

Appendix

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 23 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-10254

Plaintiff-Appellee,

D.C. No.

1:12-cr-00360-DAD-BAM-1

v.

RAYMOND ARTHUR GENTILE,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Submitted July 19, 2019**
San Francisco, California

Before: CLIFTON and FRIEDLAND, Circuit Judges, and ADELMAN,*** District Judge.

Defendant-Appellant Raymond Gentile appeals multiple aspects of his prosecution following a jury trial in which he was convicted on three counts of

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

violating federal marijuana laws and two counts of making false statements on Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) firearms transaction forms. We affirm.

1. The district court did not err in denying Gentile’s motions for discovery and to dismiss for selective prosecution, in which Gentile asserted a theory of “geographic disparity.” “To establish a claim of selective prosecution, a defendant must show both discriminatory effect and discriminatory purpose.” *United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018). To warrant discovery for such a claim, a defendant must present at least “some evidence” that constitutes a “credible showing of different treatment of similarly situated persons.” *United States v. Armstrong*, 517 U.S. 456, 470 (1996).

Even if we assume that selective prosecution based on “geographic disparity” could trigger constitutional concerns, Gentile has not produced sufficient evidence in support of a cogent disparity theory to meet a discovery standard that is “nearly as rigorous as that for proving the [selective prosecution] claim itself.” *Sellers*, 906 F.3d at 852. Gentile has not provided any statistics showing that similarly situated defendants are prosecuted in California but not Colorado, let alone evidence that any differential treatment is explained by bias or some other impermissible purpose, so he was not entitled to discovery, or relief, for a selective prosecution claim.

2. Gentile next contends that the district court erred with regard to the jury instructions at trial in two ways: first, by denying his requested entrapment-by-estoppel instruction, and second, by failing to sua sponte instruct the jury on an apparent public authority defense as to the false statement counts. We review for abuse of discretion the district court's decision to give or not give a jury instruction, viewing the evidence in the light most favorable to the party requesting the instruction. *United States v. Heredia*, 483 F.3d 913, 921-22 (9th Cir. 2007) (en banc). We reject Gentile's arguments.

First, to warrant an entrapment-by-estoppel instruction, Gentile needed to show at least some evidence that: “(1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) that [the defendant] relied on the false information, and (5) that [the] reliance was reasonable.” *United States v. Lynch*, 903 F.3d 1061, 1076 (9th Cir. 2018) (alterations in original) (quoting *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010)). The district court did not abuse its discretion when it held that Gentile lacked sufficient evidence on at least the third and fifth elements. At best, the Second Amendment Sports employee's statements that Gentile could put the Chinta Drive address on his driver's license and vehicle registration under the “current address” section of the ATF firearm application,

despite the fact Gentile no longer lived there, were an attempt to assist Gentile in filling out the application, not an affirmative indication that writing the former address was legally permissible. The employee's comment that Gentile could submit the application and "go from there" would not have reassured a "person sincerely desirous of obeying the law" that his actions were certainly lawful, so any reliance on the comment was unreasonable. *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (quoting *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970)).

Second, the public authority defense requires the defendant to show that he "reasonably relied on the authority of a government official to engage him in a covert activity." *United States v. Burrows*, 36 F.3d 875, 881 (9th Cir. 1994) (quoting *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994)). Here, Gentile at best presented evidence that the employees tried to help him fill out the current address portion of the ATF forms. He offered no evidence that the employees asked him to do so on their behalf from positions as government agents. Gentile has not pointed to any case where the relationship between the government agent and the defendant was so weak.

Thus, we conclude that the district court did not abuse its discretion in failing to instruct the jury on entrapment-by-estoppel or public authority defenses.¹

3. Finally, Gentile argues that the district court erred in denying his motion to enjoin the government from spending funds to prosecute the marijuana-related offenses under our decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). This argument also fails.

Gentile's procedural attacks on the district court's denial of *McIntosh* relief are foreclosed by *United States v. Evans*, --- F.3d ---, No. 17-30185, 2019 WL 2943492 (9th Cir. July 9, 2019). There, we clarified that, when a criminal defendant seeks to enforce the Congressional appropriations rider prohibiting the use of Department of Justice funds to prevent states from implementing their state medical marijuana laws, the defendant is seeking *injunctive* relief. As with any request for an injunction, the criminal defendant seeking such an injunction bears the burden of proving compliance by preponderance of the evidence. *Id.* at *3. We also explained that, to obtain such an injunction, the defendant must demonstrate that he has "fully complied with the laws that allow the use, distribution, possession, or cultivation of medical marijuana, not whether he would

¹ Because the district court did not err in failing to sua sponte instruct the jury on a public authority defense, we do not need to consider whether the Government forfeited plain error review of the issue by failing to raise that standard on appeal. See *United States v. Murguia-Rodriguez*, 815 F.3d 566, 573-74 (9th Cir. 2016).

be entitled to some procedure if the state, rather than the federal government, were prosecuting him in its courts.” *Id.* To the extent *McIntosh* left any doubt, *Evans* refutes Gentile’s argument that a showing of substantial, rather than strict, compliance with California law is sufficient for *McIntosh* relief, even if such a showing would immunize him from state prosecution, *see People v. Hochanadel*, 98 Cal. Rptr. 3d 347, 363-64 (Ct. App. 2009).

The district court’s conclusion that Gentile failed to demonstrate strict compliance was not clearly erroneous. *Evans*, 2019 WL 2943492, at *4. Among other examples of non-compliance, the district court did not clearly err in concluding that Gentile’s marijuana collective, ANP, operated “for profit” in violation of California law, *see* Cal. Health & Safety Code § 11362.765(a), where ANP brought in at least \$20,000 per month in revenue exceeding ANP’s expenses. Accordingly, the district court did not abuse its discretion in denying Gentile injunctive relief under *McIntosh*. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (stating that the decision to grant or deny injunctive relief is reviewable on appeal for abuse of discretion).²

² Gentile’s entire state-law-based defense was that he was lawfully operating ANP, a premise that he failed to prove. Given that his asserted state-law-based defense for all three marijuana-related counts failed, Gentile cannot explain how the absence of a count-by-count analysis prejudiced him. *See United States v. Kleinman*, 880 F.3d 1020, 1028-30 (9th Cir. 2017). Remand on that basis therefore is not required.

AFFIRMED.

UNITED STATES DISTRICT COURT

Eastern District of California

UNITED STATES OF AMERICA

V.

RAYMOND ARTHUR GENTILE
AKA: Raymond Gentile, and Raymond A Gentile

JUDGMENT IN A CRIMINAL CASE

Case Number: **1:12CR00360-001**

Defendant's Attorney: Eric K. Fogderude, Appointed

THE DEFENDANT:

- ☐ pleaded guilty to count(s) ____ .
- ☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.
- ☒ was found guilty on counts 1 through 5 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number
21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B)	Conspiracy to Manufacture, to Distribute and/or to Possess with the Intent to Distribute Marijuana (Class B Felony)	June 28, 2009, through August 28, 2012	One
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2	Manufacture of Marijuana and Aiding and Abetting (Class B Felony)	June 28, 2009, through August 28, 2012	Two
18 U.S.C. § 1001	False Statements (Class D Felonies)	June 28, 2009, through August 28, 2012	Four and Five
21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2	Possession with Intent to Distribute Marijuana and Aiding and Abetting (Class B Felony)	June 28, 2009, through August 28, 2012	Three

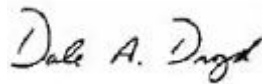
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) ____ .
- ☐ Count(s) ____ dismissed on the motion of the United States.
- ☐ Indictment is to be dismissed by District Court on motion of the United States.
- ☒ Appeal rights given. ☐ Appeal rights waived.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

6/5/2017

Date of Imposition of Judgment



Signature of Judicial Officer

Dale A. Drozd, United States District Judge

Name & Title of Judicial Officer

6/8/2017

Date

DEFENDANT: **RAYMOND ARTHUR GENTILE**

Page 2 of 7

CASE NUMBER: **1:12CR00360-001****IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 60 months on each of Counts 1 through 5, to be served CONCURRENTLY for a total term of 60 months.

- ☐ No TSR: Defendant shall cooperate in the collection of DNA.
- ☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be incarcerated in a facility where a substance abuse treatment program is offered, where the defendant's medical conditions can best be addressed, but only insofar as this accords with security classification and space availability. The Court recommends the defendant participate in the 500-Hour Bureau of Prisons Substance Abuse Treatment Program.
- ☐ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district
☐ at ____ on ____.
☐ as notified by the United States Marshal.
- ☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☒ before 2:00 PM on 7/25/2017 .
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Officer.
If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

By Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

48 months on each of Counts 1 through 3, and 36 months on each of Counts 4 and 5, all to be served CONCURRENTLY for a total term of 48 months.

MANDATORY CONDITIONS

You must not commit another federal, state or local crime.

You must not unlawfully possess a controlled substance.

You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
- ☒ You must cooperate in the collection of DNA as directed by the probation officer.
- ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.
- ☐ You must participate in an approved program for domestic violence.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall provide the probation officer with access to any requested financial information.
3. As directed by the probation officer, the defendant shall participate in an outpatient correctional treatment program to obtain assistance for drug or alcohol abuse.
4. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.
5. The defendant shall not possess or have access to any cellular phone without the advance permission of the probation officer. The defendant shall provide all billing records for such devices, whether used for business or personal, to the probation officer upon request.
6. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
7. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
8. The defendant shall register, as required in the jurisdiction in which he resides, as a drug offender.
9. The defendant shall be prohibited from using or possessing marijuana or prescription marijuana.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$500.00		

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals	\$ _____	\$ _____	

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ fine ☐ restitution

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

☐ If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A. ☒ Lump sum payment of \$ 500.00 due immediately, balance due
☐ Not later than ____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after the date of this judgment; or
- D. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or
- E. ☐ Payment during the term of supervised release/probation will commence within ____ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F. ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
The Preliminary Order of Forfeiture filed 8/1/2017 is hereby made final.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

Eastern District of California

UNITED STATES OF AMERICA

V.

RAYMOND ARTHUR GENTILE
AKA: Raymond Gentile, and Raymond A Gentile

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: **1:12CR00360-001**

Defendant's Attorney: Eric K. Fogderude, Appointed

Date of Original Judgment: June 05, 2017

(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed R. Crim. P. 35(a))
- ☒ Correction of Sentence for Clerical Mistake (Fed R. Crim. P. 36) (Corrected self- surrender date)
- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. §2255, ☐ 18 U.S.C. §3559(c)(7), ☐ Modification of Restitution Order

THE DEFENDANT:

- ☐ pleaded guilty to count(s) ____ .
- ☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.
- ☒ was found guilty on counts 1 through 5 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number
21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B)	Conspiracy to Manufacture, to Distribute and/or to Possess with the Intent to Distribute Marijuana (Class B Felony)	June 28, 2009, through August 28, 2012	One
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2	Manufacture of Marijuana and Aiding and Abetting (Class B Felony)	June 28, 2009, through August 28, 2012	Two
18 U.S.C. § 1001	False Statements (Class D Felonies)	June 28, 2009, through August 28, 2012	Four and Five
21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2	Possession with Intent to Distribute Marijuana and Aiding and Abetting (Class B Felony)	June 28, 2009, through August 28, 2012	Three

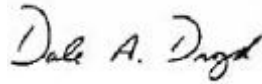
The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) ____ .
☐ Count(s) ____ dismissed on the motion of the United States.
☐ Indictment is to be dismissed by District Court on motion of the United States.
☒ Appeal rights given. ☐ Appeal rights waived.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

6/5/2017

Date of Imposition of Judgment



Signature of Judicial Officer

Dale A. Drozd, United States District Judge

Name & Title of Judicial Officer

6/9/2017

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 60 months on each of Counts 1 through 5, to be served CONCURRENTLY for a total term of 60 months.

- ☐ No TSR: Defendant shall cooperate in the collection of DNA.
- ☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be incarcerated in a facility where a substance abuse treatment program is offered, where the defendant's medical conditions can best be addressed, but only insofar as this accords with security classification and space availability. The Court recommends the defendant participate in the 500-Hour Bureau of Prisons Substance Abuse Treatment Program.
- ☐ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district
☐ at ____ on ____.
☐ as notified by the United States Marshal.
- ☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☒ before 2:00 PM on 7/5/2017 .
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Officer.
If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
 at _____, with a certified copy of this judgment.

 United States Marshal

 By Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

48 months on each of Counts 1 through 3, and 36 months on each of Counts 4 and 5, all to be served CONCURRENTLY for a total term of 48 months.

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- ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
- ☒ You must cooperate in the collection of DNA as directed by the probation officer.
- ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.
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You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
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5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall provide the probation officer with access to any requested financial information.
3. As directed by the probation officer, the defendant shall participate in an outpatient correctional treatment program to obtain assistance for drug or alcohol abuse.
4. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.
5. The defendant shall not possess or have access to any cellular phone without the advance permission of the probation officer. The defendant shall provide all billing records for such devices, whether used for business or personal, to the probation officer upon request.
6. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
7. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
8. The defendant shall register, as required in the jurisdiction in which he resides, as a drug offender.
9. The defendant shall be prohibited from using or possessing marijuana or prescription marijuana.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$500.00		

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals	\$ _____	\$ _____	

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ fine ☐ restitution

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

☐ If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A. ☒ Lump sum payment of \$ 500.00 due immediately, balance due
☐ Not later than ____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after the date of this judgment; or
- D. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or
- E. ☐ Payment during the term of supervised release/probation will commence within ____ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F. ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
The Preliminary Order of Forfeiture filed 8/1/2017 is hereby made final.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

1	UNITED STATES DISTRICT COURT	
2	EASTERN DISTRICT OF CALIFORNIA	
3	UNITED STATES OF AMERICA,	: Case No. 1:12-cr-00360-DAD-BAM
4	Plaintiff,	: Fresno, California
5	v.	: Tuesday, September 8, 2015
6	RAYMOND ARTHUR GENTILE,	: 11:29 a.m.
7	Defendant.	: MOTION HEARING
8	: : : : : : : : : : : : : : :	
9		
10	TRANSCRIPT OF PROCEEDINGS	
11	BEFORE THE HONORABLE ANTHONY W. ISHII,	
12	UNITED STATES DISTRICT JUDGE	
13	APPEARANCES:	
14	For the United States	United States Attorney's Office
15	of America:	BY: KAREN ESCOBAR, AUSA
16		2500 Tulare Street, Suite 4401
17		Fresno, CA 93721
18	For Defendant, Raymond	Fletcher & Fogderude, Inc.
19	Arthur Gentile:	BY: ERIC K. FOGDERUDE, ESQ.
20		5412 N. Palm Ave., Suite 101
21		Fresno, CA 93704
22	Court Recorder:	OTILIA ROSALES
23		
24	Transcript prepared by:	JANICE RUSSELL TRANSCRIPTS
25		1418 Red Fox Circle
		Severance, CO 80550
		(757) 422-9089
		trussell31@tdsmail.com
	Proceedings recorded by electronic sound recording; transcript produced by transcription service.	

1 FRESNO, CALIFORNIA, TUESDAY, SEPTEMBER 8, 2015, 11:29 A.M.

2 THE COURTROOM DEPUTY: Calling Item No. 9, 1:12-cr-
3 360, United States versus Raymond Arthur Gentile, a motion for
4 discovery and a motion to dismiss.

5 MR. FOGDERUDE: Yes. Good morning, Your Honor. Eric
6 Fogderude appearing on behalf of Mr. Gentile. Mr. Gentile has
7 a waiver on file.

8 MS. ESCOBAR: Karen Escobar on behalf of the United
9 States.

10 THE COURT: All right. This date and time set for
11 consideration of defendant's motions. The first is a motion
12 for discovery. The second is a motion to dismiss.

13 Let me ask. With respect to the motion for discovery,
14 if you can give me an update as to what has been disclosed and
15 what is still an issue.

16 MR. FOGDERUDE: Your Honor, from the defense
17 perspective, we've received what we think is appropriate
18 discovery as to the Department of Justice policy related to
19 prosecution of the offenses charged in Counts 1, 2, and 3 in
20 Colorado, but we have also requested and have not received a
21 comparable policy for this jurisdiction and the State of
22 California.

23 So we believe that's what still needs to be responded
24 to by the Government.

25 THE COURT: All right.

1 And on behalf of the Government?

2 MS. ESCOBAR: Your Honor, I don't think that the
3 defendant has established a basis to show that there's been any
4 discriminatory effect and has not set forth any authority that
5 he should be entitled to the specific policies that may be in
6 place in both Colorado and this District. And the case on
7 point is a Supreme Court case, U. S. v. Armstrong. That is
8 found at 517 U.S. 456, a 1996 case, in which the Supreme Court
9 specifically held that because a selective prosecution claim is
10 not a defense to the merits of a criminal charge, but instead,
11 is an independent claim, discovery related to selective
12 prosecution allegations will be granted only if defendants
13 first demonstrate some evidence of discriminatory effect and
14 discriminatory intent.

15 Here, the Government has produced the policies
16 promulgated by the Department of Justice intended to guide the
17 U. S. Attorney's action in enforcing the law relating to
18 marijuana. The U. S. Attorney has specifically testified --
19 the U. S. Attorney for Colorado -- with respect to his
20 priorities in enforcing the Controlled Substance Act. Those
21 priorities are consistent with the priorities set forth by the
22 Department of Justice that are intended to guide in the
23 enforcement of controlled substance violations. Specifically,
24 he noted that enforcement will be pursued or prosecution
25 specifically would be pursued in the case of marijuana grows

1 | where violence is involved or firearms are involved. Those
2 | are, are two of several criteria that the U. S. Attorney for
3 | Colorado identified and those priorities are consistent with
4 | priorities set forth by the Department as well as they are
5 | factors that govern, or that exist in this case. The marijuana
6 | grow case here did involve violence and did involve the
7 | presence of firearms under the possession or control and
8 | belonging to the defendant.

9 | So there has been no evidence of any discriminatory
10 | application of the law. And then under Armstrong, the Supreme
11 | Court case, there is no basis, or the defendant has not shown
12 | he's entitled to the specific policies created by the U. S.
13 | Attorney for Colorado and the U. S. Attorney here in the
14 | Eastern District

15 | THE COURT: All right.

16 | Anything further on behalf of defense, then?

17 | MR. FOGDERUDE: Your Honor, we would just add that we
18 | think the controlling case is Oyler v. Boles, U. S. Supreme
19 | Court case cited, 368 U.S. 448. And there is a gray area, no
20 | question, between the discretion that the Department of Justice
21 | has in determining which cases to prosecute, but if, as noted
22 | in that Supreme Court decision, they cross a line to what would
23 | constitute arbitrary classification, then there, there can be,
24 | it can rise to a level of a violation of the constitutional
25 | right of equal protection and that's being alleged here. And,

1 and we're raising the very specific issue of geographical,
2 whether or not there's been a violation of enforcement based on
3 geographical location and there seems to be case law supporting
4 the finding that that can be deemed an arbitrary classification
5 in Kramer v. Village of North Fond du Lac, which we've cited.

6 And so we think it's not a great burden to place on
7 the Government just to produce the policy that's in force in
8 this jurisdiction to compare them to see whether or not
9 individuals such as Mr. Gentile, who is alleged to have
10 violated the statute by growing, possessing and/or distributing
11 in a state-sanctioned marijuana dispensary, is being
12 discriminatorily prosecuted or unfairly or unequally prosecuted
13 merely because that state-sanctioned dispensary is in
14 California as opposed to Colorado. Because the Government did
15 not file opposition to the discovery motion we think it's
16 incumbent on them that the motion should be granted. They
17 should be compelled to make that last one production and then
18 the Court will have all of the facts from which to make the
19 decision whether this prosecution has crossed the line or not.

20 The only other point. I did some research and found
21 that in this area of the cart, does the egg come before the
22 chick and vice versa, you have a situation where the entity
23 that's in possession of their policy and only that entity is
24 the Government. So to argue that we haven't made a prima facie
25 showing that the policy's been violated when we don't have it

1 is virtually impossible to do without the Government complying
2 with discovery and that's why we filed the discovery case
3 along with the motion to dismiss.

4 We'll submit it.

5 THE COURT: All right.

6 I guess the big question is -- is -- I mean, I suppose
7 there is one possibility and that is the Government, if there
8 is a specific policy by the United States Attorney for the
9 Eastern District of California, I suppose one possibility is if
10 such a policy exists, to order an in-camera production so I
11 could take a look at it to see if there's anything in there
12 that might smack of discriminatory prosecution.

13 Before I get to that, I guess the real question is
14 what's the -- I'm not understanding what the discrimination is
15 with respect to geography, that is, there, obviously, as we
16 know, there are various states that have different laws
17 relating to marijuana, Colorado and, I believe, Washington,
18 allowing recreational use; whereas, a couple of others,
19 including the State of California, do allow some medical use,
20 but -- and those states that, that don't allow those, they're
21 not, there's not even a state law that allows marijuana.

22 So I guess I'm just not understanding what the
23 discrimination is based upon geography. I mean, are you
24 talking California versus Colorado? California versus the rest
25 of the United States? What's the geography parameters that

1 we're looking at here?

2 MR. FOGDERUDE: Well, we, we were specifically looking
3 to see if there was any policy discussions in both
4 jurisdictions as to state-sanctioned marijuana dispensaries
5 that are otherwise, yeah, still in conflict with federal law,
6 but whether there is a distinction, an arbitrary distinction
7 made where in Colorado those individuals engaged in that type
8 of conduct are not prosecuted, but California, they are.

9 THE COURT: But the other -- what about the other 48
10 states?

11 MR. FOGDERUDE: Well, I, I would argue to the Court if
12 there's discrimination in one jurisdiction under that Supreme
13 Court case -- and that, that federal case that we cited was two
14 counties and in one county, in the Kramer v. Village of North
15 Fond du Lac, that was really -- the DA -- it was at a local
16 state level, actually -- opted not to prosecute in one county
17 for what he prosecuted in the adjoining county.

18 So I think you don't have to show that there's
19 consistent uniformity in who's prosecuted and who isn't. You
20 just have to show that in the particular case there is
21 discrimination that they're treated unfairly or more harshly,
22 if you will. They're prosecuted when others aren't, at least
23 that's what we're trying to flush out with this motion.

24 THE COURT: Okay. But -- okay. So in that example --
25 'cause the district attorney has control over various counties,

1 | apparently, and picks and chooses the counties. So we're
2 | looking at the district attorneys. Wouldn't we then be looking
3 | at the United States Attorney rather than the local U. S.
4 | Attorney if we're talking about that kind of geographical sort
5 | of discrimination? Wouldn't it be the United States Attorney
6 | who says, "Okay. We'll go ahead and prosecute in California
7 | because," you know, whatever -- I'm just going to make this up
8 | -- "because we don't like the fact that they even legalized
9 | marijuana, even medical marijuana. That just" -- "that," you
10 | know, "we're going to go after you in California and Colorado,
11 | but," you know, "not Nebraska," or whatever.

12 | But I guess the real concern I have -- you know, I
13 | was looking at, you know, one of the cases, that Wayte case,
14 | W-A-Y-T-E, v. United States. That's 470 U.S. 598. But where
15 | the court was really clear that, in terms of discriminatory
16 | prosecution, that there had to be some impermissible
17 | governmental motivation, discriminatory purpose, etc. They
18 | talked in terms of, you know, some of the basic standards, the
19 | First Amendment rights, race, religion, etc., and there is some
20 | discussion with respect to some authority regarding
21 | geographical discrimination. I realize it gets a little beyond
22 | what we would normally see on, for example, First Amendment
23 | constitutional rights, but I'm still having a real problem with
24 | respect to what is argued here by defendant that there's
25 | selective prosecution based on geographic location.

1 And if I focus in on the U. S. Attorney here in the
2 Eastern District of California and we talk about geographic
3 location, if he's not discriminating within the 30 something
4 counties in, in the Eastern District of California, how could
5 that individual U. S. Attorney be discriminating on geographic
6 location? But if you're saying, "Well, no, no. We're talking
7 about California versus Colorado," what control does the U. S.
8 Attorney's Office in the Eastern District of California have
9 over Colorado in terms of, of geographic discrimination, that
10 is, they're doing something different in the Eastern District
11 of California as opposed to the District of Colorado, that
12 would fall within the parameters of some kind of geographic
13 location discrimination?

14 It's really -- I'm, I'm having real problems with
15 getting that as something that is significant enough as Wayte
16 where you're talking about actual constitutional rights, race,
17 religion, something that's readily identifiable that you could
18 say, okay, they're being -- they're impermissibly -- the
19 Government is impermissibly targeting individuals because of
20 race, religion, etc., as opposed to something that seems a
21 little more difficult for me to get a handle on when we talk
22 about geographic location.

23 MR. FOGDERUDE: All of the cases except for the one I
24 cited, that I could find, are on First Amendment issues.

25 THE COURT: Yeah.

1 MR. FOGDERUDE: So I, I understand the Court's
2 concern. I guess the analysis would be, using the Court's
3 comments about the district attorney and different counties,
4 are they prosecuted differently in the state, I would say that
5 the U. S. Attorney is -- is an adjunct -- is part of the
6 Department of Justice. And so, consequently, it's the
7 Department of Justice, are they showing geographical
8 discrimination in Colorado as opposed to California? In other
9 words, it's the same argument. Are we being prosecuted
10 differently here through different U. S. Attorneys? I
11 understand that complicates things as to the discretionary
12 component that they have, but we'll just submit it to the
13 Court.

14 THE COURT: Okay. And there are, as we know, there
15 are the memos that were produced by the U. S. Attorney's
16 Office, the Department of Justice, the memoranda that were
17 submitted that, apparently, apply to all, all of the U. S.
18 Attorneys as guidelines.

19 Anything further on behalf of the Government, then?

20 MS. ESCOBAR: No, Your Honor.

21 THE COURT: All right.

22 Let me just do this. I, you know, I'm -- I'm -- I
23 understand what the defense is saying. But again, as far as
24 discovery in this particular situation, I'm going to deny it
25 without prejudice. There may be some -- something -- more

1 information that could be provided or maybe some other case
2 authority that might come up that deals with this issue, but at
3 least at this point in time Mr. Gentile's argument that there
4 is an allegation, at least, or an argument for geographic,
5 discrimination, discrimination based on geographic location, I
6 can't find in this particular case as far as any indication
7 that the United States Attorney for the Eastern District of
8 California is discriminating nor have I been provided
9 information that would lead me to at least indicate that the
10 United States Attorney, the Attorney General, has issued any
11 memoranda that might cause there to be discriminatory
12 enforcement of the marijuana, prosecution on marijuana cases
13 based on geographic location.

14 So at this time I'm just going to, I'll deny it
15 without prejudice. So I think there's an interesting argument
16 to be made, but I just don't have the sense that I can
17 authorize it in this particular case.

18 MR. FOGDERUDE: Thank you, Your Honor.

19 THE COURT: All right.

20 Now with respect to the motion to dismiss, then, I
21 know that there was some concern about how the outcome of the
22 discovery motion would come out, but I don't know if the
23 parties are ready to argue on the motion to dismiss.

24 MR. FOGDERUDE: Your Honor, at this time in light of
25 the Court's ruling on the discovery we'll submit it for --

1 THE COURT: All right. Okay. All right.

2 And then anything further on behalf of, of the

3 Government?

4 MS. ESCOBAR: We will submit it as well.

5 THE COURT: All right. Okay.

6 The motion to dismiss was based upon selective

7 prosecution based upon geographical location. Obviously, what

8 the -- the main thing I think defense needed, which is

9 understandable, is some indication of a policy that then could

10 be argued that there is discrimination based on geographic

11 location, but in this case I've already ruled and I can

12 understand, then, the, the concern raised by the defense. But

13 I am going to deny the motion to dismiss for selective

14 prosecution based on geographical location. And that'll be,

15 again it'll be denied without prejudice.

16 MR. FOGDERUDE: Thank you.

17 MS. ESCOBAR: Thank you, Your Honor.

18 THE COURT: All right.

19 And so as far as the status of the case, then, for the

20 parties, how do you wish to proceed from here?

21 MR. FOGDERUDE: Your Honor, I think we've reached an

22 agreement that we will be coming back to the Magistrate Court

23 on October 26th --

24 THE COURT: Okay.

25 MR. FOGDERUDE: -- for the purpose of either resolving

1 the case or setting it for trial at that time.

2 THE COURT: All right. Okay.

3 So then this'll be set over to, if it hasn't already,
4 to Monday, October 26th, 1:00 p.m., before Magistrate Judge
5 McAuliffe. I'll continue to exclude time through and including
6 October 26th to allow time for continued pre-trial
7 investigation and trial preparation.

8 MR. FOGDERUDE: Thank you, Your Honor.

9 MS. ESCOBAR: Thank you, Your Honor.

10 THE COURT: All right.

11 MS. ESCOBAR: And an order did issue today.

12 THE COURT: Oh, okay.

13 MS. ESCOBAR: I believe the, Judge McAuliffe had it
14 set on October 13. She's not available. We stipulated to a
15 new date and the order just issued this morning.

16 THE COURT: Oh, okay. All right. Then fine.
17 Thank you.

18 MS. ESCOBAR: Thank you, Your Honor.

19 (Proceedings concluded at 11:48 a.m.)
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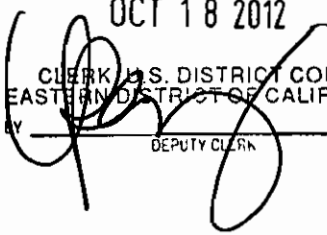
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<u>/s/ Janice Russell</u>	<u>June 15, 2017</u>
Janice Russell, Transcriber	Date

BENJAMIN B. WAGNER
United States Attorney
KAREN A. ESCOBAR
Assistant U.S. Attorney
2500 Tulare Street
Fresno, California 93721
Telephone: (559) 497-4000

FILED

OCT 18 2012

CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY  DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

- v. -

RAYMOND ARTHUR GENTILE and
GUSTAVO ANGEL SALINAS,

Defendants.

1:12 CR 00360 - AWI DLB

VIOLATIONS: 21 U.S.C. §§ 846,
841(a)(1), 841(b)(1)(B) -
Conspiracy to Manufacture, to
Distribute, and to Possess with
the Intent to Distribute
Marijuana; 21 U.S.C. §§
841(a)(1), 841(b)(1)(B), 18
U.S.C. § 2 - Manufacture of
Marijuana and Aiding and
Abetting; 21 U.S.C. §§ 841(a)(1),
841(b)(1)(B) and 18 U.S.C. § 2 -
Possession of Marijuana with the
Intent to Distribute and Aiding
and Abetting; 18 U.S.C. § 1001 -
False Statements (2 Counts); 21
U.S.C. § 853 - Criminal
Forfeiture

I N D I C T M E N T

COUNT ONE: [21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B) -
Conspiracy to Manufacture, to Distribute and/or to
Possess with the Intent to Distribute Marijuana]

The Grand Jury charges: T H A T

RAYMOND ARTHUR GENTILE and
GUSTAVO ANGEL SALINAS,

defendants herein, beginning at a time unknown, but no later than

1 on or about June 28, 2009, and continuing to on or about June 28,
2 2012, in the County of Kern, within the State and Eastern District
3 of California, and elsewhere, did knowingly and intentionally
4 conspire and agree with each other and other persons, known and
5 unknown to the Grand Jury, to manufacture, to distribute, and/or to
6 possess with the intent to distribute 100 or more marijuana plants,
7 a Schedule I controlled substance, in violation of Title 21, United
8 States Code, Sections 841(a)(1), 841(b)(1)(B), and 846.

9 COUNT TWO: [21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), 18 U.S.C.
10 § 2 - Manufacture of Marijuana and Aiding and
11 Abetting]

12 The Grand Jury further charges: T H A T

13 RAYMOND ARTHUR GENTILE,
14 defendants herein, beginning at a time unknown, but no later than
15 on or about June 28, 2009, and continuing to on or about June 28,
16 2012, in the County of Kern, within the State and Eastern District
17 of California, and elsewhere, did knowingly and intentionally
18 manufacture, and/or aid and abet the manufacture of, 100 or more
19 marijuana plants, a Schedule I controlled substance, in violation
20 of Title 21, United States Code, Sections 841(a)(1) and
21 841(b)(1)(B) and Title 18, United States Code, Section 2.

22 COUNT THREE: [21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 18 U.S.C. § 2
23 - Possession with the Intent to Distribute Marijuana
24 and Aiding and Abetting]

25 The Grand Jury further charges: T H A T

26 RAYMOND ARTHUR GENTILE and
27 GUSTAVO ANGEL SALINAS,
28 defendants herein, beginning at a time unknown, but no later than
on or about June 28, 2009, and continuing to on or about August 28,

2012, in the County of Kern, within the State and Eastern District of California, and elsewhere, did knowingly and intentionally possess with the intent to distribute, and/or aid and abet the possession with the intent to distribute, 100 or more marijuana plants, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B) and Title 18, United States Code, Section 2.

COUNT FOUR: [18 U.S.C. § 1001 - False Statements]

The Grand Jury charges: T H A T

RAYMOND ARTHUR GENTILE,
defendant herein, on or about February 28, 2012, in the County of Kern, State and Eastern District of California, and elsewhere, in a matter within the jurisdiction of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), an agency of the United States, did knowingly and willfully make false, fraudulent, and fictitious material statements and representations on Firearms Transaction Records, ATF Form 4473; that is, in connection with the purchase of a Glock handgun the defendant certified that he resided at an address on Chinta Drive in Bakersfield, California and also certified that he did not use marijuana or any controlled substance, whereas, in truth and in fact as the defendant then knew, he resided at the ANP Collective or Cooperative, a marijuana storefront, located at 1218 Baker Street in Bakersfield and used controlled substances,

All in violation of Title 18, United States Code, Section 1001.

///

///

1 COUNT FIVE: [18 U.S.C. § 1001 - False Statements]

2 The Grand Jury charges: T H A T

3 RAYMOND ARTHUR GENTILE,

4 defendant herein, on or about May 2, 2012, in the County of Kern,
5 State and Eastern District of California, and elsewhere, in a
6 matter within the jurisdiction of the Bureau of Alcohol, Tobacco,
7 Firearms, and Explosives (ATF), an agency of the United States, did
8 knowingly and willfully make false, fraudulent, and fictitious
9 material statements and representations on Firearms Transaction
10 Records, ATF Form 4473; that is, in connection with the purchase of
11 a Glock handgun the defendant certified that he resided at an
12 address on Chinta Drive in Bakersfield, California and also
13 certified that he did not use marijuana or any controlled
14 substances, whereas, in truth and in fact as the defendant then
15 knew, he resided at the ANP Collective or Cooperative, a marijuana
16 storefront, located at 1218 Baker Street in Bakersfield and used
17 controlled substances,

18 All in violation of Title 18, United States Code, Section
19 1001.

20 FORFEITURE ALLEGATION: [21 U.S.C. § 853 - Criminal Forfeiture]

21 The Grand Jury further alleges that:

22 The allegations set forth in the above Indictment are
23 incorporated by reference as though fully set forth herein for the
24 purpose of alleging forfeiture pursuant to Title 21, United States
25 Code, Section 853.

26 Pursuant to Title 21, United States Code, Section 853, and
27 upon conviction for any of the offenses alleged in Counts One
28 through Three of this Indictment, the defendants shall forfeit to

1 the United States any property constituting, or derived from, any
2 proceeds the defendants obtained, directly or indirectly, as the
3 result of the criminal conduct alleged in Counts One through Three
4 of this Indictment.

5 Pursuant to Title 21, United States Code, Section 853, and
6 upon conviction for any of the offenses alleged in Counts One
7 through Three of this Indictment, the defendants shall forfeit to
8 the United States any of the defendants' property used, or intended
9 to be used, in any manner or part, to commit, or to facilitate the
10 commission of, the criminal conduct alleged in Counts One through
11 Three of this Indictment.

12 Pursuant to Title 21, United States Code, Section 853, if any
13 property subject to forfeiture, as a result of any act or omission
14 of defendants or agents of defendants or upon direction by the
15 defendants:

- 16 a. cannot be located upon the exercise of due diligence;
- 17 b. has been transferred or sold to, or deposited with, a
18 third party;
- 19 c. has been placed beyond the jurisdiction of the court;
- 20 d. has been substantially diminished in value; or
- 21 e. has been commingled with other property which cannot be
22 divided without difficulty,

23 the United States of America shall be entitled to forfeiture of any
24 other property of the defendants, up to the value of the property

25 ///

26 ///

27 ///

28 ///

1 subject to forfeiture, including but not limited to a personal
2 forfeiture money judgment, pursuant to Title 21, United States
3 Code, Section 853(p).

4 A TRUE BILL.

5 /s/ Signature on file w/AUSA

6 FOREPERSON

7
8 BENJAMIN B. WAGNER
9 United States Attorney

10 By Mark E. Cullers
11 MARK E. CULLERS
12 Assistant U.S. Attorney
13 Chief, Fresno Office
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UNITED STATES DISTRICT COURT

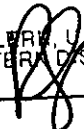
Eastern District of California
Criminal Division

1:12 CR 00360 - AWI DLB

THE UNITED STATES OF AMERICA
vs.
RAYMOND ARTHUR GENTILE and
GUSTAVO ANGEL SALINAS

FILED

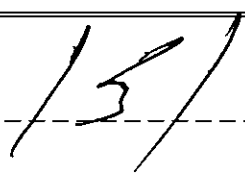
OCT 18 2012

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY  DEPUTY CLERK

INDICTMENT

VIOLATION(S): 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B) - Conspiracy to
Manufacture, to Distribute, and to Possess with the Intent to Distribute
Marijuana; 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 18 U.S.C. § 2 - Manufacture
of Marijuana and Aiding and Abetting; 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)
and 18 U.S.C. § 2 - Possession of Marijuana with the Intent to Distribute and
Aiding and Abetting; 18 U.S.C. § 1001 - False Statements (2 Counts);
21 U.S.C. § 853 - Criminal Forfeiture

A true bill,



Foreman.

Filed in open court this _____ day

of _____, A.D. 20 _____

Clerk.

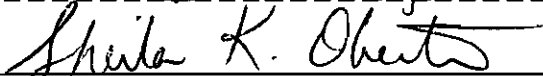
Bail, \$

☒ NO BAIL WARRANT

AS PREVIOUSLY SET

Raymond Arthur Gentile

Gustavo Angel Salinas



GPO 863 525

DEFENDANT INFORMATION RELATIVE TO A CRIMINAL ACTION -- IN U.S. DISTRICT COURT

BY

☐ COMPLAINT ☐ INFORMATION ☒ INDICTMENT
☐ SUPERSEDING INFORMATION ☐ SUPERSEDING
 SEALED ☐ Court No.

OFFENSE CHARGED

Consp. To Manf., Dist and
 Poss. W/Intent to Dist.
 Marijuana - See Indictment

☐ Petty
☐ Minor
☐ Misdemeanor
☒ Felony

Place of Offense: KERN COUNTY

USC Citations:

21: 846; 841 - SEE INDICTMENT

Name of District Court, and/or Judge Magistrate Location (city)

EASTERN DISTRICT OF CALIFORNIA
 FRESNO, CALIFORNIA

1:12 CR 00360 - AWI DLB

DEFENDANT -- U.S. vs.

RAYMOND ARTHUR GENTILE

Address {

Birth Date

☐ Male ☐ Alien
☐ Female (if applicable)

(Optional unless a juvenile)

PROCEEDING

Name of Complainant Agency, or Person (& Title, if any)

DEA - CHRISTOPHER GRIMM

☐ this person is awaiting trial in another Federal or State Court,
 give name of court.

☐ this person/proceeding is transferred from another district
 per (circle one) FRCP 20, 21, or 40. Show District

☐ this is a reprosecution of charges
 previously dismissed which were
 dismissed on motion of:

☐ U.S. Att'y ☐ Defense

SHOW
 DOCKET NO.

☐ this prosecution relates to a pending
 case involving this same defendant

☒ prior proceeding or appearance(s)
 before U.S. Magistrate regarding
 this defendant were recorded under

MAGISTRATE
 CASE NO.
 5:12MJ44 JLT

Name and Office of Person
 Furnishing information on

THIS FORM

NORA A. MCBRIDE

☒ U.S. Att'y ☐ Other U.S. Agency

Name of Asst. U.S. Att'y
 (if assigned)

KAREN A. ESCOBAR

☒ ADD FORFEITURE UNIT (Check if Forfeiture Allegation)

DEFENDANT

IS NOT IN CUSTODY

1) ☐ Has not been arrested, pending outcome this proceeding
 if not detained give date any prior summons
 was served on above charges

2) ☐ Is a Fugitive

3) ☐ Is on Bail or Release from (show District)

IS IN CUSTODY

4) ☐ On this charge

5) ☐ On another conviction

☐ Fed'l ☐ State

6) ☐ Awaiting trial on other charges

If answer to (6) is "Yes", show name of institution

Has detainer
 been filed?

Yes

No

If
 "Yes"
 give
 date

DATE OF
 ARREST ▶

Mo. Day Year

Or ... if arresting Agency & Warrant were not Federal

DATE TRANSFERRED
 TO U.S. CUSTODY ▶

Mo. Day Year

☐ This report amends AO 257 previously submitted

ADDITIONAL INFORMATION OR COMMENTS: SEE INDICTMENT - ISSUE NO BAIL WARRANT

Appendix E

E8

PENALTY SLIP

DEFENDANT:	RAYMOND ARTHUR GENTILE	1:12 CR 00360 - AWI DLB
VIOLATIONS:	21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B) - Conspiracy to Manufacture, to Distribute and/or to Possess with the Intent to Distribute Marijuana	
PENALTIES:	5-40 years \$5 million fine	
VIOLATIONS:	21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), 18 U.S.C. § 2 - Manufacture of Marijuana and Aiding and Abetting	
PENALTIES:	5-40 years \$5 million fine	
VIOLATIONS:	21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 18 U.S.C. § 2 - Possession with the Intent to Distribute Marijuana and Aiding and Abetting	
PENALTIES:	5-40 years \$5 million fine	
VIOLATIONS:	18 U.S.C. § 1000 - False Statements	
PENALTIES:	5 years \$ 250,000 fine	
VIOLATIONS:	18 U.S.C. § 1000 - False Statements	
PENALTIES:	5 years \$ 250,000 fine	
VIOLATIONS:	21 U.S.C. § 853 - Criminal Forfeiture	
PENALTIES:	See Indictment	

DEFENDANT INFORMATION RELATIVE TO A CRIMINAL ACTION -- IN U.S. DISTRICT COURT

BY

☐ COMPLAINT ☐ INFORMATION ☒ INDICTMENT
☐ SUPERSEDING INFORMATION ☐ SUPERSEDING
 SEALED ☐ Court No.

OFFENSE CHARGED

Consp. To Manf., Dist and
 Poss. W/Intent to Dist.
 Marijuana - See Indictment

☐ Petty
☐ Minor
☐ Misdemeanor
☒ Felony

Place of Offense: KERN COUNTY

USC Citations:

21: 846; 841 - SEE INDICTMENT

Name of District Court, and/or Judge Magistrate Location (city)

EASTERN DISTRICT OF CALIFORNIA
 FRESNO, CALIFORNIA

DEFENDANT -- U.S. vs.

GUSTAVO ANGEL SALINAS

Address

1:12 CR 00360 - AWI DLB

Birth Date

☐ Male ☐ Alien
☐ Female (if applicable)

(Optional unless a juvenile)

PROCEEDING

Name of Complainant Agency, or Person (& Title, if any)

DEA - CHRISTOPHER GRIMM

☐ this person is awaiting trial in another Federal or State Court,
 give name of court.

☐ this person/proceeding is transferred from another district
 per (circle one) FRCrP 20, 21, or 40. Show District

☐ this is a reprosecution of charges
 previously dismissed which were
 dismissed on motion of:

☐ U.S. Att'y ☐ Defense

SHOW
 DOCKET NO.

☐ this prosecution relates to a pending
 case involving this same defendant

☒ prior proceeding or appearance(s)
 before U.S. Magistrate regarding
 this defendant were recorded under

MAGISTRATE
CASE NO.

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Name and Office of Person
 Furnishing information on

THIS FORM

NORA A. MCBRIDE

☒ U.S. Att'y ☐ Other U.S. Agency

Name of Asst. U.S. Att'y
 (if assigned)

KAREN A. ESCOBAR

☒ ADD FORFEITURE UNIT (Check if Forfeiture Allegation)

DEFENDANT

IS NOT IN CUSTODY

1) ☐ Has not been arrested, pending outcome this proceeding
 if not detained give date any prior summons
 was served on above charges

2) ☐ Is a Fugitive

3) ☐ Is on Bail or Release from (show District)

IS IN CUSTODY

4) ☐ On this charge
 5) ☐ On another conviction ☐ Fed'l ☐ State
 6) ☐ Awaiting trial on other charges
 If answer to (6) is "Yes", show name of institution

Has detainer
 been filed?

Yes

If
 "Yes"
 give
 date

No

DATE OF
 ARREST

Mo. Day Year

Or ... if arresting Agency & Warrant were not Federal

DATE TRANSFERRED
 TO U.S. CUSTODY

Mo. Day Year

☐ This report amends AO 257 previously submitted

ADDITIONAL INFORMATION OR COMMENTS: 5-40 YRS./\$5 MILLION FINE - CUSTODY STATUS (IC) PRELIM: 10/19/12 @ 1:30

Appendix E
 Interdo; Requested 10-22-12 for
 A&P

Eric K. Fogderude, #070860
FLETCHER & FOGDERUDE, INC.
A Professional Corporation
5412 North Palm Avenue, Suite 101
Fresno, California 93704
Telephone : (559) 431-9710
Facsimile: (559) 431-4108
E-mail: efogderude1@yahoo.com

Attorney for Defendant, RAYMOND GENTILE

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. 1:12-CR-00360 AWI
)	
Plaintiff,)	
	)	MOTION FOR DISCOVERY AND MEMORANDUM
vs.	)	OF POINTS AND AUTHORITIES IN
	)	SUPPORT OF MOTION FOR DISCOVERY
RAYMOND GENTILE	)	RE: SELECTIVE PROSECUTION BASED
	)	UPON GEOGRAPHICAL LOCATION
Defendants.)	
)	
	)	DATE: September 8, 2015
	)	TIME: 10:00 a.m.
	)	Honorable Anthony W. Ishii

TO: BENJAMIN B. WAGNER , UNITED STATES ATTORNEY AND TO KAREN ESCOBAR,
ASSISTANT U.S. ATTORNEY:

PLEASE TAKE NOTICE that on September 8, 2015 , at the hour of 10:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Anthony W. Ishii, defendant Raymond Gentile, by and through undersigned counsel, will and hereby does move the court for an order permitting discovery and inspection as requested in the accompanying motion, restricted to the items and information not voluntarily given previously, if such items or information exists, and for such other and further relief as the Court may deem just and proper.

DATED: June 30, 2015

Respectfully submitted,
FLETCHER & FOGDERUDE, INC.

/s/ Eric K. Fogderude
ERIC K. FOGDERUDE, Attorney for Defendant,
RAYMOND GENTILE

MOTION FOR DISCOVERY

TO: BENJAMIN B. WAGNER , UNITED STATES ATTORNEY AND TO KAREN ESCOBAR,
ASSISTANT U.S. ATTORNEY:

PLEASE TAKE NOTICE that Defendant, Raymond Gentile, by and through his counsel ERIC K. FOGDERUDE, hereby moves this court for an order, pursuant to Rule 16, of the Federal Rules of Criminal Procedure, and such other statutory and constitutional rules relating to discovery, directing the plaintiff to permit discovery, inspection and copying of the following:

1. All information in whatever form, source or nature, which sets forth the policy of the Attorney General for the United States of America for the time period of October 18, 2012 i.e. the filing date of the Indictment, up to and including the present date, as to whether residents of the State of California and Colorado who have engaged in conduct in violation of the statutes alleged in Counts one, two and three of the Indictment, are to be prosecuted equally or differently.

Defendant requests the court, pursuant to Federal Rules of Criminal Procedure, Rule 16(c), to direct the United States Attorney to promptly supply to counsel for defendant any material ordered produced pursuant to this motion which comes into the possession, knowledge or control of the United States Attorney subsequent to the entry of the orders requested or during the course of the trial, and further to promptly advise counsel for defendant of the existence of any such material should such information be brought to the attention of the United States Attorney.

Defendant further requests that the court order plaintiff to comply with the discovery order no later than five working days after the hearing date, unless the plaintiff has provided the requested discovery on or before the date of this hearing..

This motion is based upon the entire file, records and pleadings in this matter, the Motion to Dismiss For Selective Prosecution Based On Geographical Location, on the attached memorandum of points and authorities attached hereto and made a part hereof, and on such matters which may be raised at the time set for hearing herein.

1 DATED: June 30, 2015

Respectfully submitted,
FLETCHER & FOGDERUDE, INC.

3 /s/ Eric K. Fogderude
4 ERIC K. FOGDERUDE
Attorney for Defendant,
5 RAYMOND GENTILE

6
7 **MEMORANDUM OF POINTS AND AUTHORITIES**
IN SUPPORT OF MOTION FOR DISCOVERY

8 "Because we presume that criminal prosecutions are under taken in good faith,
9 without intent to discriminate, the defendant bears the initial burden of demonstrating
10 selective enforcement." Commonwealth v. Franklin, 376 Mass. 885, 385 N.E. 2d 227 (1978).

11 There is little agreement among the Courts as to what constitutes a threshold
12 showing ..."the precise showing to be made is not quite clear from the cases." Fedaro v.
13 United States, 600 A.2d 370 (D.C. App. 1991).

14 In Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985), the
15 district court dismissed the indictment on the ground that the defendant had made out a
16 prima facie case of selective prosecution entitling him to discovery of government
17 documents and testimony of government officials, which the prosecution refused to
18 supply. The Supreme Court decided the case without dealing with these problems of proof
19 much to the chagrin of the two dissenters.

20 Some cases speak of shifting to the government. One such case is United States v.
21 Crowthers, 456 F.2d 1074 (4th Cir. 1972), where the defendants were convicted of
22 disturbing the peace by their conduct in holding several "masses for peace" in the
23 Pentagon public concourse. It was shown that in the months immediately preceding the
24 masses the area had been used 16 times for various religious, recreational and award
25 assemblies, including band recitals and a speech by the Vice President. The court
26 concluded that ... "when the record strongly suggests invidious discrimination and
27 selective application of a regulation to inhibit the expression of an unpopular viewpoint,
28 and where it appears that the government is in ready possession of the facts, and the

1 defendants are not, it is not unreasonable to reverse the burden of proof and to require
2 the government to come forward with evidence as to what extent loud and unusual noise
3 and obstruction of the concourse may have occurred on other approved occasions. It is
4 neither novel nor unfair to require the party in possession of the facts to disclose them.
5 Because the defendant has met his initial burden of demonstrating selective enforcement
6 or prosecution based upon geographical location, the plaintiff, which is in sole possession
7 of its policy on enforcement, should be required to disclose its policy.

8 For the foregoing reasons, defendant's motion for discovery and inspection should
9 be granted.

10
11
12 DATED: June 30, 2015

Respectfully submitted,
FLETCHER & FOGDERUDE, INC.

13
14 /s/ Eric K. Fogderude
15 ERIC K. FOGDERUDE
16 Attorney for Defendant,
17 RAYMOND GENTILE
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Eric K. Fogderude, #070860
FLETCHER & FOGDERUDE, INC.
A Professional Corporation
5412 North Palm Avenue, Suite 101
Fresno, California 93704
Telephone: (559) 431-9710
Facsimile: (559) 431-4108
E-Mail: efogderude1@yahoo.com

Attorney for Defendant, RAYMOND GENTILE

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. 1:12-cr-00360 AWI
)	
Plaintiff,	)	MOTION TO DISMISS FOR SELECTIVE
	)	PROSECUTION BASED ON GEOGRAPHICAL
vs.	)	LOCATION
)	
RAYMOND GENTILE)	
	)	DATE: September 8, 2015
Defendants.	)	TIME: 10:00 a.m.
	)	COURTROOM: Honorable Anthony W. Ishii
	)	United States District Judge

Defendant, RAYMOND GENTILE hereby moves the court for an order dismissing Counts one, two and three of the indictment against him on the ground that he has been discriminatorily and selectively chosen for prosecution in violation of the due process and equal protection clauses of the United States Constitution based upon geographical location.

This motion is based upon this notice of motion and motion with attached points and authorities and declarations, if any, the records on file with the court including the Motion For Discovery Re: Selective Prosecution Based Upon Geographical Location also calendared for September 8, 2015, and upon such other evidence, testimonial and documentary, as may be presented to the court at the time of hearing hereon.

///

1 Dated: June 30, 2015

Respectfully submitted,
FLETCHER & FOGDERUDE, INC.

3 /s/ Eric K. Fogderude
4 ERIC K. FOGDERUDE
Attorney for Defendant, RAYMOND GENTILE

6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO**
7 **DISMISS FOR SELECTIVE PROSECUTION**

8 **STATEMENT OF FACTS**

9 On October 18, 2012, defendant was charged in counts one, two and three of a five
10 count Indictment with conspiracy to manufacture, to distribute and/or possess with the
11 intent to distribute marijuana and with the manufacture and possession with intent to
12 distribute marijuana, in the County of Kern, State of California on or about June 28, 2009
13 and continuing to on or about June 28, 2012, all in violation of 21 USC §§ 846, 84 (a)(1)
14 and 841 (b)(1)(B). Counts four and five of the Indictment are not the subject matter of this
15 motion.

16 On January 16, 2013, the defendant entered a not guilty plea to all charges.

17 The discovery provided by the government confirmed that Raymond Gentile was
18 the owner and operator of ANP Medicinal Cooperative, Inc., hereinafter referred to as
19 ANP, a licensed marijuana dispensary located at 1218 Baker Street, Bakersfield, California
20 and that Mr. Gentile resided at the dispensary. A record check by the investigating officers
21 confirmed that ANP Medicinal Cooperative, Inc., was incorporated under the laws of the
22 State of California and that Raymond Gentile was listed as the chief operating officer,
23 President and Incorporating officer of ANP Medicinal Cooperative, Inc. The discovery
24 provided also indicated that ANP operated with a Bakersfield City Business License and a
25 Federal Tax Identification number.

26 The defendant contends the United States Attorney General has through his
27 administrative policy, selectively exempted from criminal prosecution residents of certain
28 states, such as Colorado, but not California, for the same offenses for which the defendant

1 is charged in counts one, two, and three.

2 A recent article in the California Lawyer, May 2015 entitled "This Bud's For You",
3 documented how operators of medical marijuana dispensaries in California, such as the
4 defendant, were being selectively prosecuted at the local, state and federal levels. See
5 Exhibit A.

6 Now pending before the Supreme Court, in a case entitled Nebraska and
7 Oklahoma, Plaintiffs v. Colorado, Docket No. 22O144 ORG, docketed December 22, 2014,
8 the states of Nebraska and Oklahoma claim that the federal Controlled Substances Act, or
9 CSA, preempts Colorado's marijuana law. Because the case involves one state suing
10 another, it falls within a special category of lawsuits which are filed directly with the
11 Supreme Court. Typically, the federal government would be the entity seeking to enforce
12 federal law against a state. However, because the Department of Justice under Attorney
13 General Eric Holder has refused to challenge Colorado's law, Nebraska and Oklahoma, as
14 neighboring states that say marijuana is flowing across their borders and burdening their
15 criminal justice systems, have taken on the task.

16 The Supreme Court on May 4, 2015, asked the federal government to file a brief
17 explaining its position on the issue. See Supreme Court Docket attached as Exhibit B.

18 **POINTS AND AUTHORITIES**

19 It is clear that government officials cannot enforce criminal statutes in a
20 discriminatory or selective fashion. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Washington v.
21 United States, 401 F.2d 915 (D.C. Cir. 1968); Two Guys from Harrison Allentown, Inc. v.
22 McGinley, 366 U.S. 582 (1961).

23 As set forth in the Statement of Facts, herein, the defendant has made a prima facie
24 showing that the government has acted on the basis of an unjustifiable standard of
25 selective prosecution based upon geographical location and that other persons similarly
26 situated to the defendant have not been prosecuted. Accordingly, the indictment should
27 be dismissed. United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v.
28 Insko, 496 F.2d 204 (5th Cir. 1974); United States v. Falk, 479 F.2d 616 (7th Cir. 1973)

(en banc); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972).

MOTION TO DISMISS FOR SELECTIVE ENFORCEMENT

In Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7L.Ed. 2d 446 (1962), the Supreme Court emphasized that “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation,” and that to prevail on an equal protection claim a defendant would have to show that he was selected pursuant to an “arbitrary classification” such as “race” or “religion”. Notwithstanding the number of appellate cases in which a discriminatory enforcement claim has been raised, it is far from clear just what constitutes an “arbitrary classification” in this context. Except for the obvious proposition that race or religion are illegitimate standards upon which to make enforcement decisions, the cases dealing with equal protection attacks on the decision to prosecute provide no analytic framework within which to determine the unjustifiableness of criteria. The lower court cases indicate that a rather limited number of classifications have been rather readily held or assumed to be “arbitrary”. Included are those instances in which the selection for prosecution was based upon race. United States v. Eagleboy, 200 F.3d 1137 (8th Cir. 1999) (persons of Indian descent), national origin, United States v. Cammisano, 546 F.2d 238 (8th Cir. 1976) (Italian defendant), sex, State v. Johnson, 74 Wis.2d 169, 246 N.W. 2d 503 (1976), union activity or membership in a political party, United States v. Hastings, 126 F.3d 310 (4th Cir. 1997), United States v. Torquato, 602 F.2d 564 (3rd Cir. 1979), the exercise of First Amendment rights, United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) and geographical location, State v. Kramer, 248 Wis.2d 1009, 637 N.W.2d 35 (2001) and Kramer v. Village of North Fond du Lac, 384 F.3d 856 (7th Cir. 2004.)

“In the plaintiff’s claim that he and other North Fond du Lac bar owners were singled out for prosecution, in violation of the Equal Protection Clause. In support of the claim that his equal protection rights were violated, the plaintiff relies on the decision of the Wisconsin Supreme Court, which found that he had established a prima facie case for selective prosecution in the trial court. State v. Kramer, 248 Wis.2d 1009, 637 N.W.2d 35 (Wis. 2001). As noted earlier, Kramer’s argument in his criminal appeal was that North

1 Fond du Lac tavern owners were selectively prosecuted solely on the basis of geography.
 2 Id. At 1019, 637 N.W.2d 35. The Supreme Court found that he made out a prima facie case
 3 for selective prosecution because the district attorney only prosecuted North Fond du Lac
 4 bar owners to the exclusion of owners in other parts of the county. But the issue of
 5 geography, the only alleged grounds for discrimination, dropped out of this case once
 6 Storm, Gilmore and Fond du Lac County were dismissed from this action. That is, the
 7 original argument charged the district attorney with going after North Fond du Lac
 8 residents while favoring residents outside the village. But because the plaintiff is now only
 9 proceeding against the police chief of North Fond du Lac and the village itself, he cannot
 10 logically claim that North Fond du Lac or its police chief "selectively prosecuted" only
 11 taverns in the village, while favoring non-village bars. The plaintiff does not explain how
 12 either the village or the chief could have investigated or brought charges against taverns
 13 outside their jurisdiction." See Kramer v. Village of North Fond du Lac, 384 F.3d 856 (7th
 14 Cir. 2004).

15 CONCLUSION

16 Defendant Raymond Gentile requests that the court find that the defendant, as a
 17 resident of the State of California, has been discriminately and selectively chosen for
 18 prosecution in violation of the due process and equal protection clauses of the United
 19 States Constitution and the Defendant Raymond Gentile respectfully moves the Court to
 20 dismiss counts one, two and three of the Indictment.

21
 22 Dated: June 30, 2015

Respectfully submitted,
 FLETCHER & FOGDERUDE, INC.

24 /s/ Eric K. Fogderude
 ERIC K. FOGDERUDE
 Attorney for Defendant,
 RAYMOND GENTILE

EXHIBIT A

California LAWYER

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Long Odds

Unaccompanied
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the Central Valley
are stranded
without
counsel.



Pot Rules in L.A.

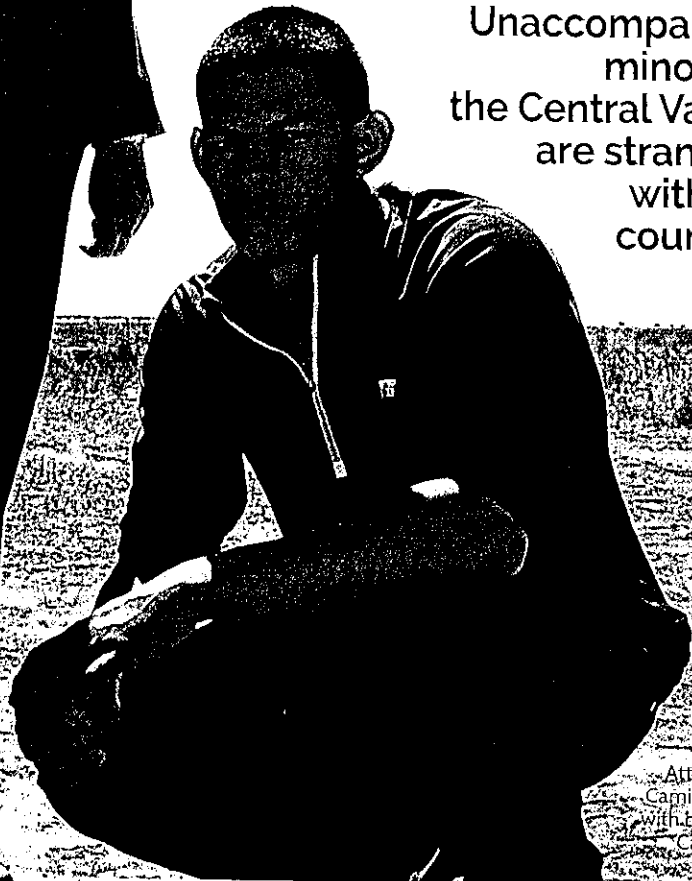
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This Bud's for You

Work-arounds bedevil efforts in
Los Angeles to limit pot clubs' growth.

by Matthew Heller

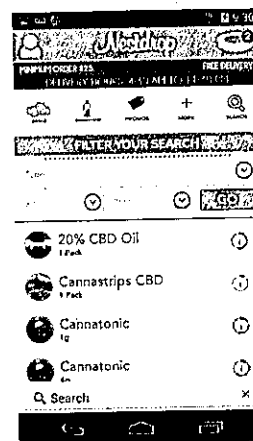


When Detective Vincent Bancroft of the Los Angeles Police Department's gangs and narcotics division heard about a mobile app that allows people to order medical marijuana from local dispensaries via smartphones, it piqued his interest. From articles about Nestdrop he read online—on local news websites and coed.com (for college students)—Bancroft learned that the service takes orders from smartphone users and then subcontracts the order to local weed-delivery services around Los Angeles, according to a court declaration late last year. Deliveries are made within an hour, Nestdrop co-founder Michael Pycher promised in an interview with *LA Weekly*.

Bancroft launched an investigation that involved downloading the Nestdrop app. "Sit back, relax, enjoy the drop! Your phone now sends alcohol and medical marijuana to your door!" the app's first page greeted him. "At this pivotal point in history," it went on to say, "we stand as pioneers ready to define tomorrow." Among the available products listed under the heading "Bud" were Blackberry Kush, Diesel Dog, and Grand Daddy Purple.

For an LAPD division normally associated with busting violent gangs and high-level drug-trafficking enterprises, a mobile marijuana-delivery app might seem like small fry. But the number of pot-delivery services nationwide has nearly tripled in three years—from 877 to 2,617—according to Weedmaps, which lists marijuana businesses on its website and posts users' reviews. And Bancroft, who had spent more than two years

Matthew Heller is a California Lawyer contributing writer.



"SIT BACK, relax, enjoy the drop! Your phone now sends alcohol and MEDICAL MARIJUANA to your door."

—NESTDROP WELCOME SCREEN

A sample offered by the marijuana delivery service Eaze (above left), and the menu choices on Nestdrop's mobile app.

assigned to Los Angeles's task force on pot dispensaries, was the city's go-to guy for enforcing an ordinance intended to confine the distribution of medical marijuana.

Proposition D, approved by L.A. voters in May 2013, gave qualified immunity to medical marijuana dispensaries that had registered under a string of ordinances going back to 2007. The measure amended the municipal code to outlaw all marijuana businesses but grant limited immunity from enforcement to those businesses that adhere to certain restrictions aimed at curtailing secondary effects such as criminal activity. It also raised the existing tax on dispensaries' gross receipts, from \$50 to \$60 per each \$1,000.

Since Prop. D took effect, City Attorney Mike Feuer says, his office has brought more than 200 cases against 743 defendants, including dispensary operators and property owners.

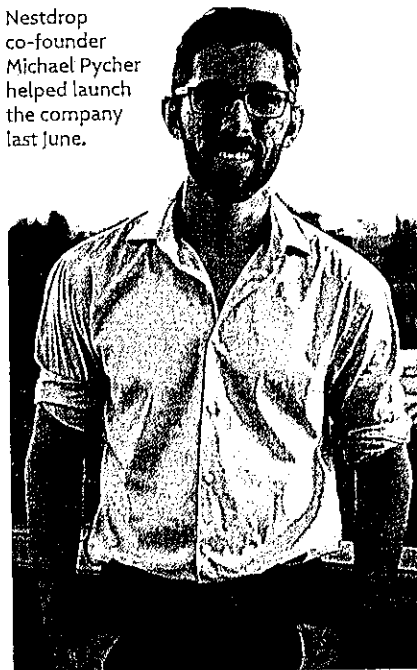
Detective Bancroft himself has helped bust a variety of enterprises, including the city's first-ever cannabis farmers market. So when he read about Nestdrop, he suspected that the company was angling to profit from marijuana sales without registering as a dispensary.

Early in December, Bancroft placed a \$75 order with Nestdrop for four grams

each of 91 OG—listed as "top-shelf indica"—and Blackberry Kush, with free delivery. He concluded that Nestdrop "was active and facilitating medical marijuana deliveries in the City of Los Angeles."

That same day, Feuer's office filed suit seeking abatement, injunction, equitable relief, and civil penalties. (*People v. Nestdrop LLC*, No. BC565409 (L.A. Super. Ct. filed Dec. 2, 2014).) "This app is a flagrant attempt to circumvent the will of the voters who passed Prop. D," Feuer proclaimed in a statement.

Nestdrop co-founder Michael Pycher helped launch the company last June.



In response, Arthur D. Hodge, a solo practitioner in Carlsbad who represented Nestdrop at the time, argued that a social media app is not a medical marijuana business subject to the ordinance. And in any case, he asserted, the law allows delivery by a dispensary that maintains a fixed location and meets the law's other immunity requirements. If Nestdrop's subcontractors are immune, Hodge reasoned, then Nestdrop cannot be prohibited from facilitating delivery.

Three weeks later, however, Los Angeles Superior Court Judge Robert H. O'Brien issued a preliminary injunction barring Nestdrop from developing or marketing any computer program that facilitates marijuana delivery in any way. (*People v. Nestdrop LLC*, No. BC565409 (L.A. Super. Ct. order filed Dec. 23, 2014).)

In theory, O'Brien's ruling could apply to the entire delivery industry in Los Angeles. And that has medical marijuana advocates worried. To them, the *Nestdrop* case exemplifies the lack of effective regulatory guidance that has bedeviled California cities ever since state voters in 1996 passed the Compassionate Use Act (CUA), which provided for the use and cultivation of marijuana for medical purposes. (See Cal. Health & Saf. Code § 11362.5.) But 19 years later, advocates, judges, law enforcers, and legislators still grapple with precisely how medical



The Struggle in Small Cities

More than 100 miles east of Los Angeles lie the Coachella Valley cities of Desert Hot Springs and Rancho Mirage. Both are clients of Steven Quintanilla, who says that as a result he has seen "all sides" of the medical marijuana controversy. The political challenge, Quintanilla says, is to forge some sort of consensus among different groups as to the benefits and drawbacks of medical marijuana. "The legal challenge is the issue of location [for dispensaries]," he says. "Where is the most appropriate place to put them in the community? Dispensaries are a new issue. They don't fit into the categories we're used to dealing with from a land-use perspective."

In cities where dispensaries are allowed to operate, they are subject to zoning restrictions designed, for example, to keep them away from schools, playgrounds, libraries, child care and youth facilities, parks, and churches. Of course, similar rules apply to adult nightclubs and liquor stores, but as Quintanilla points out, different considerations are involved when a business supplies a product whose users often may be too sick to travel to a retail outlet to obtain it.

In August 2010, Rancho Mirage city officials learned that a medical marijuana dispensary called Desert Heart Collective had opened for business in an office building in the center of town. At the time, the city of some 17,000 had no land-use regulations specifically governing dispensaries, and the city council decided to issue permits to two dispensaries on a first-come, first-served basis. So many applicants showed up at City Hall, Quintanilla recalls, "it was like they were lined up for a Rolling Stones concert." The permitting plan also raised an outcry, particularly in the business community. "They were not opposed to the idea of medical marijuana," Quintanilla explains. "They were opposed to the idea of a medical marijuana facility opening next door."

The business owners' discomfort about negative "secondary effects" reflected concerns that had become common in cities

throughout the state since passage of the Compassionate Use Act in 1996. A 2009 report by the California Police Chiefs Association said robbers had attacked and murdered dispensary operators, adding that "[d]rug dealing, sales to minors, loitering, heavy vehicle and foot traffic in retail areas, increased noise, and robberies of customers just outside dispensaries are also common ancillary byproducts."

That same year, however, an internal Los Angeles Police Department report found that although 47 robberies took place at the city's 800 pot shops, the frequency was three times higher at banks, according to the *Los Angeles Daily News*. And dispensaries can generate positive effects for municipalities, such as tax revenue.

"Dispensaries are a new issue. They don't fit into the categories we're used to dealing with from a land-use perspective."

—STEVEN QUINTANILLA,
ATTORNEY FOR RANCHO MIRAGE

community we are compassionate," Quintanilla explains. Weedmaps shows dozens of delivery-only operations now based in the Coachella Valley, including Green Pedal Delivery, Allen Plant Farms, and PSGreens. Residents who belong to medical pot clubs that don't deliver in Rancho Mirage are eligible for a \$25-a-month stipend from the city for travel to their dispensary. —M.H.

But in Rancho Mirage, city council members decided to skip all the hassle, according to Quintanilla. "They didn't want to deal with the land-use issues that came along with [medical marijuana]," he said. After enacting a series of moratoriums on new dispensaries, in March 2011 the city banned them all.

Rancho Mirage's ordinance does permit marijuana delivery services to operate within the city. "We wanted to show the

marijuana users should be allowed to obtain their supplies.

In an open letter to Feuer, Nestdrop's Pycher asserted in March, "[T]he current case against the company is unsubstantiated given the lack of explicit laws your office has been able to point to justifying the ban of Medical Marijuana delivery to registered patients or the technology surrounding it. Nor is the onus on Nestdrop to discern the city's ever evolving stances surrounding Proposition D and how it pertains to collectives."

Joe Elford, a San Francisco attorney and former chief counsel for the advocacy group Americans for Safe Access, adds, "[I]t takes a long time to sort out these issues—this is all unique in the criminal justice system."

Meanwhile, efforts are under way to qualify a 2016 ballot initiative that would largely moot the debate, legalizing the recreational use of pot across California.

No regulations governing the possession, cultivation, or distribution of medical marijuana were included in the statewide Compassionate Use Act. Legislators tried to fill in some of the gaps in 2003 with the Medical Marijuana Program Act (MMPA); among other things, it established a medical marijuana identification card and a registry database to verify qualified patients and their primary caregivers "who associate

within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." But the law didn't address much on the distribution side, instructing the state attorney general only to "develop and adopt guidelines to ensure the security and nondiversion" of the crop. (Cal. Health & Saf. Code § 11362.775.)

"The goal was to provide some needed clarification because the [CUA] was ambiguous or silent or sloppily

"THIS APP IS a flagrant attempt to circumvent the will of THE VOTERS who passed Prop. D."

—MIKE FEUER, LOS ANGELES CITY ATTORNEY



written in various respects," recalls Bill Lockyer, who, as attorney general at the time, helped get the MMPA passed. As for dispensaries, he says, legislators took the path of least resistance, opting for "the laissez-faire system of local control that we have now."

"Statewide land-use [regulation] is not frequently done," Lockyer explains. "There were a lot of concerns about having the state preempt [local government entities in] that area."

In 2008, then-state Attorney General Jerry Brown duly produced a non-binding, eleven-page document meant to "clarify the state's laws governing medical marijuana and provide clear guidelines for patients and law enforcement to ensure that medical marijuana is not diverted to illicit markets." Brown noted that cooperatives have certain statutory requirements, but California law does not define collectives. So he offered a series of "suggested guidelines and practices" to help ensure lawful operation. The document also referenced a state Board of Equalization notice confirming its policy of taxing medical marijuana transactions.

Yet within three years Brown's successor, Kamala Harris, was asking lawmakers for further clarification. "[S]tate law ... needs to be reformed, simplified, and improved to better explain to law enforcement and patients alike how, when, and where individuals may cultivate and obtain physician-recommended marijuana," Harris wrote in a 2011 letter to the legislative leadership.

Even as local police attempt to shut down dispensaries, panels of the second, third, and fourth district courts of appeal have rejected the view that section 11362.775 of the MMPA pro-

hibits operation of a nonprofit business involving exchange of marijuana for money between members of a collective or cooperative. A decade ago, the third district ruled that the law "contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." (*People v. Urziceanu*, 132 Cal. App. 4th 747, 785 (2005).)

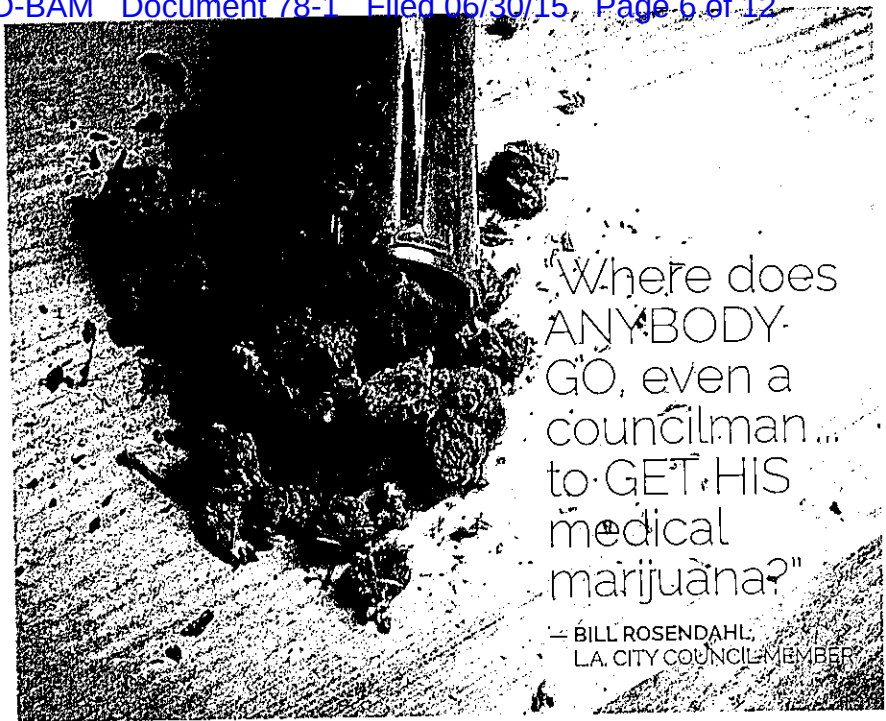
Despite efforts by some legislators, no guidance on dispensary regulation has been forthcoming from Sacramento. The result has been an unruly patchwork of land-use regulation. "Each city treats [marijuana] businesses differently," Hodge observes. "They're across the board." Some 200 California municipalities ban dispensaries outright; others,

such as San Francisco, require permits; and still others allow only delivery services to operate within their boundaries. In February, Santa Ana held a lottery for permit applications to operate medical marijuana dispensaries in designated industrial areas.

When the California Supreme Court upheld the city of Riverside's ban in May 2013, the justices ruled that the CUA and MMPA do not limit "the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders." (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr.*, 56 Cal. 4th 729, 738 (2013).)

Yet the *Inland Empire* ruling did not unleash a new flood of bans. Attorney Steven Quintanilla of Rancho Mirage, whose clients include several cities in Southern California, says he sees more movement toward regulating dispensaries through a licensing system. "Now we know we can regulate them, we can permit them," he says. "It boils down to [strategies for] land use and control." (See "The Struggle in Small Cities," page 27.)

TOP: SHUTTERSTOCK



"Where does ANYBODY GO, even a councilman... to GET HIS medical marijuana?"

— BILL ROSENDAHL, L.A. CITY COUNCIL MEMBER



"There's no way of finding out if you're qualified under Proposition D until YOU'RE CHARGED [with violating it]."

—ARTHUR HODGE, MEDICAL MARIJUANA ATTORNEY



The Los Angeles City Council's first effort to regulate medical marijuana distribution came in August 2007, when it passed a moratorium on new dispensaries. Known as an interim control ordinance (ICO), the stopgap measure was intended to give officials time to establish permanent regulations.

The ICO permitted only 187 dispensaries that registered on or before November 2007 to continue operating. Unfortunately, it contained a general hardship exemption that could be granted by the city council—leading to hundreds of applications by dispensaries that filed their papers and opened for business. In 2009 National Public Radio famously reported that some California neighborhoods had more pot

dispensaries than Starbucks franchises.

That June the Los Angeles City Council amended the ICO, and in January 2010 it passed a permanent city ordinance (Los Angeles Mun. Code §§ 45.19.6–45.19.10) to regulate the number and geographic distribution of pot shops within city limits. The ordinance attracted numerous lawsuits, and in December 2010 Superior Court Judge Anthony J. Mohr declared it unconstitutional and issued a preliminary injunction. The city appealed; two years later the court of appeal reversed. (*420 Caregivers LLC v. City of Los Angeles*, 219 Cal. App. 4th 1316 (2012).)

By then, however, the number of dispensaries in the city had swollen to more than 900 by one estimate, though a UCLA study found 472. The city

council tried banning pot shops altogether, then repealed the ban several months later rather than face a referendum backed by marijuana businesses. "Where does anybody go, even a councilman ... to get his medical marijuana?" pleaded Council Member Bill Rosendahl, who was undergoing chemotherapy for cancer at the time.

In 2013 the city's Prop. D, backed by the council, passed with nearly two-thirds of the popular vote. When the law took effect that June, the city published a list of the 134 dispensaries that it said qualified for immunity from prosecution.

Although Feuer, who took office in July 2013, claims to have closed more than 400 pot shops, these days the city attorney's website no longer offers a list

Meanwhile, in Federal Court

Los Angeles City Attorney Mike Feuer isn't the only California prosecutor who has some medical marijuana advocates gnashing their teeth in frustration. In the Bay Area, Melinda Haag, U.S. Attorney for the Northern District of California, is continuing her efforts to crack down on dispensaries even though her boss, Attorney General Eric Holder, has directed prosecutors to focus on black-market traffickers—not marijuana businesses that are legal under state law. Haag has brought civil forfeiture proceedings against Oakland's Harborside Health Center and the Berkeley Patients Group under 21 U.S.C. section 881(a)(7). (See *United States v. Real Prop. & Improvements Located at 1840 Embarcadero, Oakland, Calif.*, No. 12-CV-3567 (N.D. Cal. filed July 9, 2012); *United States v. Real Prop. & Improvements Located at 2366 San Pablo Ave., Berkeley, Calif.*, No. 13-CV-2027 (N.D. Cal. filed May 2, 2013).)

Harborside is said to be one of the world's largest dispensaries—with sales of approximately \$25 million a year, on which it pays city and state taxes. Haag alleges Harborside is in violation of federal law prohibiting the distribution, cultivation, and possession of marijuana (21 U.S.C. §§ 841 and 856).

The prosecution hasn't gone down well in Washington, D.C., where three Californians in the House—Reps. Sam Farr (D-Salinas), Barbara Lee (D-Oakland), and Dana Rohrabacher (R-Huntington Beach)—in February accused Haag of "not acting within the spirit or letter of the law." The representatives had inserted into December's federal appropriations bill a provision that prevents the Department of Justice from spending money to prosecute dispensaries that abide by state laws.

"We believe the DOJ has overstepped its bounds in the Harborside case," the representatives said in a statement.

Harborside also found an ally in the city of Oakland, which challenged the forfeiture action in its own suit under judicial review provisions of the Administrative Procedure Act (APA) (5 U.S.C. §§ 702, 706). City Attorney Barbara J. Parker alleged that attempting to seize assets impinges on Oakland's regulatory framework—developed to ensure that medical marijuana dispensaries comply with state law—and

would threaten the health and safety of resident patients by cutting off their access to an established marijuana supplier.

The district court granted the Justice Department's motion to dismiss, holding that the APA does not authorize a collateral means of contesting forfeitures. Oakland appealed that ruling to the Ninth Circuit, and also obtained a temporary stay of Haag's forfeiture action. (See *City of Oakland v. Holder*, 961 F. Supp. 2d 1005 (N.D. Cal. 2013).)

During a recent hearing, Judge Stephen Murphy III—a district court judge on temporary assignment to the court of appeals from Detroit—questioned the government's tactics. "Why have you picked this fight? What's the end game here?" Murphy asked DOJ attorney

Adam Jed. The judge noted that the forfeiture action appears to conflict with the administration's declared policy of "largely looking the other way in terms of medical marijuana facilities," Jed said he didn't know why Haag had gone to court, but he stressed that the Obama administration's policy statements weren't legally enforceable.

The panelists also appeared hostile to Oakland's attempt to intervene on behalf of the dispensary. "Go to Congress with that argument," Judge Richard Tallman advised Cedric C. Chao, the attorney representing the city.

In the Berkeley case, U.S. District Judge Jon S. Tigar denied the city's bid to block Haag's forfeiture action against the Patients Group, but he has allowed the dispensary to stay open pending an appeal.

In his order, Judge Tigar wrote: "[T]he issues raised by medical marijuana in local or state jurisdictions that permit its use, and those jurisdictions standing to assert their interests in medical marijuana regulation, present real, unanswered policy questions that are sufficiently serious to warrant consideration by the Ninth Circuit." (See 2015 WL 525711 at *2.) —M.H.

of registered dispensaries. Attorney Hodge, who has represented numerous pot stores in legal battles with the city, says the roster was so inaccurate as to be useless: Some of the outlets listed had been closed down in federal Drug Enforcement Administration raids "years ago."

Currently, a two-block stretch of Ventura Boulevard in the west San Fernando Valley features three dispensaries. Mother Nature's Remedy, a storefront sandwiched between a foot spa and an office building, and The Exchange, in a strip mall adjacent to a kid's gym, have taken the place of dispensaries that were prosecuted by the city. West Valley Caregivers, too, has been prosecuted but remains open. The signage on its ground-floor

Some eleven years after passage of California's MMPA, in February 2014, then-state Sen. Lou Correa (D-Santa Ana) proposed SB 1262 to create a regulatory and licensing structure for medical marijuana businesses. But the measure died in the Assembly amid disagreements over who should enforce it. Marijuana advocacy groups also had opposed the bill because, among other things, it capped the number of licensed cultivators, imposed an \$8,000 fee on each one, and barred anyone convicted of felony drug trafficking from running a dispensary.

The South Los Angeles district of Assemblymember Reggie Jones-Sawyer (D-Los Angeles) is home to about three dozen dispensaries, Weedmaps shows.

impose additional taxes by ordinance.

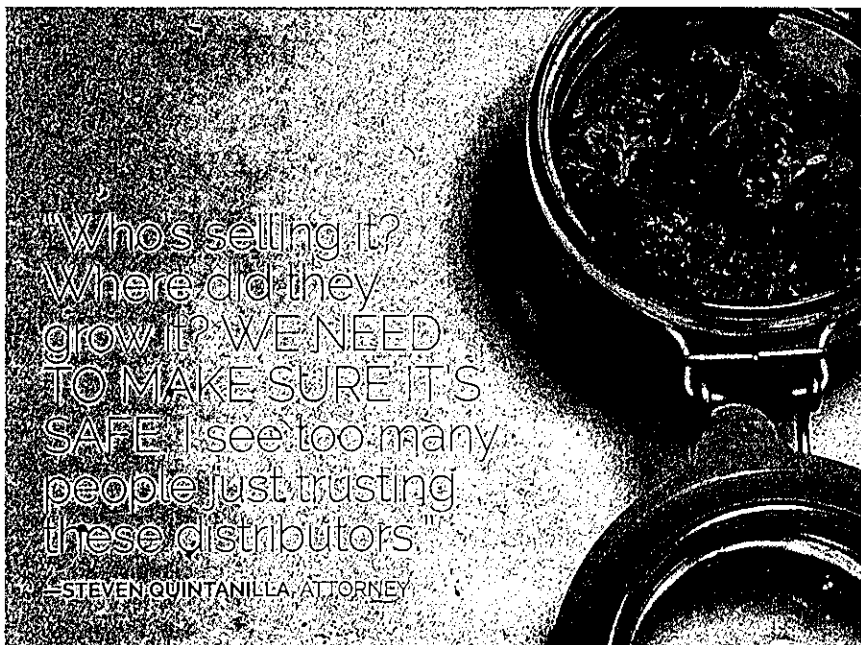
Registration and control aren't the only unresolved issues, Quintanilla adds. Consumers of medical marijuana need assurance about the quality and strength of their medicine. "Who's selling it? Where did they grow it? We need to make sure it's safe," he says. "I see too many people just trusting these [distributors]. A lot of them come from the underground market. They're not used to regulation."

But the Legislature may defer any action until California decides whether to legalize recreational marijuana. "Many people expect a marijuana initiative to be on the [state] ballot" in 2016 or 2018, says Lockyer, who is now of counsel to Brown Rudnick in Orange County. Already, the Marijuana Policy Project has filed paperwork to qualify an initiative for next year's general election.

Four other states—Colorado, Washington, Alaska, and Oregon—have already approved legalization measures. If the nation's most populous state were to join them, it would be the biggest coup yet for the cannabis industry. And 55 percent of California voters favored legalization, according to a December 2013 Field Poll, marking the first time a majority of the electorate supported the move.

In addition to boosting tax revenue for cash-strapped local governments, broader legalization also could bring investment opportunities. Although investors have largely stayed on the sidelines of the marijuana industry, Founders Fund, a heavyweight venture capital firm based in San Francisco, recently announced it would take part in a multi-million-dollar financing round for Privateer Holdings, a cannabis-focused private equity firm. Privateer's ventures include Leafly, a review site known as "Yelp for cannabis"; Tilray, a Canadian marijuana-by-mail company; and Marley Natural, a partnership with the family of the late reggae legend Bob Marley to offer "heirloom" marijuana strains and accessories. Privateer's investments are "professionalizing the cannabis business landscape through the power of private

continued on page 60



entrance in a mixed-use building bears witness to the legal convolutions it has endured, proclaiming that because it was established in 2005 it is "pre-ICO," and that it is "Prop. D compliant" as well.

Hodge describes Prop. D as "a free-for-all grandfather thing" that has left legitimate dispensary owners in a state of legal limbo. "There's no way of finding out if you're qualified under Proposition D until you're charged [with violating it]," he complains.

This year Jones-Sawyer introduced AB 26 to empower the state Department of Alcoholic Beverage Control to "register persons for the cultivation, manufacture, testing, transportation, storage, distribution, and sale of medical cannabis within the state"—and to lay the groundwork for uniform statewide taxation of marijuana businesses. The bill, patterned after one introduced last year by former Assemblymember Tom Ammiano (D-San Francisco), also permits a county board of supervisors to

per conference line per month.

- **Good travel apps.** A couple of key smartphone apps are critical to making my business travel more efficient and less infuriating. TripIt (free) lets you (or your assistant) forward all of your travel confirmation emails to plans@tripit.com, where everything gets organized into a single itinerary that you can see through the TripIt app. (You can also have it show up as a calendar in Outlook or on your phone.) FlightStats (free) comes in handy when it looks like a flight might be delayed: It provides the anticipated runway takeoff and landing times from the FAA, which sometimes tell a different (and frequently more accurate) story than you'd get from the airline's gate departure and arrival times. LoungeBuddy (free) knows the rules for getting into all the airport lounges; for any given airport it can tell you which lounges you can access based on your itinerary, airline status levels, credit cards, and lounge memberships.

Having statutes and rules in searchable form on my phone sometimes comes in handy.

- **Legal apps.** You may have noticed that I haven't mentioned any specifically "legal" apps or technologies—most just aren't that good or useful. But some come in handy. A modern time-entry interface, like the ones offered by Harvest and iTimeKeep, can make timekeeping less of a chore. And sometimes in a pinch it's good to have statutes and rules in searchable form on my phone; I like Codification (\$0.99) for the U.S. Code, and Law-Stack (free, with paid-for add-ons) for everything else.

Plenty of aspects of lawyering are poorly suited to automation, but any way technology may be able to help is worth giving a try. The suggestions above have worked wonders for me. **■**

and come up here?" she asked in Spanish. Carlos answered that he is one of eight children, and he started talking about his siblings. Cook saw a pattern. "Why are all the boys leaving?" she asked. Carlos was reticent at first, but eventually he divulged what she suspected: The situation at home was really bad, and not just because of crushing poverty. Carlos's dad beat him almost every day, and his mother could do nothing to stop it.

Cook already had one pro bono SIJ case on her hands and no time to spare. But three weeks later, she'd filed Carlos's petition for appointment of guardianship.

Cook is now on her fifth SIJ case. Recently she got a call from a nonprofit asking for her help with a four-year-old who faced proceedings alone. The boy lives with his mother in Salida, a small town outside Modesto. "They begged me to take it," Cook says. "I said I'm happy to mentor someone. I'd much rather talk on the phone than take it myself; I'm close to maxed." But there was no one to mentor. Cook took the case.

VIEWED FROM BEHIND, CARLOS'S ears stuck out past his cropped hair, making him look especially young as he sat before the immigration judge in San Francisco in February. Nervously, he fingered the wooden paneling on the desk while Cook, responding through a speaker phone, updated the judge on his case: In October a superior court judge in Fresno had made the necessary findings and appointed legal guardianship to Carlos's aunt, Cook explained. The judge looked over at Carlos. "Who's sitting next to you?" he asked. "Mi tía," Carlos said. The court interpreter nodded, telling the judge, "My aunt." The judge hung up with Cook and turned again to Carlos: "Come back June third," he said, adding, "though your case may be closed by then. Any questions?" Carlos shook his head. He added his new Notice to Appear to the sheaf of papers he kept neatly stacked in a red folder, tucked the folder under his arm, and with his aunt walked out the courtroom door. **■**

enterprise," its website states, touting the experience of its team, which includes "Ivy League MBAs ... and even former federal law enforcement professionals."

Whether marijuana distribution gets regulated by the Legislature, a ballot initiative, or, effectively, by the demands of the capital markets, attorney Elford predicts, "we've got more years to come" before it's addressed statewide. "It's very difficult for the Legislature to be able to anticipate what issues will arise."

In the courts, Los Angeles's Prop. D faces ongoing legal challenges: two suits brought by 30 dispensaries and individuals. (*Safe Life Caregivers v. City of Los Angeles*, No. BC521581 (L.A. Super. Ct. filed Sept. 16, 2013), and *Pain Free Society of Calif. v. City of Los Angeles*, No. BC536870 (L.A. Super. Ct. filed Feb. 20, 2014).)

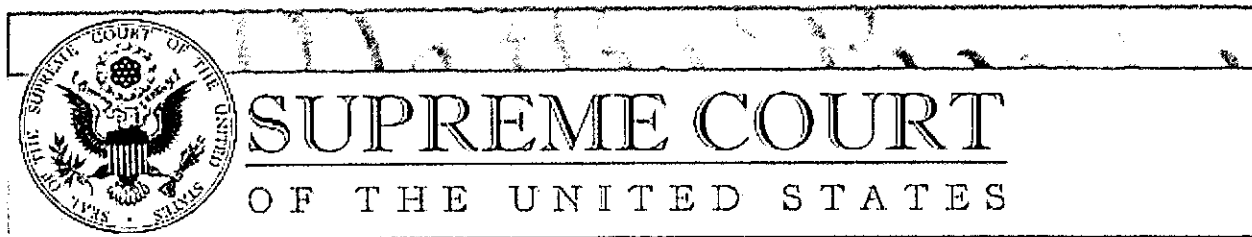
As for Nestdrop, Arthur Hodge is no longer the mobile app company's attorney, but he believes it may be able to get Judge O'Brien's preliminary injunction overturned. "The plain reading [of Prop. D] is it clearly allows [medical marijuana] delivery," he says. Nestdrop filed a notice of appeal in February (*People v. Nestdrop*, No. B262174 (Cal. Ct. App. filed Feb. 23, 2015)), and recently it launched an online crowdfunding campaign to underwrite its legal fight.

On its website, a map of Nestdrop's coverage area continues to include the city of Los Angeles. But some competition could be on the way. In San Francisco, a startup called Eaze—which advertises itself as "the Uber of pot"—enlists "caregivers" to make deliveries in unmarked cars. In its first two weeks of operation last July, its drivers serviced 500 patients.

Eaze CEO and founder Keith McCarty is quick to draw a distinction. "We're not a delivery service," he told the *San Francisco Chronicle* last year. "We're the technology that automates connections between patients and dispensers."

With \$1.5 million in seed money raised by November, McCarty reportedly has plans to deliver medical marijuana by drones. Eaze claims it now serves more than 30 Bay Area cities. **■**

EXHIBIT B



Visiting the Court | Touring the Building | Exhibitions

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No. 220144 ORG

Title: Nebraska and Oklahoma, Plaintiffs

v.

Colorado

Docketed: December 22, 2014

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Dec 18 2014 Motion for leave to file a bill of complaint filed.

Feb 10 2015 Order extending time to file response to the bill of complaint to and including March 27, 2015

Feb 19 2015 Brief amici curiae of All Nine Former Administrators of Drug Enforcement filed.

Mar 27 2015 Brief amicus curiae of Washington and Oregon filed.

Mar 27 2015 Brief of respondent Colorado in opposition filed.

Apr 3 2015 Reply of plaintiffs Nebraska and Oklahoma filed.

Apr 15 2015 DISTRIBUTED for Conference of May 1, 2015.

May 4 2015 The Solicitor General is invited to file a brief in this case expressing the views of the United States.

~~~Name~~~ ~~~~~Address~~~~~ ~~~Phone~~~

Attorneys for Plaintiff:

Ryan Stanley Post

Assistant Attorney General

(402) 471-2682

Case 1:12-cr-00360-DAD-BAM Document 78-1 Filed 06/30/15 Page 12 of 12

Counsel of Record

2115 State Capitol
PO Box 98920
Lincoln, NE 68509

Party name: Nebraska

Patrick R. Wyrick

Solicitor General
Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105

(405) 521-3921

Party name: Oklahoma

Attorneys for Respondent:Frederick R. Yarger
Counsel of RecordSolicitor General
Office of the Attorney General
1300 Broadway 10th Floor
Denver, CO 80203

(720) 508-6168

Party name: Colorado

Other:

Mark A. Perry

Gibson Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036

(202) 955-8500

Party name: All Nine Former Administrators of Drug Enforcement

Noah Guzzo Purcell

Solicitor General
PO Box 40100
Olympia, WA 98504

(206)-359-3301

Party name: Washington and Oregon

June 29, 2015 | Version 2014.1

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BENJAMIN B. WAGNER
United States Attorney
KAREN A. ESCOBAR
Assistant United States Attorney
2500 Tulare Street, Suite 4401
Fresno, CA 93721
Telephone: (559) 497-4000
Facsimile: (559) 497-4099

Attorneys for Plaintiff
United States of America

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAYMOND ARTHUR GENTILE,

Defendant.

CASE NO. 1:12CR360 AWI

UNITED STATES' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

DATE: September 8, 2015

TIME: 10:00 a.m.

COURT: Hon. Anthony W. Ishii

Defendant Raymond Arthur Gentile has moved to dismiss the indictment against him. The defendant was indicted, along with co-defendant Gustavo Angel Salinas who now stands convicted, for conspiring to manufacture, distribute and possess with intent to distribute marijuana (count 1), manufacturing marijuana (count 2), possessing marijuana with intent to distribute (count 3), and making false statements in connection with the acquisition of firearms (counts 4 and 5). He argues that the government's decision to prosecute him was the result of a discriminatory application of federal law and was based upon an arbitrary classification, geography. The defendant's motion should be denied because, as a matter of law, his claim has no merit.

I. FACTUAL BACKGROUND

On May 23, 2012, a state search warrant was obtained for ANP Collective or Cooperative, a marijuana storefront in Bakersfield owned by Gentile after a customer reported to the Bakersfield Police Department that Gentile had accused him of stealing a gram of marijuana, held him for 30 minutes, beat

1 him with a bat and threatened him with a firearm. While investigating the assault, a Bakersfield Police
2 detective suspected that the store contained an indoor marijuana grow after he heard a humming sound
3 emanating from closed rooms in the hallway from the foyer that led to the sales floor. The sound was
4 consistent with the noise of electrical equipment used in indoor grows. At that time, the Bakersfield
5 Police Department seized from the office a bat and a Glock handgun.

6 On June 28, 2012, during the execution of a federal narcotics search warrant, DEA agents found
7 that Gentile resided at the store. They also found two rooms dedicated to cultivating marijuana. Those
8 rooms contained large grow lights, exhaust systems, humidifiers, fans and growing marijuana. Agents
9 seized 170 marijuana plants, 25.1 pounds of processed marijuana, along with 1,831 suspected
10 hydrocodone pills, 735 suspected morphine pills, 59 suspected Naproxen pills, 30.39 gross grams of
11 actual methamphetamine, 112.39 gross grams kief (resin glands of cannabis), 177 suspected Seroquel
12 pills, 140 pills of different colors with no identifiable markings, a 12 gauge shotgun, and \$68,173 in
13 cash. The cash was found in two separate safes in the employee area and near the bedroom used by
14 Gentile. The shotgun was found near Gentile's bed and near one of the safes. The methamphetamine
15 was found in one of the safes.

16 Upon advice and waiver of his *Miranda* rights, Defendant Raymond Gentile admitted to
17 incorporating ANP, a marijuana cooperative, with his brother, Michael Gentile. Raymond said he is the
18 manager and was responsible for cultivating the marijuana that was found there. He admitted that he
19 controlled the two safes. Gentile said the shotgun was there to protect him and his employees from
20 attempted burglaries and robberies. He further admitted to using marijuana. Gentile said that co-
21 defendant Salinas was his "bud tender."

22 A records check indicated that Gentile had previously purchased the Glock handgun that was
23 seized by the Bakersfield Police Department and attempted to purchase another Glock handgun but was
24 denied transfer when the vendor learned that Gentile had been charged with assault. On the two ATF
25 transfer documents that Gentile signed under penalty of prosecution for false statements, Gentile falsely
26 stated in February and later in May, 2012, that he lived at an address different from where he resided at
27 the ANP Collective. Although he once lived at the other address several years ago, he did not live there
28

when he made the statements. The defendant also falsely stated that he did not use marijuana or any controlled substance, contrary to his post-arrest statement, his prior marijuana conviction, and the user quantity of methamphetamine found in the safe to which only he had access. ATF records also indicate that Gentile had previously purchased the shotgun.

Gentile and Salinas were held in state custody on the assault charges until October 5, 2012, when they bonded out on a \$150,000 bond. On October 12, when DEA went to state court to arrest Gentile and Salinas on the federal complaint, Gentile fled after Salinas was arrested. He was found in Tehachapi and led CHP on a high speed chased to Victorville at speeds of 110 to 120 miles per hour. He was apprehended after the CHP spiked his tires about 138 miles from Bakersfield.

II. ARGUMENT

The defendant argues in a conclusory fashion that the “United States Attorney General has through his administrative policy, selectively exempted from criminal prosecution residents of certain states, such as Colorado, but not California, for the same offenses for which the defendant is charged.” Def. Mot. at 2:26-28, 3:1. The defendant does not identify the “administrative policy” under which the Attorney General operates and has failed to demonstrate that the U.S. Department of Justice (“DOJ”) policy is applied in a discriminatory fashion. His argument also fails to recognize that prosecutors are permitted wide discretion in charging crimes. *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”).

His argument is also flawed in that it presumes that residents of Colorado are not prosecuted at the federal level for marijuana crimes.

Finally, the defendant completely fails to explain the basis for dismissal of the false statement charges.

A. DOJ Policy, Which Sets Forth the Department’s Priorities So That Individual U.S. Attorney’s Offices Can Most Effectively Determine Which Cases Merit Federal Prosecution, Is Not Arbitrary Nor Does It Violate the Constitution.

On October 19, 2009, Deputy Attorney General David W. Ogden issued a “Memorandum for

Selected United States Attorneys” (the Ogden Memorandum). On June 29, 2011, the Department of Justice issued a follow-up memorandum from Deputy Attorney General James M. Cole (the “Cole Memorandum”). The Cole Memorandum reaffirmed the guidance issued in the Ogden Memorandum, and reiterated that “[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.” It further noted that “[t]he Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.” *United States v. Canori*, 737 F.3d 181, 183-4 (2d Cir. 2013) (discussing DOJ memoranda, also attached hereto as Government Exhibit A).

At the time of the offenses charged in the indictment, the Ogden and Cole Memoranda provided guidance to prosecutors as to how to exercise their discretion consistent with DOJ priorities in states which had enacted laws authorizing the medical use of marijuana. The Second Circuit found that DOJ policy did not create a “constitutional crisis,” because marijuana remains illegal under federal law regardless of state law. *Canori*, 737 F.3d at 185. Equally significant, the Second Circuit expressly held that a “U.S. Attorney’s decision to exercise prosecutorial discretion by not prosecuting uses of marijuana consistent with state law, in the circumstances presented here, does not conflict with the principles of federalism, preemption or the supremacy of federal law.” *Id.* at 185 (emphasis added). Finally, the Second Circuit noted that after the close of briefing in *Canori*, (and after the indictment of Gentile) Deputy Attorney General Cole issued another policy guidance memorandum. “[A]lthough the parties have not addressed the memorandum, it does not in any way alter our conclusions.” *Id.* at 184, n. 5.

Even if the Department policy memoranda resulted in different treatment of defendants based upon geography, which they do not, that does not result in an equal protection violation. So long as there is a legitimate governmental interest in different treatment of defendants in different judicial districts, there is no equal protection or due process violation. In *James v. City Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012), the Ninth Circuit rejected an equal protection claim by California customers of medical marijuana collectives allowed to operate under state law, but not federal law. There, the plaintiffs argued that implementation of a District of Columbia Medical Marijuana initiative resulted in

unequal treatment of District of Columbia and California residents by allowing the former to purchase marijuana, but denying marijuana to the latter. The plaintiff's argued that Congress' initial listing of marijuana as a schedule I controlled substance, followed by Congress' inaction in blocking implementation of the District Columbia's initiative, denied them equal protection. The Ninth Circuit found that Congress did not violate the plaintiff's equal protection rights and explained, "[l]ocal decriminalization notwithstanding, the unambiguous federal prohibitions on medical marijuana use set forth in the CSA continue to apply equally in both jurisdictions . . ." *Id.* at 405 (emphasis in original).

Federal courts have consistently recognized the discretion afforded to the Department to determine how best to utilize its resources to prosecute marijuana dealers. A number of similar court challenges were made against the Ogden and Cole Memoranda based upon similar arguments. All, including a similar challenge in this district, were rejected. *United States v. Pickard*, __F.Supp.3d__, 2015 WL 1767536, at *24 (E.D. Calif. April 17, 2015) (See *United States v. Schweder*, E. D. Calif. No. 2:11CR 449 KJM) ("The establishment of these priorities and enforcement of the law in accordance therewith are entirely rational exercise of prosecutorial discretion"), quoting *United States v. Heying* (*Heying I*), No. 14-30, 2014 WL 5286153, at *2 (D.Minn. Aug. 15, 2014); *Canori*, 737 F.3d at 185 (Attorney General's discretion to prioritize certain types of prosecutions, as expressed in the Ogden Memo, neither legalizes marijuana or creates a constitutional crisis); *United States v. Washington*, 887 F. Supp. 2d 1077, 1100 (D. Mont. 2012) (Congress defines offenses and the Attorney General has broad discretion in enforcing the law); *United States v. Hicks*, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) (holding that "the Department of Justice's discretionary decision to direct its resources elsewhere does not mean that the Federal government now lacks the power to prosecute those who possess marijuana").

In sum, the Ogden and Cole Memoranda set forth prosecutorial policies to determine which marijuana cases to bring in light of the initiatives of several states. If anything, the federal government has recognized limited authority in the individual states to take different approaches to marijuana, while setting forth a nationwide policy that clearly enunciates the type of cases from any state which implicate the federal interest.

B. Coloradans Are Not Exempt from Federal Prosecution.

The defendant's selective prosecution argument also incorrectly presumes that "residents of certain states, such as Colorado" are exempt from federal prosecution for marijuana offenses. Def. Mot. at 2:27-28. The facts do not support this contention.

After the State of Colorado legalized recreational use of marijuana, effective January 1, 2014, John Walsh, the U.S. Attorney for the District of Colorado, appeared before the U.S. Congress and testified that "[f]ederal law enforcement has always targeted sophisticated drug traffickers and organizations, while state and local authorities generally have focused their enforcement efforts, under their state laws, on more localized drug activity." Opening Statement for the Record of John F. Walsh, United States Attorney, District of Colorado before the House Committee on Oversight and Government Reform (3-4-14) at 2, attached hereto as Government Exhibit B. United States Attorney Walsh confirmed his commitment to target high-level drug traffickers in accordance with the Justice Department's marijuana enforcement guidelines. *Id.* at 3-4.

Indeed, a sampling of indictments and corresponding press releases issued by the U.S. Attorney's Office in the District of Colorado after January, 2014, reflect the commitment of federal prosecutors in Colorado to prosecute marijuana offenses in accordance with Department policy. *See* Government Exhibit C, attached hereto; see also District Court of Colorado cases: *United States v. Stephen Paul Redwood*, 1:14-cr-00110-JLK (charging distribution and manufacture of marijuana); *United States v. Hector Diaz, et al.*, 1:13-cr-00492-REB (charging conspiracy to manufacture and distribute marijuana in 2013 and adding in a superseding indictment filed in 2014 violations of money laundering relating to marijuana laws); *United States v. Brian Daniel Evins*, 1:15-cr-00053-REB (charging multiple counts alleging distribution and possession with intent to distribute marijuana and use of communication facilities to facilitate such offenses). The continued prosecution of marijuana offenses in Colorado completely undermines the defendant's selective prosecution argument.

C. There Is No Showing that the False Statement Charges Were the Result of Selective Prosecution

The defendant does not address the false statement charges contained in the indictment. In the absence of any evidence that the false statement charges are the product of selective prosecution, there is

absolutely no basis to dismiss the indictment.

III. CONCLUSION

In light of the foregoing, it is respectfully requested that the Court deny the defendant's motion.

Dated: July 16, 2015

BENJAMIN B. WAGNER
United States Attorney

By: /s/ KAREN A. ESCOBAR
KAREN A. ESCOBAR
Assistant United States Attorney



The Deputy Attorney General

Washington, D.C. 20530

October 19, 2009

MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Investigations and Prosecutions in States
Authorizing the Medical Use of Marijuana

This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with "plenary authority with regard to federal criminal matters" within their districts. USAM 9-2.001. In exercising this authority, United States Attorneys are "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority." *Id.* This authority should, of course, be exercised consistent with Department priorities and guidance.

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on

Memorandum for Selected United States Attorneys

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Subject: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Memorandum for Selected United States Attorneys

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Subject: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis, consistent with the guidance on resource allocation and federal priorities set forth herein, the consideration of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.

cc: All United States Attorneys

Lanny A. Breuer
Assistant Attorney General
Criminal Division

B. Todd Jones
United States Attorney
District of Minnesota
Chair, Attorney General's Advisory Committee

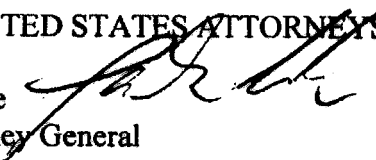
Michele M. Leonhart
Acting Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Kevin L. Perkins
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigation

June 29, 2011

MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions
Seeking to Authorize Marijuana for Medical Use

Over the last several months some of you have requested the Department's assistance in responding to inquiries from State and local governments seeking guidance about the Department's position on enforcement of the Controlled Substances Act (CSA) in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana purportedly for medical use. Some of these jurisdictions have considered approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance. You may have seen letters responding to these inquiries by several United States Attorneys. Those letters are entirely consistent with the October 2009 memorandum issued by Deputy Attorney General David Ogden to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana (the "Ogden Memo").

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises, gangs, and cartels. The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts.

A number of states have enacted some form of legislation relating to the medical use of marijuana. Accordingly, the Ogden Memo reiterated to you that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers. The term "caregiver" as used in the memorandum meant just that: individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.

The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of

commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. Some of these planned facilities have revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants.

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.

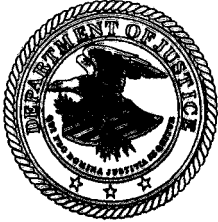
cc: Lanny A. Breuer
Assistant Attorney General, Criminal Division

B. Todd Jones
United States Attorney
District of Minnesota
Chair, AGAC

Michele M. Leonhart
Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Kevin L. Perkins
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigations



Department of Justice

OPENING STATEMENT FOR THE RECORD OF

**John F. Walsh
United States Attorney
District of Colorado**

BEFORE THE

**Committee on Oversight & Government Reform
Subcommittee on Government Operations
UNITED STATES HOUSE OF REPRESENTATIVES**

FOR A HEARING Examining

**THE DEPARTMENT OF JUSTICE'S STRATEGY
TO ENFORCE AND PROSECUTE CERTAIN MARIJUANA RELATED CRIMES**

PRESENTED ON

March 4, 2014

Government Exhibit B

**Opening Statement of John F. Walsh
United States Attorney, District of Colorado
United States Department of Justice**

**Before the Committee on Oversight & Government Reform
Subcommittee on Government Operations**

**THE DEPARTMENT OF JUSTICE'S STRATEGY
TO ENFORCE AND PROSECUTE CERTAIN MARIJUANA RELATED
CRIMES
March 4, 2014**

Good morning Chairman Mica, Ranking Member Connolly, and distinguished Members of the Committee. On behalf of Attorney General Eric H. Holder, Jr. and my colleagues at the United States Department of Justice, I appreciate your invitation to testify today. My testimony today will focus on our marijuana enforcement efforts and the guidance that the Department has issued to all United States Attorneys regarding these efforts. I also appreciate the opportunity to discuss our efforts in Colorado to ensure that federal, state and local law enforcement work together effectively to protect public safety in the new marijuana enforcement environment created by the voters of Colorado when they voted to legalize recreational use of marijuana under Colorado state law. And it's an honor to be here with Deputy Administrator Harrigan of the DEA, and to represent the dedicated U.S. Attorneys and Assistant U.S. Attorneys around the country who are addressing this issue on the ground.

As you know, the relevant federal statute, the Controlled Substances Act of 1970 (CSA), among other prohibitions, makes it a federal crime to possess, grow, or distribute marijuana, and to open, rent, or maintain a place of business for any of these purposes. Financial transactions involving proceeds generated by marijuana-related conduct can also form the basis for federal prosecution under money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA).

Starting with California in 1996, several states have authorized the cultivation, distribution, possession, and use of marijuana for medical purposes, under state law. My home state, Colorado, first authorized the use of marijuana for medical purposes fourteen years ago, in 2000. And in 2012, voters in Colorado approved state constitutional changes legalizing recreational marijuana under state law and establishing state regulatory systems for recreational marijuana.

Federal law enforcement has always targeted sophisticated drug traffickers and organizations, while state and local authorities generally have focused their enforcement efforts, under their state laws, on more localized drug activity. The Department of Justice has continued to work with its state and local partners during this time period. At this point, more than ever, I can't understate the importance of

strong partnerships and coordination between federal and state and local law enforcement. For that reason, we in federal law enforcement in Colorado and Washington are working hard with our state and local enforcement partners to ensure that our efforts are mutually supportive. For the overall regulation of marijuana to be effective and public safety to be protected, state, local and federal law enforcement need to cooperate and work together. That's the message I have sent all around Colorado, and will continue to send – and to work to make a reality on the ground.

Upon the issuance of Department's marijuana enforcement guidance on August 29, 2013, the Attorney General advised the Governors of Colorado and Washington that the Department expected their states to implement strong and effective regulatory and enforcement systems to fully protect against the public health and safety harms that are the focus of our marijuana enforcement priorities, and that the Department would continue to investigate and prosecute cases in which the underlying conduct implicated our federal interests.

Using our prosecutorial discretion, my office has historically devoted efforts and resources on cases involving these eight federal enforcement priorities and will continue to do so in the future. For example, we have targeted enforcement actions against marijuana businesses and residential grow sites near schools. My office

warned dozens of these businesses through a letter campaign that their actions violated federal law. These letters notified the owners of the property that these businesses violated federal law and gave each business an opportunity to close or relocate. Every business that received a letter closed or relocated voluntarily. In one criminal action, a defendant was convicted in 2011 for creating a residential grow house of over 200 marijuana plants within 1000 feet of a public elementary school. We also continue to actively investigate and prosecute cases involving international smuggling and interstate shipment of marijuana, marijuana grows where firearms and violence are involved, marijuana grows on public lands, and cases with potential organized crime involvement in marijuana businesses. Consistent with the guidance we have received from the office, the U.S. Attorney's Office in Colorado does not focus its finite resources to prosecute individuals whose conduct is limited to possession of marijuana for personal use on private property.

In addition, in February 2014, the Department issued guidance to all federal prosecutors regarding marijuana-related financial crimes. That guidance seeks to mitigate the public safety concerns created by high-volume cash-based businesses without access to banking and the financial system, while at the same time ensuring that criminal organizations, gangs and drug cartels do not have access to

the financial system to launder criminal proceeds. The guidance states clearly that the provisions of the money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA) remain in effect with respect to marijuana-related conduct. The guidance advises federal prosecutors to assess marijuana financial crimes under the eight federal enforcement priorities laid out in the August 29th memorandum. The Department expects financial institutions to continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers. This includes conducting customer due diligence consistent with any guidance issued by FinCEN.

In Colorado, the U.S. Attorney's Office and the Drug Enforcement Administration work closely to protect the health and safety of every citizen. I want to take this moment to thank the federal prosecutors, very much including those in Colorado, but also including the many U.S. Attorneys and their staffs in states that have legalized marijuana in some manner, along with Drug Enforcement Administration agents, and our state and local partners for their dedicated work in protecting our communities in this rapidly evolving and challenging area. With our collective effort, we can succeed in implementing strong and effective regulatory and enforcement systems in practice.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 14-cr-00110-DW

UNITED STATES OF AMERICA,

Plaintiff,

v.

I. STEPHEN PAUL REDWOOD

Defendant.

INDICTMENT

Transportation of Child Pornography: 18 U.S.C. §§ 2252A(a)(1), (b)(1)
Receipt of Child Pornography: 18 U.S.C. §§ 2252A(a)(2), (b)(1)
Possession of Child Pornography: 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2)
Distribution of Marihuana: 21 U.S.C. §§ 841(a)(1), (b)(1)(D)
Manufacture of Marihuana: 21 U.S.C. §§ 841(a)(1), (b)(1)(D)
Forfeiture Allegation

The Grand Jury charges that:

COUNT ONE

From on or about and between July 7, 2012, and November 24, 2013, in the State and District of Colorado, STEPHEN PAUL REDWOOD, defendant herein, did knowingly transport and ship child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), using any means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce by any means, including by computer.

All in violation of Title 18, United States Code, Section 2252A(a)(1), (b)(1).

COUNT TWO

On or about August 25, 2012, in the State and District of Colorado, STEPHEN PAUL REDWOOD, defendant herein, did knowingly receive child pornography, as defined in Title 18,

United States Code, Section 2256(8)(A), that has been mailed, and, using any means and facility of interstate and foreign commerce, shipped and transported in and affecting interstate and foreign commerce by any means, including by computer, to wit: two visual depictions of child pornography with the following file names: pic2.jpg and pic3.jpg.

All in violation of Title 18, United States Code, Sections 2252A(a)(2), (b)(1).

COUNT THREE

On or about January 21, 2013, in the State and District of Colorado, STEPHEN PAUL REDWOOD, defendant herein, did knowingly receive child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that has been mailed, and, using any means and facility of interstate and foreign commerce, shipped and transported in and affecting interstate and foreign commerce by any means, including by computer, to wit: one visual depiction of child pornography with the following file name: Clip Compilation.wmv.

All in violation of Title 18, United States Code, Sections 2252A(a)(2), (b)(1).

COUNT FOUR

On or about August 14, 2013, in the State and District of Colorado, STEPHEN PAUL REDWOOD, defendant herein, did knowingly receive child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that has been mailed, and, using any means and facility of interstate and foreign commerce, shipped and transported in and affecting interstate and foreign commerce by any means, including by computer, to wit: seven visual depictions of child pornography with the following partially redacted file names: a*** 06.jpg, a*** 09.jpg, a*** 11.jpg, j**** 10.jpg, j**** 11.jpg, p*280089.jpg, s*****_011.jpg.

All in violation of Title 18, United States Code, Sections 2252A(a)(2), (b)(1).

COUNT FIVE

On or about December 3, 2013, in the State and District of Colorado, STEPHEN PAUL REDWOOD, defendant herein, did knowingly receive child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that has been mailed, and, using any means and facility of interstate and foreign commerce, shipped and transported in and affecting interstate and foreign commerce by any means, including by computer, to wit: one visual depiction of child pornography with the following file name: zzzz.avi.

All in violation of Title 18, United States Code, Sections 2252A(a)(2), (b)(1).

COUNT SIX

On or about January 15, 2014, in the State and District of Colorado, STEPHEN PAUL REDWOOD, defendant herein, did knowingly possess any computer disk and other material that contained an image of child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), and excluding the child pornography described in Counts Two, Three, Four and Five, that has been mailed, and shipped and transported using any means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce by any means, including by computer, and that was produced using materials that have been mailed, and shipped and transported in and affecting interstate and foreign commerce by any means, including by computer.

All in violation of Title 18, United States Code, Sections 2252A(a)(5)(B), (b)(2).

COUNT SEVEN

From on or about and between October 31, 2013, and January 15, 2014, in the State and District of Colorado, STEPHEN PAUL REDWOOD, defendant herein, did knowingly and intentionally distribute, and possess with intent to distribute, marihuana, a controlled substance

listed in Schedule I, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(D).

COUNT EIGHT

On or about January 15, 2014, in the State and District of Colorado, STEPHEN PAUL REDWOOD, defendant herein, did knowingly and intentionally manufacture, and possess with intent to manufacture, marihuana, a controlled substance listed in Schedule I, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(D).

FORFEITURE ALLEGATION

1. The allegations contained in Counts One through Six of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of 18 U.S.C. § 2253.

2. Upon conviction of any of the violations alleged in Counts One through Six of this Indictment involving violations of 18 U.S.C. § 2252A, defendant STEPHEN PAUL REDWOOD shall forfeit to the United States, pursuant to Title 18, United States Code, Section 2253, any and all of the defendant's right, title and interest in:

a) any visual depiction described in section 2251, 2251A, or 2252, 2252A, 2252B, or 2260 of Title 18, or any book, magazine, periodical, film or videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped, or received;

b) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and

c) any property, real or personal, used or intended to be used to commit or to

promote the commission of such offense or any property traceable to such property.

3. The property subject to forfeiture, pursuant to 18 U.S.C. § 2253, includes, but is not limited to the following items : Apple iMac, model A1224, all-in-one desktop computer with serial number YM82543QZE3.

4. If any of the property described in paragraphs 2 and 3 above, as a result of any act or omission of the defendant:

- a) cannot be located upon the exercise of due diligence;
- b) has been transferred or sold to, or deposited with, a third party;
- c) has been placed beyond the jurisdiction of the Court;
- d) has been substantially diminished in value; or
- e) has been commingled with other property which cannot be subdivided without difficulty;

It is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p) as incorporated by Title 18, United States Code, Section 2253(b), to seek forfeiture of any other property of said defendant up to the value of the forfeitable property.

A TRUE BILL:

Ink Signature on File with the Clerk's Office
FOREPERSON

JOHN F. WALSH
United States Attorney

By: s/ Todd Norvell
Todd Norvell
Assistant U.S. Attorney
U.S. Attorney's Office
103 Sheppard Drive, Suite 215
Durango, CO 81303
Telephone: 970-247-1514
Fax: 970-247-8619
E-mail: todd.norvell@usdoj.gov
Attorney for Government

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 13-cr-00492-REB

UNITED STATES OF AMERICA,

Plaintiff,

v.

HECTOR DIAZ

a/k/a Hector Diaz-Martinez

a/k/a Hector Josue Diaz-Martinez

a/k/a Hector J. Diaz-Martinez

Defendant.

CRIMINAL INDICTMENT

18 U.S.C. §§ 922(g)(5)(B), 924(a)(2) and 924(d)

COUNT ONE

On or about February 7, 2013, within the State and District of Colorado, the
Defendant,

HECTOR DIAZ,
a/k/a Hector Diaz-Martinez,
a/k/a Hector Josue Diaz-Martinez,
a/k/a Hector J. Diaz-Martinez,

then being an alien who had been admitted to the United States under a non-immigrant
visa, did knowingly possess in and affecting interstate commerce, a firearm, to wit: a Smith

and Wesson M&P-15, 5.56mm semi-automatic rifle bearing serial number SP 52534, said firearm having been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Sections 922(g)(5)(B) and 924(a)(2).

FORFEITURE ALLEGATION

1. The allegations contained in Count One of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

2. Upon conviction of the violation alleged in Count One of this Criminal Indictment, involving violations of 18 U.S.C. Sections 922(g)(5)(B), the defendant,

HECTOR DIAZ
a/k/a Hector Diaz-Martinez
a/k/a Hector Josue Diaz-Martinez
a/k/a Hector J. Diaz-Martinez

shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), all firearms and ammunition involved in the commission of the offense, including but not limited to a Smith and Wesson M&P-15, 5.56mm semi-automatic rifle bearing serial number SP 52534.

If any of the property described above, as a result of any act or omission of the defendant:

- a) cannot be located upon the exercise of due diligence;

- b) has been transferred or sold to, or deposited with, a third party;
- c) has been placed beyond the jurisdiction of the Court;
- d) has been substantially diminished in value; or
- e) has been commingled with other property which cannot be subdivided

without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of said defendant[s] up to the value of the forfeitable property.

A TRUE BILL:

Ink signature on file in the Clerk's Office
FOREPERSON

JOHN WALSH
United States Attorney

BY: s/Bradley W. Giles
BRADLEY W. GILES
Assistant United States Attorney
1225 17th Street, Suite 700
Denver, Colorado 80202
(303) 454-0100
(303) 454-0409 Fax
Email: Bradley.Giles@usdoj.gov
Attorney for the Government

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 13-cr-00492-REB

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. **HECTOR DIAZ**

a/k/a Hector Diaz-Martinez

a/k/a Hector Josue Diaz-Martinez

a/k/a Hector J. Diaz-Martinez,

2. **DAVID JEFFREY FURTADO**

3. **LUIS FERNAND URIBE**

a/k/a Luis Fernando Uribe

a/k/a Luis Fernando Uribe-Cristancho,

4. **GERARDO URIBE**

a/k/a Gerardo Uribe-Cristancho

a/k/a Gorardo Uribe-Cristancho,

Defendants.

SUPERSEDING CRIMINAL INDICTMENT

18 U.S.C. § 922(g)(5)(B),

18 U.S.C. §§ 924(a)(2) and 924(d)

18 U.S.C. § 1546

18 U.S.C. § 1956(h)

18 U.S.C. § 1956(a)(2)(A)

18 U.S.C. § 1957

COUNT ONE

Title 18, United States Code, §§ 922(g)(5)(B)

Title 18, United States Code, § 924(a)(2)

On or about February 7, 2013, within the State and District of Colorado, the
Defendant,

HECTOR DIAZ
a/k/a Hector Diaz-Martinez
a/k/a Hector Josue Diaz-Martinez
a/k/a Hector J. Diaz-Martinez,

then being an alien who had been admitted to the United States under a non-immigrant visa, did knowingly possess in and affecting interstate commerce, a firearm, to wit: a Smith and Wesson M&P-15, 5.56mm semi-automatic rifle, bearing serial number SP 52534, said firearm having been shipped and transported in interstate commerce;

All in violation of Title 18, United States Code, Sections 922(g)(5)(B) and 924(a)(2).

COUNT TWO
Title 18, United States Code, § 1546

On or about April 11, 2013 and continuing through November 21, 2013, within the State and District of Colorado and elsewhere, the Defendant,

HECTOR DIAZ
a/k/a Hector Diaz-Martinez
a/k/a Hector Josue Diaz-Martinez
a/k/a Hector J. Diaz-Martinez,

did knowingly make one or more false statements with respect to a material fact, under oath or under penalty of perjury under Title 28 United States Code, § 1746, and did knowingly subscribe as true, one or more false statements with respect to a material fact in any application, affidavit or other document required by the immigration laws or regulations prescribed thereunder, and did furthermore knowingly present any such application, affidavit, or other document which contains any such false statement, or which fails to contain any reasonable basis in law or fact;

It is further alleged that the offense as described herein was committed to facilitate a drug trafficking crime, as defined in Title 18, United States Code, Section 929a;

All in violation of Title 18, United States Code, Section 1546.

COUNT THREE

Title 18, United States Code, § 1956(h)

On or about and between August of 2013 through November of 2013, within the State and District of Colorado and elsewhere, the Defendants,

HECTOR DIAZ

a/k/a Hector Diaz-Martinez

a/k/a Hector Josue Diaz-Martinez

a/k/a Hector J. Diaz-Martinez,

DAVID JEFFREY FURTADO,

LUIS FERNAND URIBE

a/k/a Luis Fernando Uribe

a/k/a Luis Fernando Uribe-Cristancho, and

GERARDO URIBE,

a/k/a Gerardo Uribe-Cristancho

a/ka/ Gorardo Uribe-Cristancho,

did knowingly combine, conspire, and agree with each other and with other persons known and unknown to the Grand Jury to commit offenses against the United States; namely, violations of Title 18, United States Code, Sections 1956(a)(2)(A), and 1957, as further described herein:

MANNER AND MEANS OF THE CONSPIRACY:

- It was part of the conspiracy for its members, acting interdependently, to effect the international transfer of funds from the Republic of Colombia into the United States ("Foreign Funding") to facilitate the purchase of real property, with existing physical

structures, located at 5200 East Smith Road in Denver, Colorado (the "Subject Property");

- It was further part of the conspiracy that the defendants intended to use or permit the use of the Subject Property to cultivate, manufacture, and/or distribute marijuana, a Schedule I Controlled Substance, and to further a conspiracy to commit the same, all of which is in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A)(vii) and 846 (said violations which are collectively referred to herein as the "Specified Unlawful Activity");
- It was further part of the conspiracy that in 2013, Gerardo Uribe filed and/or facilitated the submission of documents with the Colorado Secretary of State to incorporate Colorado West Metals, L.L.C. Attorney David Furtado was the registered agent for the L.L.C. Hector Diaz was listed as the person responsible for forming the corporation;
- It was further part of the conspiracy for David Furtado to open Account *****4901, held in the name of Colorado West Metal, L.L.C., at Wells Fargo Bank. Furtado was the sole signor on that account;
- It was further part of the conspiracy for David Furtado to use his COLTAF account, Wells Fargo Bank Account number *****1139, held in the name of The Furtado Law Firm, L.L.C., to facilitate the purchase of the Subject Property;
- It was further part of the conspiracy for David Furtado, Gerardo Uribe and Hector Diaz to communicate regarding a wire transfer associated with Colorado West

Metals. Those funds were later used to facilitate the purchase of the Subject Property;

- It was further part of the conspiracy to use the wire transfers as charged in Counts 4, 5, and 6, which are incorporated herein by reference, to facilitate the purchase of the Subject Property;
- It was further part of the conspiracy that, on or about November 7, 2013 - two days after the wire transfer alleged in Count 4, David Furtado transferred \$424,000.00 from Wells Fargo account number *****4901, held in the name of Colorado West Metal, LLC, to Colorado First Bank account number *****5047, held in the name of Land Title Guarantee Company;
- It was further part of the conspiracy that, on November 7, 2013, the conspirators caused and/or agreed for Land Title Guarantee Company to transfer those same funds to Westerra Credit Union - the mortgagor for the Subject Property;
- Between November 1, 2013 and November 4, 2013, Furtado made and/or caused to be made two separate wire transfers in the amount of \$200,000.00 each from account number *****1139 into a Colorado First Bank account in the name of Land Title Guarantee Company to facilitate the purchase of the Subject Property;
- It was further part of the conspiracy that members of the conspiracy deposited, and attempted to deposit into financial institutions, and/or converted to cashier's checks, bulk United States currency to facilitate the purchase of the Subject Property. These bulk currency amounts included proceeds from the Specified Unlawful Activity;

- It was further part of the conspiracy that on October 31, 2013, David Furtado met with Gerardo Uribe and obtained \$449,980.00 in U.S. currency. Those funds represented the proceeds of the Specified Unlawful Activity, as derived through the operation of the "VIP Wellness Center", operated by Gerardo Uribe, Luis Fernand Uribe, and others. The conspirators arranged for the attempted deposit of that currency, as alleged in Count 7, to further facilitate the purchase of the Subject Property;

All in violation of Title 18, United States Code, Section 1956(h).

COUNT FOUR

Title 18, United States Code, § 1956(a)(2)(A)
Title 18, United States Code, § 2

On or about November 5, 2013, within the State and District of Colorado and elsewhere, the Defendants,

HECTOR DIAZ
a/k/a Hector Diaz-Martinez
a/k/a Hector Josue Diaz-Martinez
a/k/a Hector J. Diaz-Martinez,
DAVID JEFFREY FURTADO, and
GERARDO URIBE
a/k/a Gerardo Uribe-Cristancho
a/ka/ Gorardo Uribe-Cristancho,

did transport, transmit, and transfer, and attempt to transport, transmit, and transfer monetary instruments and funds to a place within the United States from or through a place outside the United States, namely they wire transferred and caused the wire transfer of \$424,000.00 U.S. dollars from the Banco Bilbao Vizcaya Argenteria (BBVA) in the Republic of Colombia, to Wells Fargo Bank NA, Account Number *****4901, with the intent to promote a specified unlawful activity, namely the cultivation, manufacture, and

distribution of marijuana, a Schedule I Controlled Substance, and conspiracy to commit the same, which is in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A)(vii) and 846, respectively, and did aid and abet, counsel, command, induce and procure the same;

All in violation of Title 18, United States Code, Section 1956(a)(2)(A), and Title 18, United States Code, Section 2.

COUNT FIVE

Title 18, United States Code, § 1956(a)(2)(A)
Title 18, United States Code, § 2

On or about and October 23, 2013, within the State and District of Colorado and elsewhere, the Defendant,

DAVID JEFFREY FURTADO,

did transport, transmit, and transfer, and attempt to transport, transmit, and transfer monetary instruments and funds to a place within the United States from or through a place outside the United States, namely, he wire transferred and caused the wire transfer of \$100,000.00 U.S. dollars from the from the Banco de Occidente, in the Republic of Colombia, to Wells Fargo account number *****1139, with the intent to promote a specified unlawful activity, namely the cultivation, manufacture, and distribution of marijuana, a Schedule I Controlled Substance, and conspiracy to commit the same, which is in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A)(vii) and 846, respectively, and did aid and abet, counsel, command, induce and procure the same;

All in violation of Title 18, United States Code, Section 1956(a)(2)(A), and Title 18, United States Code, Section 2.

COUNT SIX

Title 18, United States Code, § 1956(a)(2)(A)
Title 18, United States Code, § 2

On or about November 1, 2013, within the State and District of Colorado and elsewhere, the Defendant,

DAVID JEFFREY FURTADO,

did transport, transmit, and transfer, and attempt to transport, transmit, and transfer monetary instruments and funds to a place within the United States from or through a place outside the United States; namely, the wire transfer of \$20,000.00 U.S. dollars from the from the Banco de Occidente, in the Republic of Colombia, to Wells Fargo account number *****1139, with the intent to promote a specified unlawful activity, namely the cultivation, manufacture, and distribution of marijuana, a Schedule I Controlled Substance, and conspiracy to commit the same, which is in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A)(vii) and 846, respectively, and did aid and abet, counsel, command, induce and procure the same;

All in violation of Title 18, United States Code, Section 1956(a)(2)(A), and Title 18, United States Code, Section 2.

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...

...

COUNT SEVEN

Title 18, United States Code, § 1957
Title 18, United States Code, § 2

On or about October 31, 2013, within the State and District of Colorado, the
Defendants,

DAVID JEFFREY FURTADO,
LUIS FERNAND URIBE
a/k/a Luis Fernando Uribe
a/k/a Luis Fernando Uribe-Cristancho, and
GERARDO URIBE
a/k/a Gerardo Uribe-Cristancho
a/ka/ Gorardo Uribe-Cristancho,

did knowingly engage, and attempt to engage, in a monetary transaction by and through
or to a financial institution, affecting interstate or foreign commerce, in criminally derived
property of a value greater than \$10,000.00; that is, the attempted deposit of \$449,980.00
in U.S. currency into Wells Fargo Bank, such property having been derived from a
specified unlawful activity, to wit: the cultivation, manufacture, and distribution of
marijuana, a Schedule I Controlled Substance, and a conspiracy to commit the same, all
of which is in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A)(vii)
and 846, and did aid, abet, counsel, command or procure the same;

All in violation of Title 18, United States Code, Section 1957, and Title 18 United
States Code, Section 2.

FORFEITURE ALLEGATION

1. The allegations contained in Count One of this Indictment are hereby
re-alleged and incorporated by reference for the purpose of alleging forfeiture pursuant to
the provisions of Title 18, United States Code, Section 924(d) and Title 28, United States

Code, Section 2461(c).

2. Upon conviction of the violation alleged in Count One of this Superseding Criminal Indictment, involving violations of Title 18, United States Code, Section 922(g)(5)(B), the defendant,

HECTOR DIAZ
a/k/a Hector Diaz-Martinez
a/k/a Hector Josue Diaz-Martinez
a/k/a Hector J. Diaz-Martinez,

shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), all firearms and ammunition involved in the commission of the offense, including but not limited to a Smith and Wesson M&P-15, 5.56mm semi-automatic rifle bearing serial number SP 52534.

If any of the property described above, as a result of any act or omission of the defendant:

- a) cannot be located upon the exercise of due diligence;
- b) has been transferred or sold to, or deposited with, a third party;
- c) has been placed beyond the jurisdiction of the Court;
- d) has been substantially diminished in value; or
- e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of said defendant[s] up to the value of the forfeitable property.

3. The allegations listed above in this Indictment relating to violations of Title 18, United States Code, Sections 1956 and 1957 are hereby re-alleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of: Title 21, United States Code, Section 853; Title 18, United States Code, Section 982(a)(1); Title 18, United States Code, Section 981(a)(1)(C); and Title 28, United States Code, Section 2461(c).

As a result of the foregoing offenses alleging violations of Title 18, United States Code, Sections 1956(h), 1957, and 1956(a), the Defendants,

HECTOR DIAZ
a/k/a Hector Diaz-Martinez
a/k/a Hector Josue Diaz-Martinez
a/k/a Hector J. Diaz-Martinez,
DAVID JEFFREY FURTADO,
LUIS FERNAND URIBE
a/k/a Luis Fernando Uribe
a/k/a Luis Fernando Uribe-Cristancho, and
GERARDO URIBE
a/k/a Gerardo Uribe-Cristancho
a/ka/ Gorardo Uribe-Cristancho,

shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(1), any and all property, real or personal, involved in such offense, or all property traceable to such property, including, but not limited to a money judgment in the amount of proceeds obtained as a result of the foregoing offenses for which the defendants share joint and several liability.

If as a result of any act or omission of the defendants, any of the above-described forfeitable property:

- (1) cannot be located upon the exercise of due diligence;
- (2) has been transferred or sold to, or deposited with, a third party;

- (3) has been placed beyond the jurisdiction of the Court;
- (4) has been substantially diminished in value; and
- (5) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), and as incorporated by Title 18, United States Code, Section 982(b) and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of said Defendants up to the value of the above forfeitable property.

A TRUE BILL:

Ink signature on file in Clerk's Office
FOREPERSON

JOHN WALSH
United States Attorney

BY: s/M.J. Menendez
M.J. MENENDEZ
Assistant United States Attorney
1225 17th Street, Suite 700
Denver, Colorado 80202
(303) 454-0100
(303) 454-0409 Fax
Email: M.J.Menendez@usdoj.gov
Attorney for the Government

BY: s/Bradley W. Giles
BRADLEY W. GILES
Assistant United States Attorney
1225 17th Street, Suite 700
Denver, Colorado 80202
(303) 454-0100
(303) 454-0409 Fax
Email: Bradley.Giles@usdoj.gov
Attorney for the Government

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 1:15-CR-00053-REB

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. BRIAN DANIEL EVINS,

Defendant.

INDICTMENT
21 U.S.C. § 841(a)(1)
21 U.S.C. § 843(b)

The Grand Jury charges:

Count One
(21 U.S.C. § 841(a)(1))

On or about April 24, 2014, in the State and District of Colorado, the Defendant, BRIAN DANIEL EVINS, did knowingly and intentionally distribute and possess with intent to distribute a mixture and substance containing a detectable amount of marijuana, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C).

Count Two
(21 U.S.C. § 843(b))

On or about the April 24, 2014, in the District of Colorado, the defendant, BRIAN DANIEL EVINS, did knowingly and intentionally use any communication facility, in facilitating the commission of any act or acts constituting a felony under Title 21, United States Code, Section 841(a)(1), that is, distribution of a controlled substance as set forth in Count One of this indictment and incorporated by reference herein.

All in violation of Title 21, United States Code, Sections 843(b).

Count Three
(21 U.S.C. § 841(a)(1))

On or about August 27, 2014, in the State and District of Colorado, the Defendant, BRIAN DANIEL EVINS, did knowingly and intentionally distribute and possess with intent to distribute a mixture and substance containing a detectable amount of marijuana, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C).

Count Four
(21 U.S.C. § 843(b))

On or about the August 27, 2014, in the District of Colorado, the defendant, BRIAN DANIEL EVINS, did knowingly and intentionally use any communication facility, in facilitating the commission of any act or acts constituting a felony under Title 21, United States Code, Section 841(a)(1), that is, distribution of a controlled substance as set forth in Count One of this indictment and incorporated by reference herein.

All in violation of Title 21, United States Code, Sections 843(b).

Count Five
(21 U.S.C. § 841(a)(1))

On or about October 21, 2014, in the State and District of Colorado, the Defendant, BRIAN DANIEL EVINS, did knowingly and intentionally distribute and possess with intent to distribute a mixture and substance containing a detectable amount of marijuana, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C).

Count Six
(21 U.S.C. § 843(b))

On or about the October 21, 2014, in the District of Colorado, the defendant, BRIAN DANIEL EVINS, did knowingly and intentionally use any communication facility, in facilitating the commission of any act or acts constituting a felony under Title 21, United States Code, Section 841(a)(1), that is, distribution of a controlled substance as set forth in Count One of this indictment and incorporated by reference herein.

All in violation of Title 21, United States Code, Sections 843(b).

Forfeiture Allegation

1. The allegations contained in Counts One through Six of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 21, United States Code, Section 853.
2. Upon conviction of the violations alleged in Counts One through Six of this

Indictment involving violations of Title 21, United States Code, Section 801 *et seq.* defendant, BRIAN DANIEL EVINS, shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853 any and all of the defendant's right, title and interest in all property constituting and derived from any proceeds obtained directly and indirectly as a result of such offense, and all property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such offense, including, but not limited to: A money judgment in the amount of proceeds obtained by the scheme.

3. If any of the property described above, as a result of any act or omission of the defendant:

- a) cannot be located upon the exercise of due diligence;
- b) has been transferred or sold to, or deposited with, a third party;
- c) has been placed beyond the jurisdiction of the Court;
- d) has been substantially diminished in value; or
- e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant[s] up to the value of the forfeitable property.

A TRUE BILL

"Ink signature on file in Clerk's Office"
FOREPERSON

JOHN F. WALSH
United States Attorney

s/ Kurt J. Bohn
KURT J. BOHN
Assistant United States Attorney
United States Attorney's Office
1225 17th Street, Suite 700
Denver, Colorado 80202
Telephone: (303) 454-0100
Telecopier: (303) 454-0403
E-mail: kurt.bohn@usdoj.gov

THE UNITED STATES ATTORNEY'S OFFICE
DISTRICT *of* COLORADO

U.S. Attorneys » District of Colorado » News

Department of Justice

U.S. Attorney's Office

District of Colorado

FOR IMMEDIATE RELEASE

Monday, March 10, 2014

**U.S. Attorney's Office Announces A Federal Forfeiture
Action Against A Marijuana Warehouse And Related
Marijuana Funds**

DENVER -- Colorado U.S. Attorney John Walsh announced today that his office has filed in United States District Court in Denver a civil forfeiture complaint seeking forfeiture of a Denver area marijuana warehouse and illegally connected funds. The forfeiture case stems from a criminal case indicted by a state-wide grand jury that returned indictments that were ultimately prosecuted in Jefferson County.

As revealed by the Verified Complaint, in the Summer of 2012, the Criminal Tax Enforcement Section of the Colorado Department of Revenue, subsequently joined by the Drug Enforcement Administration (DEA), initiated an investigation into an illegal marijuana growing and distribution operation based in a warehouse at 5105 East 39th Avenue in Denver. Investigators determined that the Warehouse produced hundreds of pounds of processed marijuana, and then illegally distributed the drugs to several retail marijuana stores in the metropolitan area in violation of Colorado and Federal law.

The investigation resulted in a Colorado State Grand Jury Indictment charging numerous individuals and entities with 71 counts of drug, tax, and fraud violations of Colorado state law; 8 guilty pleas have been entered, and several cases remain pending in the Jefferson County, Colorado District Court. The individuals involved in the Drug Trafficking Organization utilized various Limited Liability Companies to hold ownership of the assets, and utilized various bank accounts to buy and equip the Warehouse, fund the operations, and receive the illegal proceeds. In addition to the warehouse, the Complaint seeks forfeiture of over \$850,000 in seized funds that are the proceeds of the illegal operation, which were used to promote the illegal operation, and which were involved in money laundering.

According to the indictment referred to above, and other information from state authorities, the underlying case involves out of state diversion of marijuana, fraud on investors, false reporting to state law enforcement and regulatory authorities, filing of false and incomplete tax returns, and other broad-scale criminal activity that necessitated action to protect and enforce federal priorities as outlined in the Department of Justice's marijuana enforcement guidance published on August 29, 2013.

"The U.S. Attorney's Office continues to engage in focused enforcement of violations of federal law as it pertains to marijuana, and to work closely with our local and state law enforcement partners," said U.S. Attorney John Walsh. "In this case, the warehouse and money that is the subject of this forfeiture action were proceeds of an illegal scheme perpetrated by certain individuals who were not only violating federal law, they were violating Colorado state law, as is demonstrated by the guilty pleas obtained in Jefferson County."

[Click here for the Verified Complaint for Forfeiture.](#)

USAO - District of Colorado

Updated June 22, 2015

THE UNITED STATES ATTORNEY'S OFFICE
DISTRICT *of* COLORADO

U.S. Attorneys » District of Colorado » News

Department of Justice

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District of Colorado

FOR IMMEDIATE RELEASE

Wednesday, April 16, 2014

Montezuma County Man Indicted For Child Pornography And Marijuana Distribution

DENVER – Stephen Paul Redwood, age 31, of Montezuma County, Colorado, was placed into federal custody based on a grand jury indictment on child pornography and marijuana distribution charges, United States Attorney John Walsh and FBI Denver Division Special Agent in Charge Thomas Ravenelle announced. Redwood was indicted by a federal grand jury in Durango, Colorado on April 3, 2014. He surrendered on April 10, 2014 in Denver, and appeared before a U.S. Magistrate Judge that afternoon, where he was advised of his rights and the charges pending against him. Yesterday, April 15, 2014, Redwood had a detention hearing and arraignment. He is due back in court tomorrow, April 17, 2014 at 11:00 a.m. for a further discussion regarding detention.

According to the indictment, between July 7, 2012 and November 24, 2013, Redwood transported and shipped child pornography within interstate commerce, using any means, including a computer. Further, on August 25, 2012, January 21, 2013, August 14, 2013, and December 3, 2013, the defendant knowingly received child pornography, also by computer. On January 15, 2014, Redwood was found in possession of child pornography.

In addition to the child pornography charges, between October 31, 2013 and January 15, 2014, Redwood did knowingly and intentionally distribute and possess with intent to distribute marijuana. On January 15, 2014, Redwood did knowingly and intentionally manufacture and possess with intent to manufacture marijuana.

During the course of the investigation, the FBI determined that Redwood was receiving, transporting, and possessing child pornography. On January 15, 2014, FBI agents, working with the Colorado Bureau of Investigation (CBI), Immigration and Customs Enforcement (ICE) Homeland Security Services (HSI), United States Marshals Service, Montezuma County Sheriff's Office and the Cortez Police Department, executed a search warrant at Redwood's residence. In addition to the computer and computer media they found, which contained child pornography,

agents also found a marijuana grow, including dried marijuana ready for use and live marijuana plants. During a detention hearing, the government proffered to the court that Redwood sold marijuana to a 14 year old and other minors as well.

Redwood faces one count of transportation of child pornography and four counts of receipt of child pornography which carries a penalty of not less than 5 years, and not more than 20 years in federal prison, as well as not more than a \$250,000 fine for each count. He faces, one count of possession of child pornography, which carries a penalty of not more than 10 years in federal prison. He faces one count of distribution of marijuana and one count of manufacture/cultivation of marijuana, each count of which carries a penalty of not more than 5 years in federal prison, and up to a \$250,000 fine.

This case was investigated by the Federal Bureau of Investigation (FBI) with the assistance of the Colorado Bureau of Investigation (CBI), Immigration and Customs Enforcement (ICE) Homeland Security Services (HSI), United States Marshals Service, Montezuma County Sheriff's Office and the Cortez Police Department.

Redwood is being prosecuted by Assistant U.S. Attorney Todd Norvell, based in the Colorado U.S. Attorney's Durango Branch Office. Assistant U.S. Attorney Alecia Riewerts Wolak is providing support in Denver.

The charges contained in the indictment are allegations. The defendant is presumed innocent unless and until proven guilty.

This case was brought as part of Project Safe Childhood, a nationwide initiative to combat the growing epidemic of child sexual exploitation and abuse launched in May 2006 by the Department of Justice. Led by United States Attorneys' Offices and the Criminal Division's Child Exploitation and Obscenity Section (CEOS), Project Safe Childhood marshals federal, state and local resources to better locate, apprehend and prosecute individuals who exploit children via the Internet, as well as to identify and rescue victims. For more information about Project Safe Childhood, please visit www.projectsafechildhood.gov.

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Monday, April 28, 2014

**Denver Attorney And Others Named In Superseding
Indictment Alleging Money Laundering Related To
Marijuana Cultivation And Distribution**

*Money was being wired from bank accounts in Colombia to bank accounts in Colorado for
purchase of marijuana grow facility*

DENVER – Hector Diaz, age 49, David Jeffrey Furtado, age 48, Luis Fernand Uribe, age 28, and Gerardo Uribe, age 33, were named in a just unsealed superseding indictment, returned by a federal grand jury in Denver on April 22, 2014, federal law enforcement agencies announced. The superseding indictment alleges violations of federal firearms law and money laundering related to marijuana laws. Diaz, who was previously charged, was sent a summons to appear in court Wednesday, April 30, 2014. Furtado and Luis Uribe were arrested on Friday, April 25, 2014. Furtado and Luis Uribe made their initial appearances this afternoon before U.S. Magistrate Judge Boyd N. Boland, where they were advised of their rights and the charges pending against them. Gerardo Uribe has been charged but is not in custody. He is currently considered a fugitive from justice. Furtado, Luis Uribe, and Hector Diaz are scheduled to be back in court on Wednesday, April 30, 2014.

The superseding indictment includes the original charge that Hector Diaz illegally possessed a firearm. The superseding indictment further alleges that Diaz committed visa fraud by making a false statement regarding the purpose of his visit to the United States.

The superseding indictment alleges that all four defendants conspired with each other and others known and unknown to the grand jury, to commit offenses against the United States. The manner and means of their conspiracy include:

- Effect the international transfer of funds from the Republic of Colombia into the United States to facilitate the purchase of real property, with existing physical structures, located at 5200 East Smith Road, in Denver, Colorado.

- The defendants intended to permit the use of the Smith Road property to cultivate, manufacture, and/or distribute marijuana.
- In 2013, Gerardo Uribe filed documents with the Colorado Secretary of State to incorporate a company known as Colorado West Metal, LLC. Attorney David Furtado was the registered agent. Hector Diaz was listed as the person responsible for forming the corporation.
- Furtado opened a bank account at Wells Fargo in the name of Colorado West Metal, LLC, and was the sole signor on that account.
- Furtado used his attorney trust account, held in the name of his law firm, to facilitate the purchase of the Smith Road property.
- It was part of the conspiracy for Furtado, Gerardo Uribe and Hector Diaz to communicate regarding a wire transfer associated with Colorado West Metal, which was later used to purchase the Smith Road property.
- On November 7, 2013, Furtado transferred \$424,000 from the Colorado West Metal Wells Fargo account to a Colorado First Bank account, held in the name of Land Title Guarantee Company.
- The conspirators caused and/or agreed for Land Title Guarantee Company to transfer those same funds to Westerra Credit Union – the mortgagor for the Smith Road property.
- Between November 1, 2013 and November 4, 2013, Furtado made and caused to be made two separate wire transfers in the amount of \$200,000 each from his attorney trust account into the Colorado First Bank account in the name of Land Title Guarantee to facilitate the purchase of the Smith Road property.
- Members of the conspiracy deposited, and attempted to deposit into financial institutions, and/or converted to cashier's checks and/or bulk U.S. currency (cash) to facilitate the purchase of the Smith Road property. These bulk currency amounts included proceeds from the cultivation and sale of marijuana.
- On October 31, 2013, Furtado met with Gerardo Uribe and obtained \$449,980 in U.S. currency (cash). Those funds represented proceeds of specified unlawful activity, namely the cultivation and sale of marijuana, as derived through the operation of the "VIP Wellness Center", operated by Gerardo Uribe, Luis Uribe and others.

The superseding indictment also alleges that Diaz, Furtado and Gerardo Uribe did transfer \$424,000 using wire transfers from the Banco Bilbao Vizcaya Argentaria (BVVA) in the Republic of Colombia to the Colorado West Metal, LLC Wells Fargo account with the intent to cultivate, manufacture and distribute marijuana. Also, Furtado did two wire transfers, one for \$100,000 and a second for \$20,000 from the Banco de Occidente, in the Republic of Colombia, to his attorney trust account with Wells Fargo in Colorado, with the intent to promote the cultivation, manufacture and distribution of marijuana.

Finally, Furtado, Luis Uribe and Gerardo Uribe did knowingly engage in money laundering by and through a financial institution affecting interstate and foreign commerce, in criminally derived property greater than \$10,000; that is, the attempted deposit of \$449,980 in U.S. Currency (cash) into a Wells Fargo bank account, with such property having been derived from a specified unlawful activity, namely the cultivation, manufacture and distribution of marijuana.

The superseding indictment includes an asset forfeiture allegation, which includes the firearms possessed by Diaz, and the money derived from the unlawful activity, namely the cultivation, manufacture and distribution of marijuana, a Schedule I controlled substance.

The investigation and charges closely follow the guidance provided by the Department of Justice in August 2013. More than one of the enforcement priorities outlined in the Department guidance are implicated in this ongoing criminal matter.

In the superseding indictment, Hector Diaz is named in counts one, two, three and four. David Furtado is named in counts three, four, five, six and seven. Luis Uribe is named in counts three and seven. Gerardo Uribe is named in counts three, four and seven.

Count one is possession of a firearm by a prohibited possessor. If convicted, the defendant faces not more than 10 years imprisonment, and up to a \$250,000 fine. Count two is false statements with respect to a material fact. If convicted, the defendant faces not more than 20 years imprisonment, and up to a \$250,000 fine. Count three is conspiracy to commit money laundering. If convicted, the defendants face not more than 20 years imprisonment, and a \$500,000 fine (or twice the value of the property involved in the transaction, whichever is greater). Count four is money laundering and aiding and abetting the same. If convicted, the defendants face not more than 20 years imprisonment, and a \$500,000 fine (or twice the value of the property involved in the transaction, whichever is greater). Counts five and six are money laundering and aiding and abetting the same. If convicted, the defendants face not more than 20 years imprisonment, and a \$500,000 fine (or twice the value of the property involved in the transaction, whichever is greater). Count seven is engaging in monetary transactions in property derived from specified unlawful activity. If convicted, the defendants face not more than 10 years in federal prison, and up to a \$250,000 fine.

This case is being investigated by the Drug Enforcement Administration (DEA), the Internal Revenue Service – Criminal Investigation (IRS CI), the U.S. Department of State, Diplomatic Security Services (DSS) and the Denver Police Department. This investigation is ongoing, and no further information outside of the superseding indictment can or will be provided.

The defendants are being prosecuted by Assistant U.S. Attorneys M.J. Menendez and Bradley Giles. Assistant U.S. Attorney Tonya Andrews is handling the asset forfeiture aspect of this case.

The charges in the superseding indictment are allegations, and the defendants are presumed innocent unless and until proven guilty.

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FOR IMMEDIATE RELEASE

Monday, February 23, 2015

**Colombian Man Pleads Guilty To Visa Fraud Related To
Drug Trafficking And Conspiracy To Possess With Intent
To Distribute Marijuana**

[Click here for a copy Hector Diaz plea agreement](#)

DENVER – Hector Diaz, age 50, of Colombia, pled guilty this morning before U.S. District Court Judge Robert E. Blackburn to one count of visa fraud committed in facilitation of a drug trafficking crime and one count of conspiracy to possess with intent to distribute less than 50 kilograms of marijuana, federal authorities announced. Diaz, who is free on bond, is scheduled to be sentenced on May 29, 2015 at 9:00 a.m. by the Honorable Judge Blackburn.

If convicted of visa fraud committed in facilitation of a drug crime, the defendant faces not more than 20 years in federal prison, and up to a \$250,000 fine. If convicted of conspiracy to possess with intent to distribute less than 50 kilograms of marijuana, Diaz faces not more than 5 years imprisonment, and up to a \$250,000 fine.

This case is being investigated by the Drug Enforcement Administration (DEA), the IRS – Criminal Investigations (IRS CI), and the U.S. Department of State, Diplomatic Security Services (DSS).

Diaz is being prosecuted by Assistant U.S. Attorneys M.J. Menendez and Bradley Giles, with assistance regarding asset forfeiture from Assistant U.S. Attorney Tonya Andrews.

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FOR IMMEDIATE RELEASE

Tuesday, May 12, 2015

Castle Rock Man Pleads Guilty To Sending Marijuana Thorough The U.S. Mail

Defendant also received over \$100,000 in cash through the U.S. Mail in return

DENVER – Brian Daniel Evins, age 42, of Castle Rock, Colorado, pled guilty before U.S. District Court Judge Robert E. Blackburn to three counts of possession of a controlled substance with the intent to distribute, U.S. Attorney John Walsh and Denver U.S. Postal Inspector in Charge Adam P. Behnen announced. Evins, appeared at the change of plea on April 30, 2015 before Judge Blackburn. He was at that hearing free on bond. Evins was originally indicted by a federal grand jury in Denver on February 9, 2015.

According to the stipulated facts contained in the plea agreement, on April 2, 2014, a U.S. Postal Inspector came across a suspicious mailing that may have contained narcotics or narcotic proceeds. The first package in question came from Missouri, and contained U.S. currency. The package was sent to a Commercial Mail Receiving Agency (CMRA) mailbox and was addressed to an individual from Lone Tree, Colorado. Further investigation revealed that the person who rented the CMRA mailbox used fake identification.

Inspectors conducted surveillance of the CMRA mailbox. They saw an individual driving a grey Honda Pilot come into the CMRA, pick up several packages from the CMRA mailbox, and return to his car. Inspectors traced the car to an individual named Brian Daniel Evins, of Castle Rock, Colorado. A review of Evins' driver's license revealed that he was the same individual who entered the CMRA and claimed parcels from the CMRA mailbox. At one point he also claimed one parcel of what appeared to be U.S. Currency that was too large to fit in his mailbox.

As the investigation continued, the Inspectors found Evins mailing parcels of marijuana from a handful of post offices in South Metro Denver during the Summer and Fall of 2014. Further, he continued to pick up parcels that appeared to be U.S. currency from his CMRA mailbox. As a result, Inspectors decided to contact him while he was collecting his mail at the mailbox.

During that contact it was determined that Evins sent via U.S. Mail over 100 outbound packages containing marijuana to various locations across the country. Further, he received over 100 inbound money parcels containing several hundreds of thousands of dollars in U.S. currency. Inspectors then conducted a search of Evins' apartment. That search resulted in recovering 580 grams of bagged marijuana, 800 grams of marijuana extract/hash oil, 5,480 grams of marijuana edibles, for a total weight of 6,860 grams of marijuana. A search of his vehicle resulted in finding an additional 78 grams of liquid marijuana. He had previously mailed two additional packages that were seized by law enforcement. Those packages contained 3,654 grams of marijuana. In total, Inspectors learned that Evins sent 11,026 grams of marijuana. Law enforcement also had seized during the investigation over \$53,000 of U.S. currency which was the proceeds from his illegal narcotics transactions. That money was forfeited to the government as part of the defendant's plea agreement.

"As the Department of Justice has made clear, stopping the interstate transportation of marijuana is a federal priority," said U.S. Attorney John Walsh. "When drug traffickers use the U.S. mail to violate federal drug laws, the U.S. Attorney's Office will team up with our local, state and federal partners to hold violators accountable."

"The defendant's use of the U.S. Mail to send marijuana is illegal and is evidenced by his recent guilty plea to federal charges for intent to distribute" said Adam P. Behnen, Inspector in Charge, U.S. Postal Inspection Service, Denver Division. "Although some states have recently passed laws allowing their residents to possess small amounts of marijuana, it is a violation of federal statute to use the U.S. Mail to ship any and all illegal drugs."

The defendant pled guilty to three counts of possession of a controlled substance with the intent to distribute. He faces not more than 20 years in federal prison, and up to a \$1,000,000 fine per count.

This case was investigated by the U.S. Postal Inspection Service.

Evins is being prosecuted by Assistant U.S. Attorneys Kurt Bohn.

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Eric K. Fogderude # 070860
FLETCHER & FOGDERUDE, INC.
5412 N Palm Ave # 101
Fresno, CA 93704
Telephone: 559-431-9710
Attorney for Defendant, RAYMOND GENTILE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAYMOND GENTILE,

Defendant.

No. 1:12-cr-00360 AWI

**REPLY TO UNITED STATES'
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

Date: September 8, 2015

Time: 1:00 p.m.

**Judge: Honorable Anthony W. Ishii
United States District Judge**

The United States, in its Opposition To Defendant's Motion To Dismiss argues that the defendant does not identify the "Administrative Policy" under which the Attorney General operates and has failed to demonstrate that the U.S. Department of Justice ("DOJ") policy is applied in a discriminatory fashion, that the defendant's argument is flawed in that it presumes that residents of Colorado are not prosecuted at the federal level for marijuana crimes, and, the defendant completely fails to explain the basis for dismissal of the false statement charges.

I

The Defendant's Motion Does Not Seek Dismissal Of The False Statement Charges

Defendant's Motion to Dismiss For Selective Prosecution Based Upon Geographical Location moves the Court for an order dismissing only counts one, two and three of the indictment. The defendant, a distributor of marijuana as the owner and operator of ANP Medicinal Cooperative, Inc., which was licensed to operate under the laws of the State of

1 California and County of Kern located in the jurisdictional boundaries of the United States Court
2 for the Eastern District of California, has been charged and is being prosecuted with counts one,
3 two and three alleging the manufacture, possession with intent to distribute and conspiracy to
4 manufacture and distribute marijuana. See Motion To Dismiss page 1, lines 18-19.

5 Counts four and five of the Indictment allege violations of 18 U.S.C. §1001 – False
6 Statements. The defendant is not seeking dismissal of these counts.

7 II

8 The Defendant Has Not Identified the Administrative Policy Under Which The United States
9 Operates In California Because the United States Has Failed To Respond To Defendant's
10 Discovery Motion Requesting Disclosure of That Policy.

11 When defendant filed and calendared for hearing his Motion To Dismiss For Selective
12 Prosecution Based on Geographical Location, he also filed and calendared his Motion For
13 Discovery Re: Selective Prosecution Based Upon Geographical Location. See Document 77 filed
14 06/30/2015.

15 The discovery motion requests discovery from the United States Attorney, as the source
16 and holder of the Administrative Policy, its policy in effect during the pendency of the
17 prosecution of this case, which sets forth the criteria for prosecution of residents of California
18 who operate state licensed marijuana dispensaries and the criteria for prosecution of Colorado
19 residents who operate state licensed marijuana dispensaries, in order to determine whether
20 selective prosecution has occurred.

21 The United States in its Opposition To Defendant's Motion To Dismiss has attached to its
22 opposition, as Exhibit B, the policy criteria for prosecuting marijuana charges in the District of
23 Colorado as testified to by John F. Walsh, United States Attorney, District of Colorado. That
24 policy lists eight criteria for prosecution of marijuana offenses, none of which would apply to
25 Defendant Gentile.

26 The United States has not provided in its Opposition To Defendant's Motion to Dismiss
27 any similar policy statement, testimony or declaration from Benjamin B. Wagner, United States
28 Attorney for Eastern District of California setting forth whether the criteria for prosecution of

1 marijuana offenses in California is the same or different as that for the District of Colorado. The
2 United States has filed no objection or opposition to Defendant's Discovery Motion and therefore
3 the government should be ordered to produce a copy of its prosecution criteria in the Eastern
4 District of California so that the Court can determine if the policy has resulted in selective
5 prosecution of Defendant Gentile.

6 Therefore, the hearing on the Motion To Dismiss should be continued until such time as
7 the government has produced the requested policy.

8
9 III
10 Coloradans Who, Like Defendant Gentile, Operated A State Licensed Marijuana Dispensary,
11 Would Be Exempt From Federal Prosecution in Colorado.

12 Coloradans, according to the United States Attorney for the District of Colorado, would be
13 subject to prosecution for marijuana offenses if the cases involved these eight priorities, to wit:

- 14 1. Actions against marijuana businesses near schools;
- 15 2. Actions against residential grow sites near schools;
- 16 3. Actions involving international smuggling;
- 17 4. Actions involving interstate shipment of marijuana;
- 18 5. Marijuana grows where firearms are involved;
- 19 6. Marijuana grows where violence is involved;
- 20 7. Marijuana grows on public lands, and
- 21 8. Potential organized crime involvement.

22 See Opening Statement for the Record of John F. Walsh, United States Attorney, District
23 of Colorado before the House Committee on Oversight and Government Reform (3-4-12) at pages
24 3 and 4, attached as Exhibit B to Government's Opposition.

25 Defendant Gentile's conduct does not fall into any of the eight criteria for federal
26 prosecution in the State of Colorado.

27 Without the United States providing discovery of the prosecution criteria for such cases in
28

1 California, it can be inferred by the fact that Defendant Gentile is being prosecuted in California,
2 that the California criteria is different than the Colorado policy, and as a result, Defendant Gentile
3 has and is being selectively prosecuted in violation of the due process and equal protective clause
4 of the United States Constitution based upon geographical location.

5 For the above stated reasons, the motion to dismiss counts one, two and three should be
6 granted.

7 Respectfully submitted,

8 Dated: August 18

9 /s/ Eric K. Fogderude
ERIC K. FOGDERUDE, Attorney for Defendant
RAYMOND GENTILE