

1 **KASHA K. CASTILLO**
California State Bar No. 204148
2 **FEDERAL DEFENDERS OF SAN DIEGO, INC.**
225 Broadway, Suite 900
3 San Diego, California 92101-5030
Telephone: (619) 234-8467, Ext. 3737
4 Facsimile: (619) 687-2666
Kasha_Castillo@fd.org
5

6 Attorneys for Mr. Stacy
7

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 **(HONORABLE BARRY T. MOSKOWITZ)**
11

12 UNITED STATES OF AMERICA,) CASE NO. 09cr3695-BTM
13 Plaintiff,)
14 v.) STATEMENT OF FACTS AND
MEMORANDUM OF POINTS AND
15 JAMES DEAN STACY,) AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTIONS
16 Defendant.)
17 _____)

18 **I.**

19 **STATEMENT OF FACTS¹**

20 **A. Movement In Action**

21 From June 2009 until September 2009, James Dean Stacy operated a medical marijuana
22 collective called "Movement in Action" located at 1050 South Santa Fe Avenue, Vista, California.
23 Prior to opening the collective, Mr. Stacy (who is a qualified medical marijuana patient²) went to
24 great lengths to ensure that he was scrupulously complying with the letter of the Compassionate Use
25 _____

26 ¹ This statement of facts is based on the probable cause statement and discovery provided
27 by the government attached to the complaint. Mr. Stacy does not admit their accuracy and reserves
the right to challenge them at a later time.

28 ² A copy of Mr. Stacy's medical marijuana card is attached. Exhibit A.

1 Act (“CUA”) and the Medical Marijuana Program Act. (“MMPA). See California Health & Safety
2 Code (“H&S”) §§ 11362.5, et seq., and 11362.7. He diligently searched the internet for advice and
3 coverage of the law. Through various websites, Mr. Stacy was directed to the August 2008,
4 Attorney General, “Guidelines for the Security and non-Diversion of Marijuana Grown for Medical
5 Use.” (See attached exhibit B) After reading the Guidelines, Mr. Stacy began taking steps to open
6 a lawful collective in Vista, California. Importantly, nothing in the Guidelines warn potential
7 cooperative owners that the Guidelines are inconsistent with Federal law.

8 According to the guidelines Mr. Stacy read, “A cooperative must file articles of incorporation
9 with the state and conduct its business for the mutual benefit of its members.” Guidelines pg. 8. As
10 such, in June of 2009, Mr. Stacy started the process of putting together a non-profit corporation
11 called “Movement in Action.” Using mycorporations.com, Mr. Stacy put together his paperwork
12 and application to be filed with the State of California. The guidelines Mr. Stacy relied upon
13 warned, “nothing in Proposition 215 or the MMP authorizes collectives, cooperatives, or individuals
14 to profit from the sale or distribution of marijuana.” Guidelines pg. 9. As such, Mr. Stacy
15 specifically filed an application for a nonprofit corporation.

16 Within his application he put that the non-profit corporation would be for the Martial Arts
17 studio and medical marijuana collective since the two business were in the same building. Initially,
18 the State of California returned the application back to Mr. Stacy stating that the medical marijuana
19 side of the corporation could not have any other business associated with it within the corporation
20 papers. They wanted it rewritten so that the medical marijuana corporation would not be connected
21 to Mr. Stacy’s martial arts. The State of California sent the application back a second time because
22 they wanted the purpose of the corporation to be more “descriptive.” The second time it was kicked
23 back the State of California sent a copy of the Attorney General’s guidelines for guidance. Nothing
24 in the State of California’s rejection letter informed Mr. Stacy that the corporation he intended to
25 put together would be in violation of law, much less federal law. Following the advice he received
26 from the State of California, Mr. Stacy once again reworded the language of his application and sent
27 it back.

28

1 On July 27, 2009, the State of California approved Mr. Stacy's application and filed the
2 articles of incorporation for "Movement in Action." The Articles of Incorporation for "Movement
3 in Action" that were filed with the State of California stated that this was a "nonprofit public benefit
4 corporation and is not organized for the private gain of any person." The purpose listed for this
5 nonprofit corporation was "medical marijuana collective." (See attached Exhibit C)

6 The guidelines suggest that a collective use "membership application[s] and verification."
7 Guidelines pg. 9. Specifically, Mr. Stacy noticed that the guidelines stated, "When a patient or
8 primary caregiver wishes to join a collective or cooperative, the group can help prevent the diversion
9 of marijuana for non-medical use by having potential members complete a written membership
10 application." Guidelines pg. 9. As such, Mr. Stacy searched the internet to find examples of
11 collective agreements. He found a sample collective agreement and modified it for the Movement
12 in Action collective.

13 Following the guidelines, Mr. Stacy required each prospective member to provide some form
14 of proper identification, which was then copied and kept on file. Furthermore, a copy of the
15 prospective member's physician's recommendation was copied and kept on file. In addition,
16 Mr. Stacy would require any prospective member to sign a "Movement in Action Collective
17 Agreement." (See attached exhibit D) As part of this agreement, each person would have to agree
18 to several conditions, including that (a) they were legally able to use, possess, and cultivate cannabis
19 for medical marijuana purposes; (b) they would not redistribute any medical marijuana obtained
20 from Movement in Action; (c) they must provide the collective with all changes in their contact,
21 diagnosis or primary physician information immediately. (See Attached exhibit D) The Movement
22 in Action collective agreement as modified by Mr. Stacy tracked the requirements as laid out in the
23 Guidelines. Per the guideline requirements, Mr. Stacy maintained membership records on-site
24 and/or had them reasonably available.

25 Mr. Stacy was very strict about not selling to non-members of his collective. Repeatedly,
26 Mr. Stacy would turn people away for not having a proper physician's recommendation or medical
27 marijuana card. He posted signs throughout the Movement in Action building that people must be
28 in compliance with Prop 215.

1 Once the Movement in Action collective was up and running, Mr. Stacy continued to take
2 steps to ensure he was in compliance with the law. According to the guidelines, the collectives must
3 follow rules on organization, articles, elections, and distribution of earnings. Guidelines pg. 8. As
4 such, Mr. Stacy consulted with an attorney to make sure he was in compliance with the law and to
5 follow up on his articles of incorporation. This attorney suggested Mr. Stacy use a slightly different
6 collective agreement. Furthermore, Mr. Stacy retained this attorney to help him file a “Certificate
7 of Amendment of Articles of Incorporation.” On September, 9, 2009, the attorney sent the Secretary
8 of State, Business Programs Division, the Certificate of Amendment of Articles of Incorporation of
9 Movement in Action. Furthermore, this lawyer was retained by Mr. Stacy to draft the bylaws of
10 Movement in Action, Action of Unanimous Written Consent of Shareholders of Movement in
11 Action in Lieu of Organizational Meetings to be executed by the shareholders; Collective Member
12 Intake Checklist; Collective Membership Agreement; Collective Rules and Regulations Agreement;
13 and Collective Identification Card Agreement for Movement in Action. These drafts were sent to
14 Mr. Stacy on September 1, 2009, eight days before his arrest.

15 On September 9, 2009, there was a county wide raid throughout San Diego county.
16 Mr. Stacy along with 13 other individuals were arrested for operating collectives in San Diego.
17 However, of those 14 arrests only two cases were brought to federal court. The other twelve
18 individuals were dealt with in state court and ultimately their cases were dismissed. Mr. Stacy is
19 being charged with Conspiracy to Manufacture and Distribute Marijuana, pursuant to 18 USC
20 §§ 841(a)(1) and 846; Manufacturing Marijuana, pursuant to 18 USC § 841(a)(1); Possession of a
21 Firearm in Furtherance of a Drug Trafficking Crime, pursuant to 18 USC § 924(c); and criminal
22 forfeiture allegations, pursuant to 21 USC §§ 853, 18 USC § 924(d), and 28 USC § 2461(c).

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I.**

25 **INTRODUCTION**

26 In the instant case, the proceedings against Mr. Stacy are in direct conflict with the Fifth and
27 Tenth Amendments to the United States Constitution. The subject matter of this case involves
28 allegations of cultivating marijuana in violation of federal law. Mr. Stacy, however acted at all times

1 with direct knowledge that his conduct was authorized by the expressed language of the
2 Compassionate Use Act, codified as California Health & Safety 11362.5, et. seq. As a result of the
3 divergence of state, constitutional, and federal law on the issue of medical marijuana, Mr. Stacy will
4 be denied his fundamental right to Due Process and to a fair trial unless this Court resolves the issues
5 presented in this motion and Mr. Stacy's additional pre-trial motions. The Fundamental Right to
6 Due Process represents the principle that the government must respect all of the legal rights that are
7 owed to a person according to the law of the land. Murray v. Hoboken Land, 59 U.S. 272, 276
8 (1855). In order to protect an individual's right to Due Process, this Court is empowered to place
9 limitations on laws and legal proceedings, in order to define and guarantee fundamental fairness,
10 justice, and liberty. Id. at 277. In order to ascertain whether a process involves the right to Due
11 Process, the first step is to "examine the constitution itself, to see whether this process be in conflict
12 with any of its provisions . . ." Id. In the instant case, the proceedings against Mr. Stacy are in
13 conflict with the Fifth and the Tenth Amendments to the U.S. Constitution. The owner of a medical
14 marijuana collective in strict compliance with California Health & Safety Code §11362.5 requires
15 both Procedural and Substantive Due Process. See Hamdi v. Rumsfeld 542 U.S. 507 (2004) [quoting
16 In Re Winship, 397 U.S. 507, (1970)]. As discussed in Mr. Stacy's motion to present a complete
17 defense, filed concurrently herewith, Procedural Due Process requires James Dean Stacy be afforded
18 the opportunity to be heard and present a defense based on medical grounds. Finally, the federal
19 government's systemic plan to re-criminalize medical marijuana in California violates the Ninth and
20 Tenth Amendments. Under the Ninth Amendment, governmental expansion should be denied if it
21 violates the powers granted to the people or the states by the Constitution. See U.S. Public Workers
22 v. Mitchell, 330 U.S. 75 (1945). Here, the federal government seeks to expand its powers without
23 constitutional authority and in violation of the rights afforded to the states under the Tenth
24 Amendment. The Tenth Amendment has been construed to protect each state's authority to create
25 its own laws under the police power. New York v. United States, 505 U.S. 144, 167 (1992). Under
26 this authority, California and other states have passed laws allowing for the compassionate use of
27 medical marijuana. The federal government's plan to re-criminalize medical marijuana and the
28 practice of commandeering state officials has been documented and is implicitly obvious in the

1 instant case. This plan and practice violates the Tenth Amendment and all that is considered
2 fundamental under states' rights. Analyzing the current facts under all of these Amendments of the
3 Constitution demonstrates violations of Mr. Stacy's right to Due Process and fundamental fairness,
4 as well as attempts by the federal government to subvert state laws. Accordingly, Defense moves
5 to dismiss the current prosecution for such violations.

6 II.

7 **THE FEDERAL PROSECUTION OF MEDICAL MARIJUANA PATIENTS AND** 8 **SUBVERSION OF STATE LAW IS UNCONSTITUTIONAL UNDER THE TENTH** 9 **AMENDMENT.**

10 Under the Tenth Amendment, "The powers not delegated to the United States by the
11 Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the
12 people." The Tenth Amendment was established to protect the people and the states from an
13 intrusive federal government. See New York v. U.S., 505 U.S. 144 (1992); Printz v. United States
14 538 U.S. 1036 (1997). Accordingly, the federal government has limited powers and can only assert
15 powers specifically granted by the US Constitution. With this authority, the people of California
16 passed the Compassionate Use Act and the legislature subsequently passed the Medical Marijuana
17 Program. Accordingly, the people of California – supported by the legislature – have asserted the
18 right conferred upon them by the US Constitution and showed their majority approval of medical
19 marijuana. "The federal government may not compel the States to enact or enforce a federal
20 regulatory program." Printz, 538 U.S. at 1040. "Congress may not simply commandeer the
21 legislative process of the states by directly compelling them to enact and enforce a federal regulatory
22 program." New York, 505 U.S. at 161. The Federal Government's actions constitute commandeering
23 when it "requires state officials to assist in the enforcement of federal statutes regulating private
24 individuals." Raich v. Gonzales, 500 F.3d 850 867 n.17 (9th Cir. 2007). The manner in which the
25 Controlled Substances Act is enforced can violate the Tenth Amendment. Conant v. Walters, 309
26 F.3d 629 (9th Cir. 2002) (Chief Judge Kozinsky's concurring opinion). In this case, the evidence
27 will show that the federal government has been subverting California medical marijuana laws in
28 violation of the Tenth Amendment, to the detriment of Mr. Stacy and others like him.

1 **A. Federal Agents Have Commandeered State Officials to Re-Criminalize Medical**
2 **Marijuana in Violation of the Tenth Amendment**

3 The federal government has employed a consistent, long-standing practice and policy, to
4 undermine and render state medical marijuana laws unenforceable, and coerce California to
5 recriminalize medical marijuana. First, the federal government selectively targeted its enforcement
6 efforts against physicians to undermine the state by incapacitating the mechanism the state chose
7 for separating what is legal from what is illegal under state law. Conant v. Walters, 309 F.3d 629
8 (9th Cir. 2002). The Federal Policy of targeting physicians was enjoined in Conant v. Walters
9 because that policy violated physicians' First Amendment Rights. Id. In his concurring opinion,
10 Judge Kozinsky observed that the policy also violated the Tenth Amendment. Id. Enjoined from
11 pursuing its policy of targeting physicians, the federal government has turned to other means of
12 selectively enforcing and threatening to enforce federal drug laws to force California and other states
13 to re-criminalize medical marijuana.

14 Illustrating this federal practice and policy of targeted investigation, enforcement, and
15 prosecution in order to sabotage and render unenforceable California's medical marijuana
16 regulations, then-Administrator of the DEA Asa Hutchinson publicly confirmed that medical
17 marijuana raids were a part of the federal government's commitment to disrupt implementation of
18 the Compassionate Use Act. Hutchinson reiterated the federal policy of disrupting implementation
19 of the state's medical marijuana laws in a September 30, 2002 letter to California Attorney General
20 Bill Lockyer. Lockyer concluded, based on communication with federal officials, that federal
21 enforcement actions against cultivators and providers of medical marijuana during his tenure were
22 intended to be punitive and intimidating gestures, not aimed at enforcement of legitimate federal
23 interests, but at interfering with implementation of California law.

24 Moreover, in his concurring opinion, Chief Judge Kozinsky opined that the federal
25 government's manner of enforcing the CSA had commandeered California's legislative process.
26 Conant, 309 F.3d at 645. Kozinsky also said, "[As] much as the federal government may prefer that
27 California keep medical marijuana illegal, it cannot force the state to do so . . . preventing the state
28 from repealing an existing law is no different from forcing it to pass a new one; in either case, the

1 state is being forced to regulate conduct that it prefers unregulated. Id. at 645-46 (Kozinski J.,
2 concurring). Additionally, in an ongoing case, County of Santa Cruz v. Gonzales, Judge Jeremy
3 Fogel in the San Jose division of the District Court of Northern California, used Kozinsky's
4 concurring opinion in Conant to deny the federal government's motion to dismiss. The Court there
5 held that plaintiffs may be able to show that the federal government is "deliberately seeking to
6 frustrate the state's ability to determine whether an individual's use of medical marijuana is
7 permissible under California law".

8 Not only is there evidence that throughout California there has been a concerted plan to
9 recriminalize marijuana, but it is also clear that in the instant case, the San Diego Sheriffs were
10 commandeered to help enforce the CSA against Mr. Stacy. During July 2009, San Diego Sheriff's
11 Officer Kempton allegedly received complaints about the medical marijuana collective, "Movement
12 in Action." Detective Kempton conducted surveillance on the location. Mr. Stacy was investigated
13 thoroughly by the San Diego Sheriff's Department. Later, the Sheriff's Office used Detective Craig
14 Johnson in an undercover capacity to facilitate a controlled buy from Movement in Action. Three
15 controlled buys were conducted by Detective Craig Johnson. Evidence obtained from these
16 controlled buys are being stored at the San Diego County Sheriff's Department. Surveillance teams,
17 comprised of entirely San Diego Sheriffs, were used to conduct surveillance on Mr. Stacy's home
18 and the building of Movement in Action. Furthermore, in preparation of the affidavit to the search
19 warrant, the federal agent used the experience of Detective Conrad De Castro of the San Diego
20 Police Department concerning the use of computers by illegal marijuana dispensaries. In essence,
21 this entire case was built from the San Diego Sheriff's Office and the San Diego Police Department.
22 On the mercy of this Court, Defense asks the Court not turn a blind eye to the obvious practice of
23 state police gathering evidence and turning it over to federal agents. State Police acting as
24 investigators and reporting to the DEA constitutes a clear example of commandeering and violates
25 the Tenth Amendment.

26
27 **B. Raich Does not Control in this Case**
28

1 Under the Commerce Clause, the Supreme Court upheld the Controlled Substances Act.
2 Raich v. Gonzales, 545 U.S. 1 (2005). Limiting the application of its decision, the Court also said,
3 “state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause” Id.
4 at 26. [citing U.S. v. Morrison, 529 U.S. 598, 661-62 (2000)]. Using Raich in the instant case would
5 exceed its application because the current case does not involve the commerce clause, rather a
6 violation of the Tenth Amendment.

7 This case is further distinguishable from Raich because of the relief sought by Mr. Stacy. In
8 Raich, respondents sought relief in the form of an injunction against the federal government,
9 effectively asking the Court to invalidate the CSA as it applies to medical marijuana patients. Raich
10 at 1. Here, Mr. Stacy does not ask this court to enjoin federal agents. Rather, he asks this Court to
11 recognize federal agents’ actions as unconstitutional. As a remedy, Mr. Stacy asks this Court dismiss
12 the case and allow federal and state discrepancies be resolved by Congress or the Supreme Court.

13 In the alternative, Mr. Stacy requests that he be allowed to present a defense based on
14 compliance with the Compassionate Use Act, set forth in Health & Safety Code §11362.5,
15 §11362.765, and §11362.775. These three provisions of the Health & Safety Code prohibit the
16 criminal prosecution of individuals who are qualified to possess and/or cultivate marijuana for
17 medical purposes. The Compassionate Use Act is set forth in § 11362.5 and provides for the
18 exemption of medical marijuana patients from prosecution. Under § 11362.765, “any individual who
19 provides assistance to a qualified patient” and/or “cultivates or administers marijuana for medical
20 purposes to the qualified patient or person” shall be exempt from criminal sanctions. Finally,
21 §11362.775 specifically allows qualified patients to associate within the state of California as
22 collectives or cooperatives to cultivate marijuana for medical purposes. Mr. Stacy is a qualified
23 patient and cultivated marijuana for his lawful collective. Under these provisions, therefore, he
24 understood he was exempt from criminal prosecution and should be allowed to present his reliance
25 on valid California law as a defense.

1 **C. Recent Precedent Shows that Federal Law Acknowledges a State’s Medical Use of**
2 **Marijuana.**

3 “The Supremacy Clause unambiguously provides that if there is any conflict between federal
4 and state law, federal law shall prevail. Raich at 29. Notwithstanding its decision in Raich, the
5 Supreme Court showed its tacit approval of state medical marijuana laws by refusing to review City
6 of Garden Grove v. Superior Court of Orange County, Felix Kha, 157 Cal.App. 4th 355 (4th Dist.
7 Ct of Appeal 2007). Defendant Kha was caught with a third of an ounce of marijuana and the case
8 was dismissed because the defendant was a medical marijuana patient. Id. The issue then became
9 whether to return his medical marijuana, a Schedule 1 controlled substance under Federal Law, or
10 not. Id. The Fourth District Court of Appeal ruled Defendant Kha was entitled to the return of his
11 property. Id. at 390. The city, representing the police department, appealed the ruling, ultimately
12 seeking review by the U.S. Supreme Court. Id. Since the California Supreme Court and the U.S.
13 Supreme Court both refused to review the decision the Kha decision stands as authority. Id.
14 Similarly, the U.S. Supreme Court recently refused to hear the appeals of two California Counties
15 (San Diego and San Bernardino) who object to California’s thirteen year old medical marijuana law
16 and claimed it should be struck down as violating the federal drug control act. The Supreme Court’s
17 refusal to hear the matter again shows tacit approval of California’s right to maintain medical
18 marijuana laws. The Supreme Court’s tacit approval, coupled with the Attorney General’s public
19 press conference statement that American Policy endorses California’s right to maintain medical
20 marijuana laws shows that the CSA does not apply when a defendant is following California’s
21 medical marijuana laws. Accordingly, as discussed below, a hearing is required to establish James
22 Stacy’s compliance with state law. If compliance is found, the case must be dismissed.

23 Raich and Kha together demonstrate that the relationship of federal drug law and state
24 medical marijuana laws remains undefined. Here, the defendant does not ask this Court to legislate,
25 rather Mr. Stacy appeals to this Court’s sense of fairness in applying a federal law which conflicts
26 with a state law in such an egregious manner, that the consequences could include a lengthy sentence
27 in federal prison.

28

1 Defense is hard pressed to find an analogous situation where state and federal laws directly
2 conflict, resulting in prosecutions of individuals who are complying with state laws. As a
3 consequence of such confusion, a man's freedom is at stake. Accordingly, when a man's freedom
4 is at stake, justice requires a careful managing of this gray area. As discussed above, the federal
5 government has gone to great lengths to try and re-criminalize medical marijuana in California.
6 These efforts have forced state officials to acquiesce beyond the requirements of the Commerce
7 Clause and have thus operated in violation of the Tenth Amendment. Defense accordingly urges this
8 Court to dismiss this case.

9 **D. Under the Current Administration, the DEA's raid on James Stacy, Which Resulted**
10 **in the Instant Prosecution, violated "American Policy".**

11 In a press conference on February 24, 2009, U.S. Attorney General, Eric Holder, announced
12 that under the current administration, DEA raids in California are against "American Policy."³ He
13 stated, "You will be surprised to know that the Justice department will be acting in a manner
14 consistent with what [the president] said during the campaign". *Id.* Similarly, on March 19, 2009,
15 Eric Holder explained that under current American policy, the Justice Department would no longer
16 prosecute pot dispensaries operating legally under state laws in California or dozens of other states.⁴
17 The American Policy on medical marijuana, as declared by President Barack Obama, is that the
18 "concept of medical marijuana" used and controlled in the same manner as other drugs prescribed
19 by doctors, is "entirely appropriate". *Id.* At a campaign stop in New Hampshire, Obama was specific
20 about medical marijuana raids, "I would not have the justice department prosecution and raiding
21 medical marijuana users". *Id.*

22 In this case, Mr. Stacy was operating a medical marijuana collective in compliance with state
23 law. He met with attorneys, reviewed the guidelines, and researched statements made by President
24

25 ³Video Avail. at
26 http://rawstory.com/news/2008/Justice_Department_will_stop_medical_marijuana_0226.html
27 (Last visited 2/27/09)

28 ⁴ <http://www.latimes.com/news/local/la-me-medpot19-2009mar19,0,4987571.story> (Last
visited 3/27/09)

1 Obama and the Federal Government, to ensure his compliance with the law. Yet, the federal
2 government continues with this prosecution in violation of federal policy. Therefore, the current
3 prosecution runs contrary to both federal and state law and should not be allowed to continue.

4 **E. Mr. Stacy Requests an Evidentiary Hearing to Demonstrate His Compliance with the**
5 **Compassionate Use Act, Thus Establishing the Constitutional Violation Set Forth**
6 **Herein and Thereby Obviating the Federal Government's Jurisdiction.**

7 Because the burden of proof is on the government, Mr. Stacy is requesting this court hold
8 an evidentiary hearing on whether his conduct was in compliance with state law. It will be clear that
9 his conduct and his collective are highly distinguishable from a common drug-dealer, because he
10 took every precaution to comply with the CUA. Such evidence is relevant for the Court to consider
11 whether the federal government overstepped its role with the current prosecution. Accordingly,
12 defense would like the opportunity to have a hearing to establish Mr. Stacy's compliance with
13 California law so the Court can make an informed decision before deciding how to proceed.

13 **III**

14 **THE INDICTMENT IN THIS CASE MUST BE DISMISSED BECAUSE THE CHARGES**
15 **VIOLATE HIS DUE PROCESS RIGHTS OF THE UNITED STATES CONSTITUTION**

16 **A. Mr. Stacy's Due Process Rights Were Violated and Therefore, Dismissal is Required.**

17 It is well established that the principle of estoppel can be applied to the government in
18 criminal cases. Raley v. Ohio, 360 U.S. 423 (1959); Cox v. Louisiana, 379 U.S. 559 (1965). The
19 Raley and Cox holdings reflect a fundamental notion of fairness: the individual must have fair
20 warning of what conduct the government intends to punish. See, inter alia, Applying Estoppel
21 Principles in Criminal Cases, 78 Yale Law Journal 1046 (1969).¹ The purpose of criminal estoppel
22 is the protection of those whom the government has confused as to the state of the law where the
23 government says it will do one thing, and then does another. See, e.g., United States v. Penna
24 Industrial Chemical Corp, 411 U.S. 655 (1973) In United States v. Hsieh Hui Mei Chen, 754 F.2d
25 817 (9th Cir), cert denied, 471 U.S. 1139 (1985), the Ninth Circuit described the defense of
26 entrapment by estoppel as follows: "Entrapment by estoppel applies when an official tells the
27 defendant that certain conduct is legal and the defendant believes the official." Id. at 825.

28

1 The concept of unintentional entrapment by a official who mistakenly misleads a person into
2 a violation of the law was first applied by the Supreme Court in Raley, 360 U.S. at 423. In Raley,
3 the appellants were convicted of contempt for refusing to answer questions about Communist or
4 subversive activities at sessions of the Unamerican Activities Commission of the State of Ohio. Id.
5 The appellants had claimed their privilege against self-incrimination after they were informed by
6 the Commission Chairman that they had a right tot do so under the Ohio Constitution. The
7 Commission’s advice was contrary to Ohio law. Id. at 438. The Supreme Court reversed the
8 convictions. The Court stated its holding as follows:

9 We hold that in the circumstances of these cases, the judgments of the Ohio Supreme Court
10 affirming the convictions violated the Due Process Clause [] and must be reversed. [] After
11 the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court’s
12 judgment would be to sanction an indefensible sort of entrapment by the State-convicting
13 a citizen for exercising a privilege which the State had clearly told him was available to him.

12 Raley, 360 U.S. at 425-26.

13 In Cox v. Louisiana, 379 U.S. at 559, the Supreme Court applied Raley in reversing the
14 conviction of persons who were arrested for picketing across the street from a courthouse. Id. at
15 571. The defendants were given permission to hold their demonstration on the west side of the street
16 by the Chief of Police. Some time after the demonstrators were ordered to disperse by the Sheriff.
17 They were arrested for refusing to obey the dispersal order. The court concluded that at the time of
18 his arrest, Cox was “justified in his continued belief that because of the original grant of permission
19 he had a right to stay where he was for the few additional minutes required to conclude the meeting.”
20 Id. at 572. The Court in Raley held that “[t]he Due Process Clause does not permit convictions to
21 be obtained under such circumstances.” Id. at 571.

22 The Ninth Circuit has held that under a defense of entrapment by estoppel, the defendant
23 must show that he relied on the false information and that his reliance was reasonable. United States
24 v. Timmins, 464 F.2d 385, 386-87 (9th Cir. 1972); see also United States v. Lansing, 424 F.2d 225,
25 227 (9th Cir. 1970)(to establish the defense of the official misleading, the defendant must establish
26 “that his reliance on the misleading information was reasonable - in the sense that a person sincerely
27 desirous of obeying the law would have accepted the information as true, and would not have been
28 put on notice to make further inquiries.)

1 In United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987), the Ninth Circuit applied the
2 doctrine of entrapment by estoppel to a defendant who had purchased a firearm despite the fact he
3 was previously convicted of a felony. Id. at 773. The defendant in Tallmadge received and
4 possessed firearms in reliance upon the incorrect representation of a federally licensed gun dealer
5 that a person convicted of a felony in state court could purchase firearms if the offense had
6 subsequently been reduced to a misdemeanor. Id. at 774. The Ninth Circuit held the defendant
7 had a right to rely on the federally licensed firearms dealer. The court then found the defendant's
8 reliance on the firearm dealer's misleading information reasonable because (1) the defendant had
9 also sought and obtained advice from an experienced criminal lawyer that he could purchase a rifle,
10 and (2) a state court judge had previously warned him against carrying a concealable firearm,
11 thereby implying that it was lawful for the defendant to obtain a nonconcealable firearm. Id. at 775.
12 Holding that under these circumstances, the Ninth Circuit stated the defendant's convictions violated
13 due process, and reversed his convictions. Id.

14 Here the doctrine of entrapment by estoppel is directly on point and Mr. Stacy's Due Process
15 rights have been violated. Therefore, this Court must dismiss the indictment against Mr. Stacy. In
16 the alternative, Mr. Stacy should be allowed to present this defense at trial because there are factual
17 determinations that must be left to the jury.

18 Before Movement in Action was opened, Mr. Stacy was diligent about researching the lawful
19 way of opening up a collective. With the means he had available to him, he researched on the
20 internet, he read numerous articles about California law, he read numerous articles about the proper
21 way of opening a collective. Mr. Stacy traced the history of California law and how it was
22 implemented. Through various websites, Mr. Stacy was directed to the August 2008, Attorney
23 General, "Guidelines for the Security and non-Diversion of Marijuana Grown for Medical Use."
24 (See attached exhibit) After reading the Guidelines, Mr. Stacy began taking steps to open a lawful
25 collective in Vista, California. Importantly, nothing in the Guidelines warn potential cooperative
26 owners that the Guidelines are inconsistent with Federal law. Following the Guidelines to the letter,
27 Mr. Stacy filed his corporation papers with the State of California, making it clear he wanted to open
28 a nonprofit corporation for the purpose of selling medical marijuana. There were a few revisions

1 needed, therefore the State of California sent Mr. Stacy a copy of the Attorney General Guidelines
2 for him to follow. In the letters requesting revisions, the State of California representatives never
3 warned Mr. Stacy that his actions would be in violation of Federal law. Instead, after revisions were
4 made, the State of California granted Mr. Stacy's articles of incorporation. Therefore, the State of
5 California implied to Mr. Stacy that his actions were lawful and he was in compliance with the law.
6 Mr. Stacy reasonably relied upon the actions of the State of California in believing his collective was
7 lawful.

8 Furthermore, similar to the defendant in Tallmadge, Mr. Stacy sought the advice of an
9 attorney known in the community as an attorney assisting individuals who wanted to open
10 collectives or be a medical marijuana card holder. Mr. Stacy spoke with this attorney about how to
11 make sure he was opening his collective legitimately. This attorney assisted Mr. Stacy with his
12 articles of incorporation and gave him suggestions about revising his collective agreement. This
13 specialized attorney never advised Mr. Stacy that his actions were in violation of Federal law.
14 Because Mr. Stacy sought this attorney's advice on how to open is collective lawfully, and this
15 attorney never warned Mr. Stacy that his conduct was in violation with Federal law, Mr. Stacy
16 reasonably believed his actions were lawful.

17 Additionally, Mr. Stacy's beliefs were reinforced by statements made by President Obama
18 and/or his representatives. On March 22, 2008, Presidential Candidate Barack Obama stated,
19 "[w]hen it comes to medical marijuana, I have more of a practical view than anything else. I mean,
20 my attitude is that if it's an issue of doctors prescribing medical marijuana as a treatment for
21 glaucoma or as a cancer treatment, I think that should be appropriate because there really is no
22 difference between that and a doctor prescribing morphine or anything else. I think there are
23 legitimate concerns in not wanting to allow people to grow their own or start setting up mom and
24 pop shops, because at that point it becomes fairly difficult to regulate. And again, I am not familiar
25 with all the details of the initiative that was passed and what safeguards there were in place, but I
26 think the basic concept that using medical marijuana in the same way with the same controls as other
27 drugs prescribed by doctors, I think that's entirely appropriate. What I am not going to be doing is
28 using Justice Department resources to try to circumvent state laws on this issue. Simply because

1 I want folks to be investigating violent crimes and potential terrorism. We've got a lot of things for
2 our law enforcement officers to deal with.”⁵

3 In a May 12, 2008, article in the San Francisco Chronicle, Obama campaign spokesman Ben
4 LaBolt stated that , “[v]oters and legislators in the states - frfom California to Nevada to Maine -
5 have decided to provide their residents suffering from chronic diseases and serious illnesses like
6 AIDS and cancer with medical marijuana to relieve their pain and suffering. . . Obama supports the
7 rights of states and local governments to make this choice - though he believes medical marijuana
8 should be subject to (U.S. Food and Drug Administration) regulation like other drugs.” LaBolt also
9 said Obama would end U.S. Drug Enforcement Administration raids on medical marijuana suppliers
10 in states with their own laws.⁶

11 In a press conference on February 24, 2009, U.S. Attorney General, Eric Holder, was asked
12 point blank, during a DOJ press conference if the DEA would continue to raid medical marijuana
13 clubs that are established legally under state law. He responded, “[n]o ... What the president said
14 during the campaign, you'll be surprised to know, will be consistent with what we'll be doing in law
15 enforcement. He was my boss during the campaign. He is formally and technically and by law my
16 boss now. What he said during the campaign is now American Policy.”⁷

17 Similarly, on March 19, 2009, Eric Holder explained that under current American policy,
18 the Justice Department would no longer prosecute pot dispensaries operating legally under state laws
19 in California or dozens of other states.⁸ The American Policy on medical marijuana, as declared by
20

21
22 ⁵Interview between Presidential Candidate Sen. Barack Obama and Gary Nelson, editorial
23 page editor for the Mail Tribune (Mar. 22, 2008); available at
http://granitestaters.com/candidates/video_obama_02.html.

24 ⁶ Bob Egelko, *Next president might be gentler on pot clubs*, San Francisco Chronicle, May
25 12, 2008; available at
<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/05/12/MNKK10FD53.DTL>.

26 ⁷ Ryan Grim, *Holder Vows to End Raids on Medical Marijuana Clubs*, Huffington Post, Feb.
27 26, 2009; available at http://www.huffingtonpost.com/2009/02/26/holder-vows-to-end-raids_n_170119.html&cp.

28 ⁸ <http://www.latimes.com/news/local/la-me-medpot19-2009mar19,0,4987571.story> (Last
visited 3/27/09)

1 President Barack Obama, is that the “concept of medical marijuana” used and controlled in the same
2 manner as other drugs prescribed by doctors, is “entirely appropriate”. Id. At a campaign stop in
3 New Hampshire, Obama was specific about medical marijuana raids, “I would not have the justice
4 department prosecution and raiding medical marijuana users”. Id.

5 Mr. Stacy’s beliefs were only further confirmed by the actions of the Supreme Court.
6 Mr. Stacy read numerous articles about the Supreme Court refusing to hear cases involving medical
7 marijuana. Like most regular citizens do, Mr. Stacy did not read the actual cases themselves, but
8 instead relied upon news articles explaining the Supreme Court’s actions. Numerous newspapers
9 articles would claim statements such as, “Supreme Court Hands Medical Marijuana Major Victory,”⁹
10 or “Supreme Court Action Upholds California’s Medical Pot Law,”¹⁰ or “Supreme Court Will Not
11 Review California Medical Marijuana Law,”¹¹ or “The Supreme Court announced Monday it will
12 not get involved in a dispute over California medical marijuana laws.” Id. All of this press on the
13 actions of the Supreme Court demonstrated to Mr. Stacy that the federal law would not get involved
14 in these state matters. For example, the Supreme Court showed its tacit approval of state medical
15 marijuana laws by refusing to review City of Garden Grove v. Superior Court of Orange County,
16 Felix Kha, 157 Cal.App. 4th 355 (4th Dist. Ct of Appeal 2007). Defendant Kha was caught with a
17 third of an ounce of marijuana and the case was dismissed because the defendant was a medical
18 marijuana patient. Id. The issue then became whether to return his medical marijuana, a Schedule
19 1 controlled substance under Federal Law, or not. Id. The Fourth District Court of Appeal ruled
20 Defendant Kha was entitled to the return of his property. Id. at 390. The city, representing the police
21 department, appealed the ruling, ultimately seeking review by the U.S. Supreme Court. Id. Since the
22 California Supreme Court and the U.S. Supreme Court both refused to review the decision the Kha
23 decision stands as authority. Id. Mr. Stacy followed this case through the media and took note of
24 its decision and the Supreme Court’s refusal to hear the case. The news media marked the Supreme
25

26
27 ⁹ http://www.huffingtonpost.com/2009/05/18/supreme-court-hands-medical_marijuana_major_victory_n_204681.html

28 ¹⁰ <http://www.articles.latimes.com/2009/may/19/nation/na-court-marijuana19>

¹¹ <http://www.foxnews.com/story/0,2933,520525,00.html>

1 Court's actions as a clear indication the federal government did not intend to get involved in these
2 types of cases.

3 Similarly, the U.S. Supreme Court refused to hear the appeals of two California Counties
4 (San Diego and San Bernardino) who object to California's thirteen year old medical marijuana law
5 and claimed it should be struck down as violating the federal drug control act. County of San Diego
6 v. San Diego NORML, 165 Cal.App.4th 798 (2008), cert denied, 129 S.Ct. 2380 (May 18, 2009);
7 and cert denied, San Bernardino County v. California, 129 S.Ct.2380 (May 18, 2009). The Supreme
8 Court's refusal to hear the matter again shows tacit approval of California's right to maintain
9 medical marijuana laws. The Supreme Court's tacit approval, coupled with the Attorney General's
10 public press conference statement that American Policy endorses California's right to maintain
11 medical marijuana laws demonstrated to Mr. Stacy that the CSA does not apply when a defendant
12 is following California's medical marijuana laws.

13 In this case, Mr. Stacy was operating a medical marijuana collective in compliance with state
14 law. He met with attorneys, reviewed the guidelines, and researched statements made by President
15 Obama and the Federal Government, to ensure his compliance with the law. Yet, the federal
16 government continues with this prosecution. Because the government seems to be saying one thing,
17 "they will not get involved in the prosecution of pot dispensaries operating legally," yet doing
18 exactly the opposite by prosecuting Mr. Stacy, this court must dismiss Mr. Stacy's case as a
19 violation of Due Process. Mr. Stacy reasonably relied upon the representations made to him by the
20 government and therefore believed his conduct was legal. Therefore, the current prosecution runs
21 contrary to both federal and state law and should not be allowed to continue.

22 **B. This Court Should Dismiss this Case as a Violation of Due Process. In The Alternative,**
23 **this Court Must Allow Mr. Stacy to Present this Defense At Trial.**

24 Because the government's actions here are a in clear violation of Mr. Stacy's Due Process
25 rights, this court should dismiss the indictment. Furthermore, this Court cannot rule upon the
26 government's assertions alone. Therefore, the Court must hold an evidentiary hearing.

27 In the event this Court does not dismiss the indictment, Mr. Stacy must be allowed to present
28 the entrapment by estoppel defense at trial. The entrapment by estoppel principle rests on a due

1 process theory which focuses on the conduct of the government officials rather than the defendant's
2 state of mind. United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991); United States v. Hedges,
3 912 F.2d 1397, 1405 (11th Cir. 1990)(noting that entrapment by estoppel is based on principles of
4 fairness, not a defendant's mental state). As a result, it can be raised as a defense even to offenses
5 that do not require proof of specific intent. United States v. Brebner, 951 F.2d 1017, 1025 (9th Cir.
6 1991); citing Smith, at 712, Hedges, 912 F.2d at 1405, Tallmadge, 829 F.2d at 773. As such, this
7 Court must allow Mr. Stacy to present an entrapment by estoppel defense at trial.

8 IV.

9 **THIS COURT MUST DISMISS THE INDICTMENT BECAUSE THE PROSECUTOR IS**
10 **ACTING IN DIRECT CONFLICT WITH THE U.S. DEPARTMENT OF JUSTICE**
11 **DIRECTIVE THAT STATES FUNDS SHOULD NOT BE USED TO PROSECUTE**
12 **INDIVIDUALS IN COMPLIANCE WITH STATE LAW.**

12 Since the election of President Obama, the Federal Government has repeatedly stated that
13 there should be no federal prosecutions on those individuals who are in compliance with state law.

14 On October 19, 2009, the U.S. Justice Department sent out a new directive that reinforced
15 previous statements by Attorney General Eric Holder. The directive's purpose was to provide
16 guidance to federal prosecutors in states that have enacted laws authorizing the medical use of
17 marijuana. Although, the directive made clear that Department of Justice is still committed to the
18 prosecution of significant traffickers of illegal drugs, including marijuana, the directive also stated
19 that funds should directed towards these objectives. However, the directive made clear that
20 President Obama's previous statements and Attorney General Eric Holder's statements still
21 remained true. The directive stated, as a general matter, federal prosecutors should not focus federal
22 resources in their states on individuals whose actions are in clear and unambiguous compliance with
23 existing state laws providing for the medical use of marijuana.

24 Here the government cannot prove that Mr. Stacy was not in compliance with state law. As
25 such, they are in violation of their own directives. As stated in previous motions, the government
26 agents made allegations within their affidavit in support of an application for a warrant that
27 Mr. Stacy was operating this collective for profit. However, these allegations are completely
28 unfounded. Because the government cannot establish that Mr. Stacy was not acting in compliance

1 with state law, this case must be dismissed. Furthermore, any statements made by the government
2 in their pleadings cannot be accepted without the opportunity of cross examination by Mr. Stacy.
3 U.S.Const.,Amend VI. At the very least, this court must conduct an evidentiary hearing regarding
4 the legitimacy of the government's allegations.

5 **V.**

6 **LEAVE TO FILE FURTHER MOTIONS**

7 Mr. Stacy and defense counsel have received discovery in this case, however, much more
8 is outstanding. As new information surfaces – via discovery provided by government, defense
9 investigation, or an order of this Court – the defense may need to file further motions, or to
10 supplement existing motions. For this reason, defense counsel requests leave to file further motions.

11 **VI.**

12 **CONCLUSION**

13 For the reasons stated, Mr. Stacy requests that this Court grant his motions.

14 Respectfully Submitted,

15
16 */s/ Kasha K. Castillo*

17 Dated: December 9, 2009

18 **KASHA K. Castillo**
19 Federal Defenders of San Diego, Inc.
20 Attorneys for Mr. Stacy
21 Kasha_Castillo@fd.org
22
23
24
25
26
27
28