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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 EDWARD ROSENTHAL,

17 Defendant.
18
19

No. CR 02-0053-CRB

UNITED STATES' OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS ON GROUNDS OF
VINDICTIVE PROSECUTION

Date: March 2, 2007
Time: 2:00 p.m.

20 Defendant Edward Rosenthal moves to dismiss the indictment, alleging that the
21 government obtained the superseding indictment against him in retaliation for public
22 statements that he made after he was convicted at his first trial. That motion rests on a
23 distortion of the prosecutor's comments at a hearing on October 25, 2006. As the record
24 and the attached declaration show, the government did not obtain the superseding
25 indictment in retaliation for Rosenthal's comments to the press but because the
26 government agreed with Rosenthal that at a retrial the jury should hear the full story of
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1 Rosenthal's marijuana growing operation. Put simply, the government believed that
2 giving the jury a complete picture of Rosenthal's activities required the jury to know that
3 Rosenthal obtained proceeds from his marijuana cultivation that he did not declare on his
4 income tax return. Accordingly, the prosecutor did not obtain the superseding indictment
5 in retaliation for Rosenthal's exercise of his First Amendment rights, and the motion
6 should be denied.

7 BACKGROUND

8 The original indictment against Rosenthal filed on February 28, 2002, charged him
9 with one count of cultivation of marijuana, in violation of 21 U.S.C. § 841(a)(1); one
10 count of conspiracy to cultivate marijuana, in violation of 21 U.S.C. § 846; and one count
11 of maintaining a place for the cultivation of marijuana, in violation of 21 U.S.C. §
12 856(a)(1). Trial on the indictment began in January 2003. During trial, the Court
13 excluded evidence that Rosenthal grew marijuana to be distributed to medical marijuana
14 clubs or dispensaries and that Rosenthal believed that he was lawfully engaged in
15 growing medical marijuana. *See United States v. Rosenthal*, 266 F. Supp. 2d 1068, 1074-
16 76 (N.D. Cal. 2002). In response to the Court's ruling, Rosenthal reportedly told the
17 press that the district judge "didn't want the whole truth; he only wanted pieces of the
18 truth." *See Bob Egelko, Judge Keeps Tight Rein on Pot Trial*, San Francisco Chronicle,
19 Jan. 31, 2002, available at
20 [http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/01/31/BA213606.DTL&hw=Rosen](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/01/31/BA213606.DTL&hw=Rosenthal+marijuana&sn=062&sc=549)
21 [thal+marijuana&sn=062&sc=549](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/01/31/BA213606.DTL&hw=Rosenthal+marijuana&sn=062&sc=549). On January 31, 2002, the jury convicted defendant on
22 all three counts. As defendant's motion points out (at 3), soon after the verdict, some
23 jurors publicly complained that the Court's rulings had prevented them from learning that
24 Rosenthal had been growing marijuana for medical purposes and that he had been
25 deputized by the City of Oakland. *See Bob Egelko, Jurors Say They Were Duped*, San
26 Francisco Chronicle, Feb. 5, 2002, available at
27 <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/02/05/MN190810.DTL&hw=Rose>

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1 nthal+marijuana&sn=059&sc=931.

2 As explained in the accompanying Declaration, immediately after the verdict, the
3 government began a financial investigation of Rosenthal so that the government would be
4 in a position to charge Rosenthal with offenses arising out of the financial side of his
5 activities if the Ninth Circuit reversed his conviction. *See* Declaration of George L.
6 Bevan, Jr. at ¶ 4 (hereinafter Bevan Declaration). On April 26, 2006, the Ninth Circuit
7 reversed Rosenthal's conviction because one of the jurors had solicited legal advice from
8 an attorney during deliberations. *United States v. Rosenthal*, 454 F.3d 943 (9th Cir.
9 2006). The court of appeals held, however, that Rosenthal was not entitled to immunity
10 from federal prosecution because he had been designated an agent of the City of Oakland.

11 On October 12, 2006, the government obtained a superseding indictment against
12 Rosenthal. The superseding indictment adds counts charging that Rosenthal filed false
13 tax returns, in violation of 26 U.S.C. § 7206(1), and money laundering, in violation of 18
14 U.S.C. § 1956(a)(1)(A)(i).

15 Following the Grand Jury's return of the superseding indictment, on October 18,
16 2006, the government filed a status memorandum summarizing the amended indictment.
17 The government noted that the new indictment expanded the time frame and scope of the
18 original drug offenses, added two drug conspiracy counts, and added money laundering
19 counts and tax offenses against all three defendants. The government set forth its
20 objective in revising the indictment: "By this revised charging document, the government
21 seeks a trial on the defendants' entire marijuana-related conduct for the periods charged
22 (not just cultivation), including the financial and tax side of their criminal conduct."
23 Clerk's Docket, No. 314.

24 At the first court appearance after the grand jury returned the superseding
25 indictment, on October 25, 2006, the Court asked the prosecutor the purpose of the
26 superseding indictment. The prosecutor replied as follows:

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1 The purpose is this: Mr. Rosenthal, after the verdict, took to the
2 microphones and said, I didn't get a fair trial. The jury didn't know that I
3 was growing for clubs. The jurors said this was a distorted process. The
government was part of it. The Court was part of it. We would have
wanted to know why he was growing the plants.

4 So I'm saying this time around, he wants the financial side reflected, fine,
5 let's air this thing out. Let's have the whole conduct before the jury: Tax,
money laundering, marijuana. And let's decide it on all the evidence.

6 October 25, 2006 Tr. 16-17. The prosecutor added, "There [were] a lot of things in the
7 press about the trial being unfair." *Id.* at 17. Rosenthal contends that these comments
8 show that the government obtained the superseding indictment in retaliation for his public
9 comments about the trial.

10 ARGUMENT

11 As the Supreme Court has explained, prosecutorial decision-making carries "a
12 presumption of regularity." *Hartman v. Moore*, 126 S. Ct. 1695, 1706 (2006); *United*
13 *States v. Armstrong*, 517 U.S. 456, 464 (1996). Accordingly, "so long as the prosecutor
14 has probable cause to believe that the accused committed an offense defined by statute,
15 the decision whether to prosecute, and what charge to file or bring before a grand jury,
16 generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364
17 (1978). Prosecutors are accorded that "broad discretion" because "the decision to
18 prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S.
19 598, 607 (1985). Such decisions ordinarily rest on a number of factors that "are not
20 readily susceptible to the kind of analysis that the courts are competent to undertake,"
21 including "the strength of the case, the prosecution's general deterrence value, the
22 Government's enforcement priorities, and the case's relationship to the overall
23 enforcement plan." *Id.* at 607. Moreover, "[t]he original counts of an indictment are not
24 unalterably set in concrete." *United States v. Eichman*, 957 F.2d 45, 47 (2d Cir. 1992).
25 Thus, "[a] prosecutor should remain free before trial to exercise the broad discretion
26 entrusted to him to determine the extent of the societal interest in prosecution." *United*
27 *States v. Goodwin*, 457 U.S. 368, 382 (1982). For those reasons, "[a] prosecutor violates

1 a defendant's due process rights when he brings additional charges *solely* to punish the
2 defendant for the exercise of constitutional or statutory rights." *United States v. Gilbert*,
3 266 F.3d 1180, 1186 (9th Cir. 2001) (emphasis added); accord *United States v. Noushfar*,
4 78 F.3d 1442, 1446 (9th Cir. 1996).

5 Rosenthal cannot show that the government obtained the superseding indictment
6 "solely" to retaliate against him for his post-trial statements to the press and the public.
7 Rosenthal does not assert that the government did not have probable cause that he
8 committed the offenses charged in the superseding indictment. Instead, he argues that the
9 prosecutor retaliated against him for "his exercise of First Amendment rights." Mot. at 8.
10 That contention rests on a mischaracterization of the prosecutor's comments at the
11 October 25 hearing. The prosecutor did not say that he had obtained the superseding
12 indictment because Rosenthal complained after the trial about the Court's rulings during
13 trial. Instead, the prosecutor responded to the specific comments that Rosenthal and
14 others made. Rosenthal and some of the jurors asserted that the trial was unfair in part
15 because the jury was not allowed to hear that Rosenthal grew marijuana to supply medical
16 marijuana clubs and dispensaries. The prosecutor also remarked that the press in general
17 had criticized the trial as unfair. The essence of the prosecutor's response is that he
18 decided to address the charges of unfairness by bringing a superseding indictment that
19 would allow Rosenthal to present evidence concerning the purpose for which he grew the
20 marijuana **and** at the same time allow the government to show that Rosenthal did not
21 report the income from his marijuana sales on his tax returns. Put another way, the
22 prosecutor essentially responded that if Rosenthal wished to tell the jury the full story
23 surrounding his marijuana growing, then the jury should hear the full story concerning the
24 financial side of Rosenthal's marijuana cultivation operation. In short, the prosecutor
25 obtained the superseding indictment not to retaliate against Rosenthal's public statements,
26 but to put to rest the accusations of unfairness that followed the first trial.

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1 Rosenthal's motion also rests on the assumption that the prosecutor is pursuing a
2 vendetta against him. As set forth in the Bevan Declaration, however, in this case, as in
3 every case in which the government seeks to bring tax charges under the Internal Revenue
4 Code, the decision was approved by the Tax Division of the Department of Justice in
5 Washington. In addition, as AUSA Bevan relates, supervisors in the United States
6 Attorney's office approved the superseding indictment. Bevan Declaration at ¶ 3.

7 Moreover, the government has a substantial incentive to bring tax charges against
8 California marijuana growers when the evidence supports such charges. California
9 marijuana growers frequently claim altruistic motives for their cultivation of marijuana.
10 Even if that evidence is not admissible at a trial for growing marijuana, members of the
11 jury may learn that a defendant claims to have grown marijuana for distribution to
12 medical marijuana clubs or dispensaries. Evidence that the defendant pocketed the
13 money paid for the marijuana without declaring it on his tax return tends to show that the
14 defendant knew that it was illegal to grow the marijuana and that he grew the marijuana
15 for financial, not altruistic, purposes. Thus, the government's addition of tax charges to
16 the marijuana cultivation indictment may prevent juror nullification and is consistent with
17 increasing the deterrence value of the prosecution. *See Wayte v. United States*, 407 U.S.
18 at 607.

19 Rosenthal finds "inescapable evidence of vindictiveness" in the fact that "the
20 prosecutor convened a new grand jury to re-indict Rosenthal four months after he won his
21 appeal." Mot. at 10. But that fact only shifts the burden to the government to explain
22 why it obtained additional charges after Rosenthal prevailed on appeal. *See United States*
23 *v. Gilbert*, 266 F.3d at 1186. It does not conclusively establish vindictiveness. Here, as is
24 his habit, the prosecutor forthrightly acknowledged his reasons for obtaining the
25 superseding indictment: "to air this thing out" and have the case decided "on all the
26 evidence." There is nothing vindictive in that reason, and there is no credible evidence
27 that the prosecutor had some other nefarious reason to obtain the superseding indictment.

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1 Rosenthal also alleges that the prosecutor said to an attorney, J. David Nick, that
2 the prosecutor would “do whatever was necessary to have Rosenthal punished more
3 severely.” Mot. at 12. The prosecutor allegedly made this comment in 2005, before
4 Rosenthal’s conviction was reversed on appeal. First, that assertion is false; AUSA
5 Bevan did not make that remark. See Bevan Decl. ¶ 11(e). Second, even if the
6 prosecutor had made that statement, it provides no evidence of vindictiveness or bad
7 faith. The government vigorously argued to this Court that Rosenthal should receive a
8 five-year sentence. See *United States v. Rosenthal*, 266 F. Supp. 2d 1091 (N.D. Cal.
9 2002). When the Court imposed a one-day sentence, the Solicitor General of the United
10 States approved an appeal of the sentence to the Ninth Circuit. In the Ninth Circuit, the
11 government argued vigorously that the sentence should be overturned because it
12 substantially undervalued Rosenthal’s conduct. See *United States v. Rosenthal*, 454 F.3d
13 at 945. Thus, if in 2005, the AUSA in fact said that Rosenthal should be “punished more
14 severely,” he was simply repeating the official, public position of the United States.

15 Finally, Rosenthal seeks discovery of the inter-office memoranda between the
16 prosecutor and the Department of Justice concerning the government’s decision to bring
17 tax charges. That request should also be denied. As explained in the Bevan Declaration,
18 the United States Attorney’s office obtained Tax Division verbal approval to file the tax
19 charges against Rosenthal, and the confirming Tax Division authorization is attached to
20 the declaration as Exhibit A. The authorization documentation, and the Bevan
21 Declaration, are sufficient to show that the Department followed its settled procedures in
22 obtaining the indictment on the tax counts and that the government acted in conformity
23 with the presumption of regularity in prosecutorial decision-making. See *Hartman v.*
24 *Moore*, 126 S. Ct. at 1706.

25 Accordingly, Rosenthal cannot meet the “rigorous” standard governing discovery
26 from the government in support of a vindictive prosecution claim. See *United States v.*
27 *Armstrong*, 517 U.S. at 468. As the Court explained in *Armstrong*, such a showing is


1 necessary because discovery imposes substantial costs on the government by diverting
2 prosecutorial resources and disclosing prosecutorial strategy. *See id.* at 468. Rosenthal is
3 not entitled to review materials showing the government's deliberative process.

4 For the foregoing reasons, the motion to dismiss should be denied.

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6 Respectfully submitted,

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8 United States Attorney

9 Dated: 2/26/07

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