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for purposes of this motion only
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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,
14

Plaintiff,

CR 02-0053 CRB

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v.

16

EDWARD ROSENTHAL,

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Defendant.

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NOTICE OF MOTION AND MOTION TO
DISMISS ON GROUNDS OF
VINDICTIVE PROSECUTION OR
ALTERNATIVELY FOR DISCOVERY
AND/OR AN EVIDENTIARY HEARING

19 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE UNITED
STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:
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21 PLEASE TAKE NOTICE that on the date and time indicated
22 above, defendant Edward Rosenthal ("Rosenthal"), by and through
23 his counsel, will and hereby does move to dismiss the present
24 charges on grounds of vindictive prosecution. Alternatively,
25 Rosenthal seeks discovery and/or an evidentiary hearing in
26 support of this claim.

27 This motion is predicated on the files and records of this
28 case, and on the Declaration of J. David Nick to be filed.

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INTRODUCTION

Defendant Edward Rosenthal ("Rosenthal") likes to talk to the press. Now, he is being prosecuted because of this. In a remarkably candid admission, the prosecutor stated in open court that the reason for this successive prosecution of Rosenthal is that he "took to the microphones and said, I didn't get a fair trial." Standing alone, this admission demonstrates that this prosecution is a vindictive one, which requires its dismissal. Unfortunately, there is more. In addition to this direct evidence of prosecutorial vindictiveness, there is the conspicuous timing of the ramped up investigation of Rosenthal months after he on his appeal. There is also the prosecutor's statements that he believed Rosenthal had gotten off far too lightly and that he would do whatever was necessary to have Rosenthal punished more severely. The Constitution ensures that a defendant may talk to the press without retaliation. It also ensures that he be prosecuted by a disinterested prosecutor. Rosenthal has received neither of these protections in this case and, for these reasons, the Superseding Indictment against him should be dismissed.

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STATEMENT OF FACTS

After conducting a thorough investigation of Rosenthal in 2001-02, the government indicted him on February 12, 200, charging him with: one count of cultivation of marijuana, in violation of 21 U.S.C. § 841(a)(1); one count of conspiracy to cultivate marijuana, in violation of 21 U.S.C. § 846, and one count of maintaining a place for cultivating marijuana, in violation of 21 U.S.C. § 856(a)(1). As the government was well

1 aware when it indicted Rosenthal, he is a renowned author on
2 marijuana topics and his indictment would be sure to attract
3 significant media attention. Not surprisingly, the indictment
4 and trial of Rosenthal were reported on the front page of *The*
5 *San Francisco Chronicle* and in *The New York Times*. (See
6 [http://www.sfgate.com/cgi-](http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/02/05/MN190810.DTL)
7 [bin/article.cgi?file=/chronicle/archive/2003/02/05/MN190810.DTL](http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/02/05/MN190810.DTL))

8 In the face of this media scrutiny, the government elected
9 to file a motion *in limine* to exclude all evidence or any
10 reference to medical marijuana at Rosenthal's trial. This
11 motion was successful and precluded Rosenthal from explaining
12 the humanitarian reasons for his marijuana cultivation and his
13 deputization by the City of Oakland to do this. Having gotten
14 the trial it requested, the government obtained a conviction of
15 Rosenthal on all counts on January 31, 2003.

16 Minutes after the verdict, the jury began expressing its
17 regrets. One juror complained that, before deliberations, she
18 and another juror had discussed the prospect of refusing to
19 convict Rosenthal, but were told by an attorney-friend of one
20 juror that they would get into "big trouble" if they did not
21 abide this Court's instructions. After the remaining jurors
22 learned the full facts surrounding Rosenthal's activities, a
23 majority called a press conference to condemn their verdict only
24 four days after it was issued. See [http://www.sfgate.com/cgi-](http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/02/05/MN190810.DTL)
25 [bin/article.cgi?file=/chronicle/archive/2003/02/05/MN190810.DTL](http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/02/05/MN190810.DTL).
26 On June 4, 2003, this Court sentenced Rosenthal to one-day
27 imprisonment and three years supervised release, with credit for
28 time served. Both sides appealed.

1 On appeal, Rosenthal made several contentions, including
2 one based upon juror misconduct for the erroneous advice given
3 the jurors by the attorney-friend. The Ninth Circuit found this
4 to constitute reversible error, adding that it "would not be
5 inclined to disturb the court's reasoned analysis underlying its
6 sentencing determination." *United States v. Rosenthal*, 454 F.3d
7 943, 950-51 n.8 (9th Cir. 2006). The government, however,
8 apparently did not get the message.

9 Dissatisfied with the outcome, the same prosecutor who
10 prosecuted the first case against Rosenthal convened another
11 grand jury to seek additional charges against him. After
12 subpoenaing more than fifty witnesses over the course of
13 multiple weeks, the prosecutor secured renewed charges against
14 Rosenthal for the marijuana activity involved in the first trial
15 and new charges for filing false tax returns and money
16 laundering. Then facts supporting these new charges are less
17 than overwhelming. The four counts of money laundering consist
18 of four money orders paid to Rosenthal's landlord and packing
19 company in the amounts of \$500, \$500, \$453.66, and \$401.11,
20 respectively. See Superseding Indictment, filed October 12,
21 2006, at 11-12. The remaining counts for filing false tax
22 returns do not allege that Rosenthal made any profit, but,
23 rather, that he failed to include his gross receipts (and costs)
24 from his marijuana cultivation on his tax returns. See
25 Superseding Indictment, filed October 12, 2006, at 12-14; see
26 also Transcript of Grand Jury Proceedings, dated October 12,
27 2006, at 48 (prosecutor stating "The government is not alleging
28 necessarily that [Rosenthal's gross receipts are] his profits,

1 given the absence of records to reconstruct what his net profit
2 was."). Notwithstanding this lack of profiteering, the
3 prosecutor has announced his intention to call no less than 63
4 witness for what he describes as a straightforward case. See
5 Amended United States' Opposition to Motion to Continue, filed
6 December 22, 2006.

7 At the first court appearance on the new charges, this
8 Court asked the prosecutor the purpose of this successive
9 prosecution of Rosenthal. Astonishingly, the prosecutor
10 answered as follows:

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

16 So I'm saying, this time around, he wants
17 the financial side reflected, fine, let's
18 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.

19 Reporter's Transcript of Proceedings, dated October 25,
20 2006, at 16-17.

21 This Court responded:

22 THE COURT: Well, wait, I would like to say
23 several things:
24 Number one, if in fact you are -- you have
reindicted him because of something he said
after his trial, then I simply want to
25 remind you that the First Amendment to the
Constitution provides the opportunity for
him to speak. He can say whatever he wants
26 to about the prosecution, and he can say
whatever he wants to about the judge. That
27 is his constitutional right.

28 MR. BEVAN: Your Honor --

1 THE COURT: And if, in fact, he said things
2 which were offensive, so be it.
3 On the other hand, to reindict him or to
4 continue or to have a prosecution that is in
5 some measure contributing -- the emphasis is
6 on "some measure" -- the result of what he
7 may have said, I think that would be the
8 subject of a motion, if the parties think
9 it's appropriate.

10 Reporter's Transcript of Proceedings, dated October 25,
11 2006, at 17.

12 This Court added: "I am simply inviting the parties to
13 comment in writing on this issue." Reporter's Transcript of
14 Proceedings, dated October 25, 2006, at 19. This is Rosenthal's
15 response.

16 LEGAL STANDARDS

17 "To punish a person because he has done what the law
18 plainly allows him to do is a due process violation of the most
19 basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).
20 Although a prosecutor has broad discretion in his charging
21 decisions, there are two important limitations on this
22 authority. *First*, a prosecutor may not bring charges with a
23 vindictive motive, since "'penalizing those who choose to
24 exercise' constitutional rights, 'would be patently
25 unconstitutional.'" *North Carolina v. Pearce*, 395 U.S. 711, 724
26 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S.
27 794 (1989) (quoting *United States v. Jackson*, 390 U.S. 570, 581
28 (1968)); *see Guam v. Fegurgur*, 800 F.2d 1470, 1473 (9th Cir.
1986). Nor may a prosecutor selectively enforce the law based
on race, religion or some other arbitrary classification,
including the exercise of rights under the First Amendment.
Guam, 800 F.2d at 1473; *United States v. P.H.E., Inc.*, 965 F.2d

1 848, 849 (10th Cir. 1992).¹

2 Because the prohibition on vindictive prosecutions is
3 intended not only to prevent against prosecutions actually
4 motivated by prosecutorial animus, but also to prevent the
5 chilling of the exercise of constitutional rights by defendants,
6 no evidence of actual bad faith is necessary to establish the
7 claim. *Blackledge v. Perry*, 417 U.S. 21, 28 (1974); *United*
8 *States v. Groves*, 571 F.2d 450, 454 n.1 (9th Cir. 1978); *United*
9 *States v. DeMarco*, 550 F.2d 1224, 1227 (9th Cir. 1977); see also
10 *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir.
11 1976) ("the mere appearance of vindictiveness is enough to place
12 the burden on the prosecution") (emphasis in original). Once
13 the defendant shows that charges have been increased after he
14 has exercised a constitutional or statutory right, the defendant
15 has demonstrated an "appearance of vindictiveness" on the part
16 of the prosecutor. *United States v. Shaw*, 655 F.2d 168, 171
17 (9th Cir. 1981) (citing *United States v. Groves*, 571 F.2d at
18 453). With this *prima facie* showing, or other evidence of "a
19 realistic likelihood of vindictiveness," vindictiveness is
20 presumed and the burden shifts to the government to prove that
21 the increase in the severity of the charge was not based on a
22 vindictive motive. See *United States v. Spiesz*, 689 F.2d 1326,
23 1328 (9th Cir. 1982); *Shaw*, 655 F.2d at 171; *United States v.*
24 *Burt*, 619 F.2d 531, 536 (9th Cir. 1980); see also *Ruesga-*
25 *Martinez*, 534 F.2d at 1369 (when prosecution reindicts the

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27 ¹ Though similar, vindictive prosecution and selective prose-
28 cution are distinct claims governed by different legal stan-
dards. See *United States v. DeTar*, 832 F.2d 1110, 1112 (9th
Cir. 1987). A motion to dismiss on grounds of selective
prosecution is filed herewith.

1 accused after he exercises a procedural right, the prosecution
2 "bears a heavy burden of proving that any increase in the
3 severity of the alleged charges was not motivated by a
4 vindictive motive"). "[A]n indictment must be dismissed if
5 there is a finding of 'actual' vindictiveness, or if there is a
6 presumption of vindictiveness that has not been rebutted by
7 objective evidence justifying the prosecutor's action," the
8 indictment must be dismissed. *United States v. Johnson*, 171
9 F.3d 139, 140 (2d Cir. 1999) (per curium); see *Spiesz*, 689 F.2d
10 at 1328.

11 ARGUMENT

12 I.

13 THE INDICTMENT MUST BE DISMISSED BECAUSE 14 THIS PROSECUTION IS VINDICTIVE

15 This case involves all forms of prosecutorial vindictive-
16 ness condemned by the courts. *First*, as the prosecutor's own
17 words reveal, this successive prosecution of Rosenthal is
18 motivated by vindictiveness against Rosenthal for his exercise
19 of First Amendment rights. The prosecutor freely admitted:
20 "The purpose [of this prosecution] is this: Mr. Rosenthal,
21 after the verdict, took to the microphones and said, I didn't
22 get a fair trial. ... So I'm saying, this time around, he wants
23 the financial side reflected, fine, let's air this thing out.
24 Let's have the whole conduct before the jury: Tax, money
25 laundering, marijuana. And let's decide it on all the
26 evidence." Reporter's Transcript of Proceedings, dated October
27 25, 2006, at 16-17. The prosecutor added: "There [were] a lot
28 of things in the press about the trial being unfair. ... It was

1 uncomfortable from my standpoint to be on the receiving end that
2 the trial was deemed to be unfair -- was said to be unfair."
3 Reporter's Transcript of Proceedings, dated October 25, 2006, at
4 17-18. "We only charged and only tried a portion of his
5 conduct, and what we're saying now is, Okay, we're going to put
6 all of his conduct in front of the jury. We want the jury to
7 know everything about his conduct, the marijuana cultivation and
8 what he did with the money and his tax returns. And that's the
9 basis for the indictment." Reporter's Transcript of
10 Proceedings, dated October 25, 2006, at 18.

11 As this court recognized in response to the prosecutor, a
12 defendant has the right to speak to the press about his
13 prosecution. See Reporter's Transcript of Proceedings, dated
14 October 25, 2006, at 17. Piling on additional charges against a
15 defendant for exercising this right constitutes a paradigmatic
16 example of vindictive prosecution. *Cf. United States v. P.H.E.,*
17 *Inc.*, 965 F.2d 848, 853 (10th Cir. 1992) (holding that a
18 prosecution motivated by a desire to discourage expression
19 protected by the First Amendment is barred and must be enjoined
20 or dismissed, irrespective of whether the challenged action
21 could possibly be found to be unlawful) (citations omitted);
22 *United States v. Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989)
23 ("The broad discretion accorded prosecutors in deciding whom to
24 prosecute is not 'unfettered,' and a decision to prosecute may
25 not be deliberately based upon the exercise of protected
26 statutory rights.") (citations omitted); *Brooks v. United*
27 *States*, 450 U.S. 927 (1981) (stating that a court must reconcile
28 the rule that a prosecutor has broad discretion to file charges

1 where there is probable cause with the rule that vindictive
2 conduct by prosecutors is unacceptable and requires control);
3 see also *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987)
4 ("The freedom of individuals verbally to oppose or challenge
5 police action without thereby risking arrest is one of the
6 principal characteristics by which we distinguish a free nation
7 from a police state.").

8 Lest there be any doubt from the prosecutor's words that
9 this prosecution is vindictive, the sequence of events confirms
10 this. Because future defendants may be deterred from exercising
11 their constitutional and statutory rights by increased charges
12 filed against a defendant who files a successful appeal,
13 vindictiveness is presumed under these circumstances. See *Shaw*,
14 655 F.2d at 171; *DeMarco*, 550 F.2d at 1227; *United States v.*
15 *Groves*, 571 F.2d at 453. Here, the prosecutor convened a new
16 grand jury to re-indict Rosenthal four months after he won his
17 appeal, which constitutes inescapable evidence of vindictive-
18 ness. Cf. *Groves*, 571 F.2d at 453-54 (dismissing indictment on
19 marijuana charges, which the government had known about since
20 related cocaine charges were filed, because government waited
21 nine months to file marijuana charges and resurrected them only
22 after defendant moved to dismiss the related cocaine charges;
23 "The conclusion is inescapable on this record that the
24 government brought the marihuana charge in retaliation for the
25 appellant's exercise of his statutory rights on the cocaine
26 charge); *DeMarco*, 550 F.2d at 1227-28 (dismissing indictment
27 charging the making of false statements to an IRS agent after
28 such charges were added in response to defendant's assertion of

1 his statutory venue rights to be tried in the district of his
2 residence). During Rosenthal's first trial, for instance, the
3 government presented evidence that Rosenthal had paid his
4 landlord, Leslie Wilmer, money orders totaling thousands of
5 dollars; Amended United States' Opposition to Motion to
6 Continue, filed December 22, 2006, at 9, but it did not indict
7 Rosenthal for this "money laundering" until after he was
8 successful on his appeal. Likewise, the government presented
9 evidence that Rosenthal had received checks for thousands of
10 dollars as payment for the marijuana clones he cultivated and it
11 had possession of the tax returns that form the basis for counts
12 21 and 22 of the Superseding Indictment, yet it did not indict
13 Rosenthal for this until after it learned he had won his appeal.
14 See Trial testimony of James Halloran and Robert Martin
15 regarding money paid to Rosenthal, Exhibits P, Q, R; see also
16 Amended United States' Opposition to Motion to Continue, filed
17 December 22, 2006, at 7 ("Halloran's purchase of hundreds of
18 marijuana plants grown at Rosenthal's warehouse, as a price of
19 \$7 per plants during the period 1998-2002, is alone sufficient
20 evidence that Rosenthal received income from marijuana sales
21 during the years 1999-2001)." As in other cases where courts
22 have dismissed indictments due to prosecutorial vindictiveness,
23 the prosecutor has "upped the ante" in response to Rosenthal's
24 successful assertion of his statutory rights. See *Groves*, 571
25 F.2d at 453-54; *DeMarco*, 550 F.2d at 1227-28; see also *Spiesz*,
26 689 F.2d at 1328 ("A claim for vindictive prosecution arises
27 when the government increases the severity of alleged charges in
28 response to the exercise of constitutional or statutory

1 rights.”). The result in this case ought not to be different.

2 As if this were not enough, there is additional direct
3 evidence that the prosecutor in this case has an axe to grind
4 against the defendant. At a deposition in a *habeas* action in
5 2005, Prosecutor Bevan told J. David Nick, the attorney of
6 Rosenthal’s co-defendant Rick Watts, that he viewed the one-day
7 sentence given to Rosenthal as grossly unjust and that he would
8 do whatever was necessary to have Rosenthal punished more
9 severely. See Declaration of J. David Nick in Support of Motion
10 Dismiss on Grounds of Vindictive Prosecution, to be filed.²
11 Now, he is putting his words into effect. Not only do the new
12 charges against Rosenthal carry the possibility of a lengthy
13 prison term, but the government’s investigation of Rosenthal and
14 the filing of tax charges against him reflect a blatant attempt
15 to generate evidence that Rosenthal was an organizer, super-
16 visor, leader, or manager, which might result in a five-year
17 mandatory minimum sentence on the already tried counts. In
18 *Wright v. United States*, 732 F.2d 1048 (2d Cir. 1984), the court
19 established that a defendant has a constitutional right to a
20 “disinterested prosecutor” and that a prosecutor “is not dis-
21 interested if he has, or is under the influence of others who
22 have, an axe to grind against the defendant. . . .” *Id.* at 1055.
23 The prosecutor here as acted as a “stalking horse” against

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26 ² This overzealousness is consistent with the prosecutor’s
27 false statements to the original grand jury about the government
28 not targeting the cannabis clubs in order to ensure an indict-
ment of Rosenthal. See *United States v. Rosenthal*, 266
F.Supp.2d 1068, 1085 n.5 (N.D. Cal. 2003), *rev’d in part on*
other grounds by United States v. Rosenthal, 445 F.3d 1239
(2006).

1 Rosenthal and is in no way disinterested.³

2 II.

3 ROSENTHAL IS ENTITLED TO DISCOVERY ON HIS
4 VINDICTIVE PROSECUTION CLAIM AND TO AN
5 EVIDENTIARY HEARING

6 Although Rosenthal believes that the prosecutor's admission
7 regarding the reason for this prosecution and the new charges,
8 standing alone, requires that the Superseding Indictment be
9 dismissed, he requests, in the alternative, for discovery and an
10 evidentiary hearing on the vindictive prosecution claim. See
11 *Adams*, 870 F.2d at 1145-46 (holding that defendants were
12 entitled to discovery on their vindictive prosecution claim and
13 stating that "where there has been a *prima facie* showing of 'a
14 realistic likelihood of vindictiveness,' it is incumbent upon
15 the district court to 'conduct an evidentiary hearing where the
16 government's explanations can be formally presented and
17 tested'" (quoting *United States v. Andrews*, 633 F.2d 449, 453
18 (6th Cir. 1980) (en banc)). To be entitled to such discovery, a
19 defendant must come forward with "some evidence" of each of the
20 elements of the defense. See *United States v. Armstrong*, 517
21 U.S. 456, 465 (1996). Rosenthal has done this and the discovery
22 he seeks⁴ -- in particular the inter-office memoranda between
23 the prosecutor and the Justice Department -- will bolster his
24 claims that he is being targeted for prosecution because of
25 prosecutorial vindictiveness. Cf. *Adams*, 870 F.2d at 1146 ("It
26 is hard to see, indeed, how the defendants could have gone much
27 farther than they did without the benefit of discovery on the

27 ³ Rosenthal is contemporaneously filing a motion to recuse the
28 prosecutor on this and other grounds.

⁴ See Exhibits K, L, N.

1 process through which this prosecution was initiated.”).

2

CONCLUSION

3 Knowing full well the media attention this case would
4 attract, the government indicted Rosenthal to send a message to
5 the Rosenthals of the world that the federal government will
6 seek lengthy prison sentences against medical marijuana
7 cultivators. The strategy, however, backfired. Rather than
8 demonstrate to the public that the government’s position on
9 medical marijuana will prevail, the public got the message from
10 Rosenthal’s trial that it was “unfair.” While the prosecutor
11 understandably may not like this message and blames it on the
12 statements Rosenthal made to the press, he cannot use his office
13 to retaliate against Rosenthal. The government’s case against
14 Rosenthal, at most, warrants a one-day sentence and has gone on
15 long enough. The overzealousness of the prosecutor at
16 Rosenthal’s expense should be brought to an end.

17 Dated: February 20, 2007

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Respectfully submitted,

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ED ROSENTHAL

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/s/ Joseph D. Elford
by JOSEPH D. ELFORD

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Specially appearing for Defendant
EDWARD ROSENTHAL
(for purposes of this motion only)

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