1
2 **HONORABLE JUDGE LEIGHTON**
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6 IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT
OF WASHINGTON AT TACOMA
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UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	NO. CR13-5659 RBL
)	
vs.)	DEFENDANT LANCE EDWARD GLOOR'S MOTION AND MEMORANDUM TO DISMISS INDICTMENT
)	
LANCE EDWARD GLOOR,)	
)	
Defendant.)	
____)	

13 COMES NOW the defendant, LANCE EDWARD GLOOR, by and through his attorney
14 of record, and moves this court for an order dismissing the indictment filed herein. This motion
15 is based on the Memorandum subjoined below and the records and files herein.
16 Dated this October 24, 2015.
17 KAREN L. UNGER, P.S.
18
19 s /Karen L. Unger/
KAREN L. UNGER # 11671
20 Attorney for Defendant
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INTRODUCTION

Defendant LANCE GLOOR is charged by indictment with the following: Conspiracy to Distribute Marijuana, which alleges, in part, that within the last five years, and continuing through the present, Mr. GLOOR, along with co-defendants JAMES LUCAS and MATTHEW ROBERTS, did conspire to distribute marijuana; Conspiracy to Commit Money Laundering, again with Mr.LUCAS and Mr. ROBERTS, during the same time frame as mentioned above; Manufacturing Marijuana, on or about September 20, 2010, in Kitsap County,Washington, in furtherance of the conspiracy noted above; and, Possession of a Firearm in Furtherance of a Drug Trafficking Crime, again alleged to have occurred on or about September 20, 2010.

Co-defendants LUCAS and ROBERTS have entered pleas of guilty in sealed plea agreements and await sentencing. Mr. GLOOR is awaiting trial, set to begin in early January, 2016.

FACTUAL BACKGROUND

The following account as to how Mr. GLOOR came to be before this court can be found in an investigative report provided to the defendant, authored by Special Agent Daniel Olson:

> "On October 13, 2011, the DEA Tacoma Resident Office (TRO) initiated an investigation into four medical marijuana dispensaries (hereafter referred to as the CROSS DISPENSARIES) which were being operated in Thurston, Pierce, and King Counties, Washington. This investigation was largely based on information gained from the Thurston County Narcotics Task Force (TNT) who had been investigating the distribution of marijuana from LACEY CROSS, a medical marijuana dispensary operating at 4227 Pacific Ave SE, Lacey, WA. The owner of the dispensary was identified as James Canyon LUCAS. Further records checks revealed that LUCAS owned three additional medical marijuana dispensaries (TACOMA CROSS, 1126 Commerce St, Tacoma, WA I SEATTLE CROSS, 2315 E. John St, Seattle, WA I KPN CROSS, 15607 92nd Street, Lakebay, WA). This investigation was coordinated with and run in conjunction with the state investigation into the CROSS DISPENSARIES, which, under Washington State Law, were and remain illegal.

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> During the course of the investigation, two Bank of America bank accounts which serviced the various CROSS DISPENSARIES were identified. Account number XXXX1819, operating under the name of LACEY CROSS, was identified as servicing the KPN and LACEY CROSS dispensaries and account number 24604217 (the petitioned account), operating under the name of SEATTLE CROSS, was identified as servicing the TACOMA and SEATTLE CROSS dispensaries. These accounts were used by the CROSS DISPENSARIES to collect funds from credit/debit card purchases made at the CROSS DISPENSARIES utilizing Electronic Merchant Services."

According to S.A. Olson, co-defendant LUCAS opened these bank accounts at the local branch of the Bank of America.

After making several purchases at the various Cross locations (Lacey Cross, Tacoma Cross, Seattle Cross, etc., after producing the requisite authorizations to enter each dispensary (which were established by Washington State statute), federal law enforcement authorities executed various search warrants and eventually the three individuals named herein were indicted.

Defendant GLOOR is seeking dismissal of all charges, as set forth below.

OPERATING MEDICAL MARIJUANA DISPENSARIES IN THE STATE OF WASHINGTON IS NOT ILLEGAL PURSUANT TO RCW 69.51A

Washington became one of the first states to approve the use of marijuana for medical purposes in 1998. The city of Seattle estimates that there are at least 300 marijuana businesses inside the city. With only a handful of recreational stores and growers, that means most of those are medical. Plus, medical businesses haven't had to abide by the same location restrictions as recreational stores (1,000 feet from schools and parks), so there are more of them. See, Drastic Changes Are Coming to Washington State's Medical Marijuana Industry, by Heidi Groover , *The Stranger*, Apr 16, 2015. Medical marijuana legalization created an affirmative defense for a

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patient or *designated provider* who is authorized by their healthcare provider to possess a 60-day supply of marijuana (emphasis added). While the State Health Department would later define a 60-day supply as 24 ounces of marijuana, little else was done to clarify what medical patients could and could not do. In the absence of regulations, large medical marijuana cultivation cooperatives and dispensaries sprouted around the state. As far as Lacey and Seattle Cross and the rest are concerned, they were operating in full compliance with RCW 69.51A et seq. and were equipped and required that all patients provide the necessary prescription paperwork to substantiate their affirmative defense under that law for their collective garden management as access points.

Under RCW 69.51A, there is no obligation to register a corporate entity with the secretary of state and there is no formal state licensing process (like there will be going forward), but Seattle Cross LLC/James Lucas and Seattle Cross/Matt Roberts secured their master state business licenses and were paying state taxes at the time. See attached Exhibit 1. While litigating a zoning issue against the City of Lacey, which refused to grant them a local business license to operate Lacey Cross, in Thurston County Superior Court in 2012, no where in any of the pleadings did anyone claim that this business was not operating pursuant to state law (See *Lacey Cross v City of Lacey*, Thurston County Superior Court cause no. 12-2-00521-1). Nowhere in any of the materials supplied by the Government do they provide any proof that Mr. Gloor, was acting in violation of RCW 69.51A.

Given that these businesses were operated pursuant to RCW 69.51A, this defendant is asking the court to dismiss this matter under several theories:

1. ENTRAPMENT BY ESTOPPEL

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Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes the official. *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817 (9th Cir.), cert. denied, 471 U.S. 1139, 105 S.Ct. 2684, 86 L.Ed.2d 701 (1985) as cited in *US v. Tallmadge*, 829 F. 2d 767 (9th Circuit Court of Appeals) 1987 Id. at 825 (citing *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965)).

The concept of entrapment by estoppel by an official who mistakenly misleads a person into a violation of the law was first applied by the Supreme Court in *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). In *Raley*, the appellants were convicted of contempt for refusing to answer questions about Communist or subversive activities at sessions of the Unamerican Activities Commission of the State of Ohio. Id. at 424, 79 S.Ct. at 1259. The appellants had claimed their privilege against self-incrimination after they were informed by the Commission Chairman that they had a right to do so under Article I, Section 10 of the Ohio Constitution. Id. at 425, 79 S.Ct. at 1259. The Commission's advice was contrary to Ohio law. Id. at 438-39, 79 S.Ct. at 1266-67. An Ohio immunity statute deprived them of the protection of the privilege against self-incrimination. Id. The Supreme Court reversed the convictions. The Court expressed its holding in the following language:

> We hold that in the circumstances of these cases, the judgments of the Ohio Supreme Court affirming the convictions violated the Due Process Clause of the Fourteenth Amendment and must be reversed, except as to one conviction, as to which we are equally divided. After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State convicting a citizen for exercising a privilege which the State had clearly told him was available to him.

Raley, 360 U.S. at 425-26, 79 S.Ct. at 1260, as cited in *Talmadge*, *supra.*

In *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), the Supreme

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1 Court applied *Raley* in reversing the conviction of persons who were arrested for picketing across
2 the street from a courthouse. Id. at 571, 85 S.Ct. at 484. The defendants were given permission to
3 hold their demonstration on the west side of the street by the Chief of Police. Id. at 569-70, 85
4 S.Ct. at 483. Some time thereafter the demonstrators were ordered to disperse by the Sheriff. Id.
5 at 570, 85 S.Ct. at 483. They were arrested for refusing to obey the dispersal order. The court
6 concluded that at the time of his arrest, Cox was "justified in his continued belief that because of
7 the original grant of permission he had a right to stay where he was for the few additional
8 minutes required to conclude the meeting." Id. at 572, 85 S.Ct. at 485. The Court in *Raley* held
9 that "[t]he Due Process Clause does not permit convictions to be obtained under such
10 circumstances." Id. at 571, 85 S.Ct. at 484.
11 More recently, in *United States v. Pennsylvania Indus. Chem. Corp*., 411 U.S. 655, 93
12 S.Ct. 1804, 36 L.Ed.2d 567 (1973), the Supreme Court, relying on *Raley* and *Cox*, held that it
13 was error to deny a corporate defendant the right to present evidence that it had been
14 affirmatively misled by the responsible administrative agency into believing that the law did not
15 apply in this situation. Id. at 670-75, 93 S.Ct. at 1814-17.
16 In 1972, the 9th Circuit Court of Appeals applied the defense of official misleading to the
17 conduct of a local draft board in *United States v. Timmins*, 464 F.2d 385, 386-87 (9th Cir.1972),
18 where it held that the defendant must show that he relied on the false information and that his
19 reliance was reasonable. Id. at 387; see also *United States v. Lansing*, 424 F.2d 225, 227 (9th
20 Cir.1970) (to establish the defense of official misleading, the defendant must establish "that his
21 reliance on the misleading information was reasonable in the sense that a person sincerely
22 desirous of obeying the law would have accepted the information as true, and would not have
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been put on notice to make further inquiries").

In *Talmidge*, the uncontradicted evidence established that Mr. Tallmadge received and possessed firearms in reliance upon the representation of a federally licensed gun dealer that a person convicted of a felony in a state court could purchase firearms if the offense had subsequently been reduced to a misdemeanor. The court noted that under the doctrine of entrapment by estoppel a person could not be prosecuted under 18 U.S.C. §§ 922(h)(1) and 1202(a)(1) if an ATF official had represented that a person convicted of a felony can purchase firearms after the charge has been reduced to a misdemeanor. Here, the misleading statement regarding the lawfulness of Tallmadge's proposed conduct was made by a licensee of the federal government, along with several other individuals, including his attorney, and under the theory of entrapment by estoppel, the court reversed Tallmadge's conviction.

The Washington Department of Health distributes information to the citizenry on the legality of cannabis. See the state-created Department of Health website:

ttp://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuanaCannabis/GeneralFrequentlyAskedQuestions.aspx.

This is but another example that the state of Washington sanctions the sale of medical marijuana. Multiple levels of government have stated to the public in numerous instances that they may treat their illnesses with medical cannabis when validly prescribed by a physician. The next logical conclusion is that this marijuana has to be obtained somewhere - and it is, from one of hundreds of medical marijuana dispensaries located throughout Washington.

Additionally, statements made by Jenny Durkan, United States Attorney for the Western District of Washington at the time of these raids, and afterwards, are contained in the various

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news reports and position papers issued by the United States Attorney's office:

> "We will not prosecute truly ill people or their doctors who determine that marijuana is an appropriate medical treatment.":

If that is indeed the position of the U.S. Attorney's office, where, then, are these "truly ill" people supposed to obtain their medication, if not from a dispensary? And, given that the relevant statutes in play at the time neither explicitly banned cannabis shops under the 1998 voter-approved state law that legalized marijuana in Washington for medical purposes, it cannot be said that at the time that any of these dispensaries were operating, they were in violation of any state law.

Therefore, under the due process theory of entrapment by estoppel, this matter against Mr. Gloor must be dismissed. Mr. Gloor's involvement with his co-defendants was done under the color of state law; he relied upon the statutory authority to participate in a marijuana cooperative to provide medical marijuana as prescribed by a purchaser's treating physician.

2. VIOLATION OF DEFENDANT'S RIGHT TO EQUAL PROTECTION UNDER THE LAW - SELECTIVE PROSECUTION

The Government has decided to pursue prosecution against Mr. Gloor and his two co-defendants for allegedly operating 4 medical marijuana dispensaries. Attached is a partial list of medical marijuana dispensaries located throughout Western Washington. All of these establishments are operational, or at least appear to be operational, as of 2013. See attached Exhibit 2. Of the "raids" carried out in King, Pierce and Thurston Counties in 2011, only these three defendants are facing federal prosecution for the illegal operation of medical marijuana dispensaries. According to information contained in discovery provided in this case, along with news reports dating back to the date of the initial raid of November 15, 2011, at least 15

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dispensaries were raided on that date - only Mr. Gloor, Mr. Lucas and Mr. Roberts faced prosecution for conspiracy, possession, etc.; the only other individual prosecuted in any court was an individual named Arthur Wheeler, who arrived at Tacoma Cross just as federal agents were conducting their raid, and found him to be in possession of over 3 pounds of marijuana while armed with a Glock 40 caliber pistol (he plead guilty in Federal District Court in Tacoma and received a sentence of 5 years probation). **No other individual was prosecuted as a result of the raids of November 15, 2011, including the owners of the Seattle Cannabis Coop, where it was alleged that an undercover federal agent purchased 5 pounds of marijuana for $11,000.00 prior to the raid.** See attached Exhibit 3 and Exhibit 4.

Casey Smith and Addison McFeeley, employees on site at Seattle Cross at the time of the raid, were not arrested; Anthony Platoni, who was connected with Tacoma Cross and whose house was raided during this time period, was found with contraband, but never prosecuted; Casey Lee and Madelain Norton, purported owners of the Bayside Collective in Olympia, raided in 2013, have not been prosecuted, although their 56 foot yacht "Raven" was seized by the DEA and forfeited, but no charges ever filed. See attached Exhibit 5. In fact, not a single individual operating over 300 medical marijuana dispensaries in the state of Washington have been arrested, or prosecuted, despite the fact that their operations are identical to those allegedly operated by the three defendants named in the indictment filed herein.

On February 10, 2012, DEA agents interviewed employees at the Parkland and Sumner branches of the Bank of America, where Seattle Cross had a bank account and where deposits, withdrawals and credit card payments were processed. Although several employees admitted that they knew co-defendant James Lucas, the owner of the account, no one at the bank was

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1 arrested or prosecuted for accepting deposits related to the sale of marijuana, or prosecuted for
2 the crime of money laundering. See attached Exhibit 6.
3 In *Freeman v. City of Santa Ana*, 68 F. 3d 1180 (9th Circuit 1995), the court addresses
4 the issue of selective prosecution: "The first step in equal protection analysis is to identify the
5 [defendants'] classification of groups." *Country Classic Dairies, Inc. v. State of Montana, Dep't*
6 *of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir.1988). To accomplish this, a
7 plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens
8 on different classes of people. *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir.1988), cert. denied,
9 490 U.S. 1114, 109 S.Ct. 3176, 104 L.Ed.2d 1038 (1989). "The next step ... [is] to determine the
10 level of scrutiny." *Country Classic Dairies*, 847 F.2d at 596. Classifications based on race or
11 national origin, are subject to strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910,
12 1914, 100 L.Ed.2d 465 (1988).
13 Once the plaintiff establishes governmental classification, it is necessary to identify a
14 "similarly situated" class against which the plaintiff's class can be compared. *Attorney General v.*
15 *Irish People, Inc.*, 684 F.2d 928, 946 (D.C.Cir.1982) ("Discrimination cannot exist in a vacuum;
16 it can be found only in the unequal treatment of people in similar circumstances."), cert. denied,
17 459 U.S. 1172, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983). "The goal of identifying a similarly
18 situated class ... is to isolate the factor allegedly subject to impermissible discrimination. The
19 similarly situated group is the control group." *United States v. Aguilar*, 883 F.2d 662, 706 (9th
20 Cir.1989), cert. denied, 498 U.S. 1046, 111 S.Ct. 751, 112 L.Ed.2d 771 (1991). The court in
21 *Freemen* recognized the lower court's broad discretion to allow in evidence to support a claim of
22 selective prosecution (Freeman's equal protection claims were based on theories of retaliation
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1 and selective prosecution due to the national origin of the bar's patrons) and recognized that for
2 for purposes of defining the similarly situated class, Freeman could only introduce evidence of
3 premises with the same license type as The Red Turtle. In this case, although a protected class is
4 not the basis of the equal protection claim, the fact that other marijuana dispensaries (at least 11
5 others) that are a similarly situated class were not subject to prosecution, the burden is on the
6 Government to refute this claim of selective prosecution.

7 "Under rational basis analysis, a classification must be upheld against equal protection
8 challenge if there is any reasonably conceivable state of facts that could provide a rational basis
9 for the classification." *Isbell v. City of San Diego*, 258 F.3d 1108, 1116 (9th Cir.2001). Where a
10 defendant provides sufficient evidence of selective prosecution, the indictment will be dismissed.
11 *United States v. Mayer*, 503 F.3d 740, 747 (9th Cir. 2007). This is because selective prosecution
12 "does not constitute a challenge to the merits of the charges brought against the accused" but
13 instead concerns the right to be free from prosecution itself. *United States v. Wilson*, 639 F.2d
14 500, 502 (9th Cir. 1981. Under a rational basis test, the Government's actions fail. There is no
15 rational basis for prosecuting Mr. Gloor, and no one else.

16 **3. THE NEW DIRECTIVE OF CONGRESS IN SECTION 538 OF THE CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT OF 2015,**
17 **PUB. L. 113-235, 128 STAT. 2130 (2014) ("2015 APPROPRIATIONS ACT"), PROHIBITS THE DEPARTMENT OF JUSTICE FROM EXPENDING ANY FUNDS IN**
18 **CONNECTION WITH THE ENFORCEMENT OF ANY LAW THAT INTERFERES WITH WASHINGTON'S ABILITY TO IMPLEMENT ITS OWN STATE LAW THAT**
19 **AUTHORIZES THE USE, DISTRIBUTION, POSSESSION, OR CULTIVATION OF MEDICAL MARIJUANA. SEE 2015 APPROPRIATIONS ACT § 538**
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21 Section 538 of the 2015 Appropriations Act, which governed Treasury Funds for the
22 fiscal year ending September 30, 2015, and which has now been extended until December 11,
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2016, by the 2016 Appropriations Act, Pub. L. 114-53, § 103, 129 Stat. 502 (2015)?states as follows:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of . . . California [and 32 other states], to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

2015 Appropriations Act § 538.

"The plain reading of the text of Section 538 forbids the Department of Justice from enforcing this injunction against MAMM to the extent that MAMM operates in compliance with California law." *US v. Marin Alliance for Medical Marijuana*, 98-cv-00086-CRB Dist. Court, ND California (October 19, 2015). This decision is attached in its entirely as Exhibit 7.

The District Court's interpretation of Section 538 can best be summarized as follows, in its decision on page 7:

> In other words, this Court is not in a position to "override Congress" policy choice, articulated in a statute, as to what behavior should be prohibited.; See id. at 497. On the contrary: This Court's only task is to interpret and apply Congress's policy choices, as articulated in its legislation. And in this instance, Congress dictated in Section 538 that it intended to prohibit the Department of Justice from expending any funds in connection with the enforcement of any law that interferes with California's ability to "implement [its] own State law[] that authorize[s] the use, distribution, possession, or cultivation of medical marijuana." 2015 Appropriations Act § 538. The CSA remains in place, and this Court intends to enforce it to the full extent that Congress has allowed in Section 538, that is, with regard to any medical marijuana not in full compliance with "State law[] that authorize[s] the use, distribution, possession, or cultivation of medical marijuana." Id.

The fact that Washington's 1998 voter-approved initiative was ambiguous, at the very least, does not therefore permit the Government to violate the clear intent of Section 538, particularly as it applies to this, particular defendant. Given the language of the *MAMM* case,

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1 cited above and attached hereto as Exhibit 7, it is clear that case should be dismissed. There is
2 no rational basis to go forward; there is no legal basis to go forward, particularly in light of this
3 most recent ruling from Judge Breyer.

4 **CONCLUSION**

5 For all of the reasons set forth above, the defendant respectfully requests that this court
6 dismiss this action against Mr. Gloor, with prejudice.

7 Dated this October 24, 2015.

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9 s /Karen L. Unger/
KAREN L. UNGER # 11671
10 Attorney for Defendant

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5 CERTIFICATE OF SERVICE

6 I hereby certify that on October 24, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the
7 attorney(s) of record for the United States. I hereby certify that I have served the attorney(s) of record for the United States that are not CM/ECF participants via telefax.
8
9
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