instruction that fact-finder may disregard entire testimony upon finding that witness had deliberately proffered false testimony). DEA Agent Pickette repeatedly made unwarranted leaps of logic in his affidavit to conclude that Rosenthal was involved in marijuana cultivation, as where he ignored the possibility that Rosenthal was a patient-customer of HRC, rather than a supplier, based on his observation of Rosenthal's singular visit there. (*See* AB 69) Agent Pickette was obviously anxious to search Mandela, likely due to Rosenthal's medical marijuana advocacy, and he relied on this advocacy to support his conclusion that Rosenthal must have crossed the line from an advocate to a criminal. This Court has held that "[m]ere confirmation of innocent static details in an anonymous tip" is insufficient to establish probable cause. *United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993).

Nor can the government compensate for the derelictions of the affidavit in support of the search warrant by claiming that the building had “high” electrical usage. (GB 68-69) The teaching of *United States v. Clark*, 31 F.3d 831 (9th Cir. 1994), is that there is “no basis for a magistrate judge or this court to evaluate whether [electrical] usage is high,” absent a proper comparison with similarly situated structures. *Id.* at 834. The district court, however, admitted that it would be “meaningless” to make such comparison in light of the evidence before it. (ER 79) The government’s eleventh-hour references to the much smaller HRC building and to increased electrical usage at Mandela in the summer months cannot fill this void, since neither provides a proper basis for comparison.

DEA Agent Pickette repeatedly saw evidence of marijuana cultivation in completely innocent facts (AOB 61-62), and the government repeats many of those conclusions here. “Probable cause means more than a bare suspicion; it exists when the officer’s knowledge of reasonably trustworthy information is sufficient to warrant a prudent person to believe that an offense has been or is being committed.” *Graves v. City of Coeur D’Alene*, 339 F.3d 828, 841 (9th Cir. 2003). Viewed from the perspective of an unbiased prudent person, as opposed to someone with an axe to grind against Rosenthal, the innocent details observed by Agent Pickette do not provide probable cause that a crime was being committed.

The district court erred in denying Rosenthal's request for a *Franks* hearing.

IX. TO THE EXTENT THAT ANY PUNISHMENT WAS WARRANTED, THE DISTRICT COURT PROPERLY SENTENCED ROSENTHAL TO ONE DAY OF IMPRISONMENT

After Rosenthal was convicted and the public rallied to his support, he argued for the application of the safety valve provisions of 18 U.S.C. § 3553(f) and he presented the district court with several legally recognized grounds for downward departures. (*See* CR 240) The district court found that Rosenthal did, in fact, qualify for the safety valve and it decided to depart downward because of the extraordinary and unique circumstances of this case. (ER 312-14 & 317-21)⁴ In determining the extent of this departure, the court found that this case lies “well outside” the heartland of narcotics cases and that Rosenthal honestly and reasonably believed that his conduct was immunized under federal law because he was acting as a City official in cultivating marijuana in accordance with state and local law. (ER 319) Due to the need for just punishment and the fact that no sentencing disparity would result from a substantial downward departure, since there are no others in Rosenthal's position, the court departed downward ten levels and it sentenced Rosenthal to a term of one day in prison, followed by a three-year

⁴ The court also noted that it would consider other grounds for departure if this Court remands for resentencing. (ER 320-21 n.2)

term of supervised release, a fine of \$1,000, and a special assessment of \$300.

(ER 321)

A. Legal Standards

Because the defendant's role in the offense is a factual conclusion rather than a legal one, this Court reviews the district court's finding of the defendant's role in the offense only for clear error. *See United States v. Green*, 152 F.3d 1202, 1205 (9th Cir. 1998). While this Court reviews the district court's decision to depart *de novo* (*see United States v. Alfaro*, 336 F.3d 876, 880 (9th Cir. 2003)), it reviews the extent of this departure only for reasonableness. *United States v. Barragan-Espinoza*, 350 F.3d 978, 984 (9th Cir. 2003).

B. The District Court Did Not Clearly Err in Finding that Rosenthal Was Not an Organizer, Leader, or Manager

From its detached view of the evidence in the record, the government contends that "the only reasonable inference" to be drawn from this evidence is that Rosenthal was a supervisor or manager. (GB 76) The district court and the Probation Office, however, after overseeing the trial and reviewing all of the evidence, concluded that there was no proof that Rosenthal directed or exercised control over the fewer than five people who assisted in the marijuana cultivation at Mandela. (ER 313-14) The government points to no new facts on appeal.

Although the government does not acknowledge this, *it* has the burden to prove Rosenthal’s managerial status by a preponderance of the evidence, which requires proof that he “exercised some control over others involved in the commission of the offense [or was] responsible for organizing others for the purpose of carrying out the crime.” *See United States v. Harper*, 33 F.3d 1143, 1150 (9th Cir. 1994) (quotation omitted); *United States v. Scholz*, 907 F.Supp. 329, 332 (D. Nev. 1995), *aff’d*, 91 F.3d 157 (9th Cir. 1996). “The Defendant is entitled to the benefit of any doubt as to his managerial status.” *Scholz*, 907 F.Supp. at 333.

In an attempt to meet this burden, the government relies primarily on the testimony of Rosenthal’s self-proclaimed former partner, James Halloran (“Halloran”) that the two men once had an “employee” who “did a lot of damage” (ER 151), as well as the testimony of Robert Martin, an HRC employee, that he once met an “employee” named Brian (SER 173). Neither of these witnesses, however, has any first-hand knowledge of the goings-on at Mandela during the relevant period and there was no proof whatsoever that Rosenthal paid a salary to anyone. The district court either found the cited testimony incredible, or insufficient to establish Rosenthal’s managerial status. *Cf. Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999) (noting “special deference” afforded to credibility

determinations by trial court). Either way, it did not commit clear error. *Cf. United States v. Lopez-Sandoval*, 146 F.3d 712, 717 (9th Cir. 1998) (“Without a showing that the defendant had control over others, even a defendant with an important role in the offense cannot be deemed a manager”) (quotation omitted).

The government cites *United States v. Polichemi*, 219 F.3d 698 (7th Cir. 2000) for the proposition that an employment relationship, standing alone, demonstrates management and control. (GB 76) Aside from the fact that the government failed to establish an employment relationship in this case, *Polichemi* does not hold that any such relationship *ipso facto* establishes control. Relying on the deference appellate courts accord trial courts in sentencing matters, the *Polichemi* court found that the lower court did not clearly err in finding that a company president supervised two salesmen. *Id.* at 712. The fact of this relationship was not only undisputed, but it is far more hierarchical, by definition, than the ill-defined employment relationship alleged by the government here.

Turning the reasoning of *Polichemi* on its head, the government contends that Rosenthal must have exercised supervisory authority over the others because he was the salesman of the marijuana, he owned the Mandela Parkway building, he had no assignments on the “to do” list, and he had extensive experience with marijuana cultivation. (GB 76-77) Simply having ownership and paying the

expenses of the Mandela Parkway building is insufficient to warrant a finding of managerial control. *See United States v. Frega*, 179 F.3d 793, 810 (9th Cir. 1999) (affirming district court’s finding that defendant was not an organizer or leader, despite evidence that he was “the scheme’s central actor, having bankrolled it, profited from it, involved in other participants, and exercised control over co-conspirators”); *United States v. Mares-Molina*, 913 F.2d 770, 774 (9th Cir. 1990) (“We cannot conclude that Mares organized or controlled his coconspirators . . . merely because he was the owner of the trucking business which leased the warehouse in which the cocaine was offloaded”). The district court properly found that Rosenthal did not author the “to do” list found at Mandela (ER 314), which suggests that someone other than Rosenthal exercised managerial control.

This case, therefore, is not controlled by *United States v. Scott*, 270 F.3d 30 (1st Cir. 2001), where the First Circuit found that the trial court did not clearly err in finding that appellant was an organizer of the conspiracy, due, in part, to “evidence . . . that he was behind it and recruited people.” *Id.* at 51-52. Rather, the facts here are more akin to *United States v. Hoac*, 990 F.2d 1099 (9th Cir. 1992), wherein this Court held that the trial court clearly erred in finding that appellant was an organizer, leader, or manager, despite evidence that he: “opened the trading company to export the heroin;” “possessed the rental contract and keys

for the packing warehouse,” and assisted in its operations. *Id.* at 1110-11. This Court observed that such facts merely suggest that defendant “was perhaps one of the more culpable defendants, [but] they do not indicate that [the defendant] exercise ‘control over others’ or was ‘responsible for organizing others.’” *Id.* at 1110. Inferences and supposition aside, the government has failed to show that Rosenthal exercised managerial control over anyone, and the district court did not clearly err in finding that he did not.

Even if there were evidence that Rosenthal supervised or controlled others, he still would not qualify as an organizer, leader or manager for sentencing purposes, due to the size of the entire medical marijuana enterprise. *See United States v. Scholz*, 907 F.Supp. 329, 333 (D. Nev. 1995), *aff’d*, 91 F.3d 157 (9th Cir. 1996); *see also United States v. Barnes*, 993 F.2d 680, 685 (9th Cir. 1993) (suggesting that exercise of authority over one person may be insufficient basis upon which to impose enhanced sentence for managerial status). In *Scholz*, the government established that the defendant, who was convicted of operating two or three marijuana grow sites in Reno, Nevada, recruited his wife and brother into the operation; selected the sites for the operation; exercised decision-making authority with respect to planting and harvesting techniques; paid his brother a salary, and arranged with his codefendant to take half of the profits generated. *Scholz*, 907

F.Supp. at 333-34. Despite finding that “Scholz wielded managerial authority over the marihuana-growing operation,” *id.*, the court declined to find him an organizer or leader for sentencing purposes because “Scholz’s grow houses form a part of the larger operation. . . . [so] Scholz appears not to have occupied a position of much authority in the overall scheme.” *Id.*

The same is true here. Rosenthal was part of a much larger enterprise, which included: all seven members of the Oakland City Council, all of the employees and cultivators for OCBC and HRC, and, arguably, the tens of millions of California voters who passed Proposition 215. Rosenthal did not occupy a position of much authority within this overall scheme and he cannot be considered a leader or organizer for sentencing purposes.

Moreover, this is so by definition. The enhancement for one’s managerial status is intended to punish more harshly those who are more morally blameworthy for their criminal conduct; not to punish those whose purpose is to reduce the suffering of the gravely ill. In explaining the meaning and purpose of the organizer and leader provision, the Background Note to Guideline § 3B1.1 lists among the factors for courts to consider the “nature and scope of the illegal activity” and defendant’s “claimed right to a larger share in criminal profits.” This provision clearly was never intended to apply to non-profit, humanitarian activities

like Rosenthal's.

B. The District Court Did Not Clearly Err in Finding That Rosenthal Honestly Believed That He Was Authorized to Cultivate Medical Marijuana by Virtue of His Deputization To Do So By The City of Oakland

Nor did the district court err in departing downward due to Rosenthal's good-faith belief that he was immune from federal prosecution by virtue of deputization to cultivate medical marijuana by the City of Oakland. (ER 319-20) The district court observed Rosenthal testify and it determined from Rosenthal's demeanor and the openness of his conduct that this testimony was credible. (ER 319-20) The government cannot overcome the "special deference" owed to such credibility determinations (*see Singh-Kaur*, 183 F.3d at 1151) by the "two crucial and indisputable facts" it cites, which were also presented to the district court, *see* AB 78-79; CR 236, at 14; CR 239, at 7 . In any event, remand would be futile because the district court has expressed its intent to impose the same sentence on the basis of "lesser harms." *See* ER 320-21 n.2; *United States v. Koon*, 518 U.S. 81, 113 (1996).

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C. It Was Not Unreasonable for the District Court to Give Rosenthal a One Day Sentence

The district court's plainly possessed the authority to impose the sentence it did. *See United States v. Thomas*, 930 F.2d 526, 528 (7th Cir. 1991) (recognizing “the one-day minimum term of imprisonment implicit in the general probation ban”); *cf. United States v. Roth*, 32 F.3d 437, 440 n.1 (9th Cir. 1994) (“the language of § 841(b)(1)(A) requires only a *de minimis* term of imprisonment” (citing *Thomas*). The government nonetheless contends that the extent of the departure was unreasonable because it conflicts with congressional intent. The district court addressed this point in its sentencing order by noting that Congress had not considered the “unusual,” “unprecedented” circumstances of this case, involving as it does the active encouragement of humanitarian activities by local government officials. (ER 319 & 321) Furthermore, the district court found that the extent of its departure was warranted by the need for just punishment (ER 321), which is borne out by the public outpouring of support for Rosenthal. By treating Rosenthal no differently from a for-profit drug dealer and demanding a five-year sentence for his humanitarian conduct, the government compromised its credibility in assess what sentence is just. The district court acted entirely reasonably in sentencing Rosenthal.

CONCLUSION

For the reasons stated above and in his opening brief, appellant Rosenthal's conviction should be reversed.

Dated: July 2, 2004

Respectfully submitted,

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