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7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10  
11 UNITED STATES OF AMERICA,

CR 02-0053 CRB

12 Plaintiff,

NOTICE OF MOTION AND MOTION FOR  
RECONSIDERATION OF ORDER  
SEVERING TRIAL OF TAX COUNTS  
FROM MARIJUANA AND MONEY  
LAUNDERING COUNTS

13 v.

14 EDWARD ROSENTHAL,

Date: March 2, 2007

15 Defendant.

Time: 2:00 p.m.

16 \_\_\_\_\_/  
17 PROCEDURAL HISTORY

18 The government filed a superseding indictment against Mr.  
19 Rosenthal, Mr. Watts, and Mr. Hayes on October 12, 2006.<sup>1</sup> On  
20 October 25, 2006, the Court *sua sponte* raised the issue of  
21 severance with respect to (1) severance of defendants for trial  
22 and (2) severance of the money laundering and marijuana counts  
23 from the tax counts, trying the tax counts first.<sup>2</sup>

24  
25 <sup>1</sup> Mr. Watts pled guilty to a misdemeanor and was sentenced to  
26 one year of supervised release on December 20, 2006, subject to  
27 a fine being paid. The fine has been paid in full, and Mr.  
Watts' probation is terminated. Mr. Hayes is alleged to be a  
fugitive at present.

28 <sup>2</sup> Severance of defendants is presently moot, in light of Mr.  
Watts' plea and the unknown whereabouts of Mr. Hayes.

1 The government asked why the Court would take this action.  
2 The Court replied that money laundering involves proof that the  
3 "laundered" money was proceeds from an illegal enterprise;  
4 therefore, state of mind with respect "to the legality of the  
5 enterprise of the transactions becomes relevant. So it becomes  
6 a very different trial from the first trial" where the Court  
7 precluded evidence of Mr. Rosenthal's belief that he was  
8 cultivating marijuana for medical purposes. (Reporter's  
9 Transcript of October 25, 2006 Proceedings (hereafter "RT") at  
10 12-13)

11 The Court reasoned:

12 However, regardless of whether they thought  
13 they were growing marijuana and selling  
14 marijuana for medical reasons ... as I  
15 understand the law, they have to report the  
16 proceeds on their tax return. You can be  
17 engaged in a business that you believe to be  
18 lawful or that you believe to be unlawful,  
19 makes no difference. You have to report the  
20 income. That's a well-established rule.

21 Therefore, the jury doesn't consider, for  
22 those purposes, whether or not the defendant  
23 believed that what he was doing was author-  
24 ized by California State law or not. Or by  
25 Oakland or by any other municipality. Or by  
26 the government of the United States of  
27 America. Makes no difference.

(RT 13:19-15-14:10)

28 The government argued that as to the tax counts, failure to  
29 report income "goes to the issue of his good faith belief as to  
30 whether the conduct was legitimate" which the jury is "entitled  
31 to know ... as part of the mix." Notably, the following  
32 colloquy ensued:

**THE COURT: Why?**

**MR. BEVAN: Because if he thought it was legal, he**

1 would report it.

2 THE COURT: No, I don't understand that.

3 MR. BEVAN: Perhaps.

4 THE COURT: I don't understand that.

5 MR. BEVAN: But that's a probative fact that's not on  
6 the tax return.

7 THE COURT: Well - -

8 MR. BEVAN: As to his good faith.

9 THE COURT: So you're saying, you think, from a defense  
10 point of view, they would be entitled to show that?

11 Maybe I'll let it in.

12 MR. BEVAN: No, I want to show that.

13 (RT 14:19-16:10) [Emphasis added.]

14 After the Court reminded the government that Mr. Rosenthal  
15 had been sentenced for the marijuana charges and had served his  
16 sentence, the government replied "that's the reason ... that we  
17 have structured the indictment to take penalties out of the mix  
18 with respect to the drug count." The Court queried: "So one  
19 wonders what is the purpose of this prosecution" as to the  
20 marijuana. Mr. Bevan replied that since Mr. Rosenthal "took to  
21 the microphones" after the verdict and said he didn't get a fair  
22 trial, and the jurors called it a distorted process, "this time  
23 around, he wants the financial side reflected, fine, let's air  
24 this thing out. Let's have the whole conduct before the jury:  
25 Tax, money laundering, marijuana. And let's decide it on all  
26 the evidence." (RT 15:4-16:5)

27 After additional colloquy, the Court stated:

28 False tax returns is quite separate, though  
related, obviously, but separate from the

1 underlying offense or whatever generated the  
2 income. The jury in a tax case would be  
3 told, I assume: It's not up to you to decide  
4 whether or not he had a legitimate reason  
5 for earning this income. That's not a  
6 consideration.

7 (RT 19:5-10)

8 The Court invited briefing on the issue, and set the matter  
9 over to November 8, 2006.

10 Mr. Rosenthal and Mr. Watts each filed a memorandum  
11 opposing severance.

12 The government also filed a memorandum where it is  
13 specifically opposed "a solo trial of Rosenthal on tax counts,"  
14 noting that "the tax counts and drug counts are properly joined;  
15 there is overlapping evidence on these counts; and there is no  
16 legal basis for severance." (United States' Memorandum at 2:16-  
17 25.) [Citations omitted.]

18 The government argued that the marijuana counts and the tax  
19 counts "are based on the same series of events and are factually  
20 inter-related." (United States Memorandum at 4:7-9.) For  
21 example:

22 [E]vidence of Rosenthal's cash expenditures  
23 to pay marijuana-related expenses, such as  
24 rent and wages, and his use of money orders  
25 purchased with cash for that purpose, are  
26 relevant to the drug counts because they  
27 create a reasonable inference that the money  
28 for these expenditures came from marijuana  
29 income. Conversely, to the extent these  
30 funds were derived from marijuana sales,  
31 they are evidence of unreported income for  
32 purposes of the tax counts.

33 When joined counts are logically related and  
34 there is a large area of overlapping proof,  
35 joinder is appropriate. [Citations.]

36 (United States Memorandum at 4:16-26.)

1 The government concluded that "there is no practical or  
2 legal reason for trying the tax counts alone" because the  
3 government will necessarily establish:

4 [T]he marijuana-related conduct that  
5 underlies the drug counts charged in Counts  
6 6-8. That fact goes to the issue of  
7 judicial economy in not splitting otherwise  
8 properly joined counts, tried together. The  
9 drug and tax counts are properly joined.  
... Moreover, if the tax counts are tried  
alone, the jury understandably will  
wonder/speculate why there were no drug  
charges in the indictment as they hear  
evidence of Rosenthal's cultivation....

10 (United States Memorandum at 4:27-5:8)

11 On November 8, 2006, the government announced its with-  
12 drawal of that position and orally moved under Rule 14 of the  
13 Federal Rules of Criminal Procedure "for a sole trial of the tax  
14 counts, as suggested by Your Honor." (Reporter's Transcript of  
15 November 8, 2006 Proceeding at 4:18-25 (hereafter "RT").)

16 The prejudice the government claimed was the "likelihood of  
17 confusion by the jury, starting with jury selection." (RT 5:1-3)  
18 For the government, the issue of medical marijuana - the  
19 state/federal dichotomy - is not relevant in a trial solely on  
20 the tax counts, where the only issues (according to the  
21 government) are:

22 Did you have income, taxable income during  
23 the years in question?

24 Is that income on your tax return? And, has  
25 the government proved beyond a reasonable  
26 doubt, the state of mind requisite to the  
section 7206(1) of Title 26, which is: You  
willfully, filed a return, knowing that the  
returns were not accurate?

27 (RT 5:14-21)

1 Counsel for Mr. Watts noted that the counts were properly  
2 joined, and opined that the government changed its position  
3 after receiving the memorandum filed by each defendant, and had  
4 no justification to recant its previous position. (RT 7:21-  
5 8:21)

6 The Court surmised the government's position that a  
7 separate trial would avoid "prejudice that would **possibly**  
8 accrue" to the government, given very strong feelings in the  
9 community about the legality of marijuana "for medicinal  
10 purposes and for other purposes." (RT 8:19-9:12) [Emphasis  
11 added.]

12 Counsel for Mr. Watts argued that:

13 The government is wrong, because on the tax  
14 count, the mental state of the defendant is  
15 relevant because a person cannot be con-  
16 victed of willful failure to file a tax  
17 return if he subjectively believes -

16 The Court: It is a different mental state.  
17 The mental state of whether or not you have  
18 a right to grow marijuana is very different  
19 from the mental state you have as to whether  
20 or not you pay taxes. Those are  
21 two different issues.

19 (RT 9:16-25)

21 Mr. Watts' counsel replied that the government could not be  
22 prejudiced because the marijuana evidence will necessarily come  
23 in at trial on the tax counts. (RT 10:14-16)

24 The Court stated that the government is "prejudiced in a  
25 sense" in the event of jurors "who **may** have strong feelings  
26 concerning the legality of marijuana" that would not be  
27 precluded from sitting on a jury for trial on the tax counts  
28 only, but that the Court was concerned with voir dire vis-a-vis

1 questioning on just ability to follow the tax laws versus the  
2 issues surrounding the marijuana. (RT 10:17-11:21) [Emphasis  
3 added.]

4 Counsel for Mr. Rosenthal requested additional time to  
5 address the government's new position in writing. The Court  
6 granted the government's motion for severance but invited Mr.  
7 Rosenthal's counsel to file a Motion for Reconsideration in  
8 which counsel would bear the burden of persuasion. In response  
9 to the Court invitation the defense respectfully lodges the  
10 herein.

11 ARGUMENT

12 I

13 ALL OF THE SAME EVIDENCE BEARING ON THE  
14 STATE OF MIND OF MR. ROSENTHAL WILL BE  
15 ADMISSIBLE ON THE TAX COUNTS UNDER *CHEEK v.*  
*UNITED STATES.*

16 Congress determined that the complexity of the federal tax  
17 laws is such that most federal criminal tax statutes proscribe  
18 specific intent crimes, requiring that the government prove a  
19 voluntary and intentional violation of a known legal duty. See  
20 *Cheek v. United States* (1991) 491 U.S. 192.

21 In considering severance of the tax counts from the  
22 marijuana and money laundering counts, this Court specifically  
23 reasoned:

24 However, regardless of whether they thought  
25 they were growing marijuana and selling  
26 marijuana for medical reasons and they were  
27 entitled to sell it or not, as I understand  
the law, they have to report the proceeds on  
their tax return. You can be engaged in a  
business that you believe to be lawful or  
that you believe to be unlawful, makes no  
difference. You have to report the income.

1 That's a well-established rule. Therefore,  
2 the jury doesn't consider, for those pur-  
3 poses, whether or not the defendant believed  
4 that what he was doing was authorized by  
5 California State law or not. Or by Oakland  
6 or by any other municipality. Or by the  
7 government of the United States of America.  
8 Makes no difference.

9 (RT 13:19-15-14:10)

10 Mr. Rosenthal submits that the Court's ruling set November  
11 8, 2006 severing the tax charges is not in harmony with the  
12 Supreme Court's holding in Cheek, to wit:

13 Willfulness, as construed by our prior  
14 decisions in criminal tax cases, requires  
15 the Government to prove that the law imposed  
16 a duty on the defendant, that the defendant  
17 knew of this duty, and that he voluntarily  
18 and intentionally violated that duty. ...  
19 [T]he issue is whether the defendant knew of  
20 the duty purportedly imposed by the  
21 provision of the statute or regulation he is  
22 accused of violating, a case in which there  
23 is no claim that the provision at issue is  
24 invalid. In such a case, if the Government  
25 proves actual knowledge of the pertinent  
26 legal duty, the prosecution, without more,  
27 has satisfied the knowledge component of the  
28 willfulness requirement. But carrying this  
burden requires negating a defendant's claim  
of ignorance of the law or a claim that  
because of a misunderstanding of the law, he  
had a good-faith belief that he was not  
violating any of the provisions of the tax  
laws. This is so because one cannot be aware  
that the law imposes a duty upon him and yet  
be ignorant of it, misunderstand the law, or  
believe that the duty does not exist. In the  
end, the issue is whether, based on all the  
evidence, the Government has proved that the  
defendant was aware of the duty at issue,  
which cannot be true if the jury credits a  
good-faith misunderstanding and belief  
submission, whether or not the claimed  
belief or misunderstanding is objectively  
reasonable.

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29 Knowledge and belief are characteristically  
30 questions for the fact finder, in this case  
the jury. Characterizing a particular belief

1 as not objectively reasonable transforms the  
2 inquiry into a legal one and would prevent  
3 the jury from considering it. It would of  
4 course be proper to exclude evidence having  
5 no relevance or probative value with respect  
6 to willfulness; but it is not contrary to  
7 common sense, let alone impossible, for a  
8 defendant to be ignorant of his duty based  
9 on an irrational belief that he has no duty,  
10 and forbidding the jury to consider evidence  
11 that might negate willfulness would raise a  
12 serious question under the Sixth Amendment's  
13 jury trial provision.

14 Id. at 201-203 [citations omitted].

15 \_\_\_\_\_ While Mr. Rosenthal does not believe he is required to  
16 reveal his defense prior to trial, as this Court recognized at  
17 his sentencing in the prior proceeding, he had a good-faith  
18 belief in the legality of his conduct vis-a-vis the marijuana  
19 counts. Undoubtedly, his defense will entail the presentation  
20 of evidence that he did *not* believe he had any tax obligation  
21 for conduct which was a humanitarian versus commercial  
22 enterprise and yielded no profit.

23 \_\_\_\_\_ Ironically, the government implicitly recognized this  
24 holding during the October 25, 2006 hearing, and appropriately  
25 argued against severance. (See *Exhibit I*, October 25, 2006  
26 hearing, RT 14:19-16:10).  
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II

SEVERANCE OF THE TAX COUNTS IS CONTRARY TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AND CAUSES PREJUDICE TO MR. ROSENTHAL THAT FAR OUTWEIGHS ANY CLAIM OF PREJUDICE BY THE GOVERNMENT, WHICH IS SPECULATIVE AND MADE SOLELY FOR TACTICAL ADVANTAGE.

The Federal Rules of Criminal Procedure "are designed to promote economy and efficiency and to avoid multiplicity of trials where these objectives can be achieved without substantial prejudice" to the defendant's right to a fair trial.

Bruton v. United States (1968) 391 U.S. 123, 132 fn. 6.

"Motions for severance are rarely granted, and separate trials should not be granted in absence of very strong and cogent reasons." United States v. Steffes, 228 F.Supp. 491 (D. Mont. 1964); *citing* Davenport v. United States, 260 F.2d 591, 594 (9<sup>th</sup> Cir. 1958).

Even more rare than the grant of severance is the government moving for severance, opposed by the defendant. Of the hundreds of cases collected in the annotations to Rule 14, only a handful address this oddity. Of the five cases, three pertain to the government moving to sever *defendants*, not counts as here. In the one case pertaining to the government moving to sever *counts* only, the government's motion was denied (United States v. Cappello, 209 F.Supp. 959 (E.D.N.Y. 1962), *infra*).

The first of these four cases is United States v. Dioguardi, 20 F.R.D. 10 (S.D.N.Y. 1956). In Dioguardi, a conspiracy case involving seven co-defendants, the District Court noted that Rule 14 severance more frequently arises where a defendant claims prejudice if tried with another defendant or

1 defendants. Id. at 12. The motion is addressed to the discre-  
2 tion of the Court, and is reviewed for abuse thereof. Id. In  
3 deciding such a motion by a defendant, the Court weighs the  
4 alleged prejudice to the defendant in being jointly tried  
5 against possible prejudice to the Government which might result  
6 from a separate trial. Id.

7 The Court questioned "whether there is any such balancing  
8 to be done when the motion for severance is made by the  
9 Government." Id. at 13. The Court concluded that there is no  
10 such balancing, quoting Judge Learned Hand: "No accused person  
11 has any recognizable legal interest in being tried with another,  
12 accused with him. Id. [Citation omitted.]

13 "[N]evertheless, in order to entitle the Government to a  
14 severance it must show to the satisfaction of the Court that  
15 prejudice to it would result from a joint trial." Id. The  
16 claimed prejudice was twofold: (1) that the pattern of proof as  
17 to three of the defendants was much simpler than the pattern as  
18 to the other four, and therefore would afford the government a  
19 simpler and clearer presentation than would be the case in a  
20 joint trial; and (2) that evidence with respect to the defen-  
21 dants as to whom it asks a severance will not be available to it  
22 until after the trial of the first three defendants. Id. The  
23 Court granted the requested relief, finding that both grounds,  
24 taken together, "are sufficient to show that prejudice to the  
25 Government would result from a joint trial ... and that such  
26 prejudice would be in large measure avoided by granting the  
27 severance which it seeks." Id.

28 Dioguardi is distinguishable. First, that matter concerned

1 seven co-defendants whom the government moved to sever into two  
2 trial groups, not one set of counts against Mr. Rosenthal, who  
3 objects, as here.

4 Second, and more importantly, unlike the government, Mr.  
5 Rosenthal will unquestionably suffer manifest prejudice if  
6 forced to proceed to trial on only the tax counts.<sup>3</sup> Ironically,  
7 the very evidence this Court sought to preclude by virtue of  
8 granting severance of the tax counts, is embroiled in the heart  
9 of the defense, and Mr. Rosenthal will be unable to defend  
10 against the tax charges without being able to show, for example,  
11 that he believed his "deputized" status with the City of Oakland  
12 validated his good-faith belief that he did not need to report  
13 anything on his income tax returns because there was no "income"  
14 from his pioneering work implementing California Health and  
15 Safety Code § 11362.5. As discussed above, though objectively  
16 reasonable on the unique facts presented here, Mr. Rosenthal's  
17 belief could even be unreasonable - so long as the trier of  
18 facts determines that he subjectively held this belief and  
19 therefore there was no willful falsity on the tax returns at  
20 issue. See, e.g., Cheek v. United States (1991) 491 U.S. 192.

21 The only case counsel was able to locate involving the  
22 government's motion for severance of counts is United States v.  
23 Cappello, 209 F.Supp. 959 (E.D.N.Y. 1962). The Court denied the  
24 government's Rule 14 motion for separate trial of three counts.  
25 While the government relied on Dioguardi, the District Court

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26  
27 <sup>3</sup> Not only will the severance prejudice Mr. Rosenthal, but  
28 also all of the witnesses who will be compelled to testify in  
not one, but two proceedings. Especially those witnesses who  
may be facing criminal contempt, who now will also be subject to  
not one, but two contempt proceedings.

1 distinguished the severance of co-defendants for trial from  
2 severance of counts, reasoning that:

3           When the Government drafts an indictment it  
4           is in the controlling position to state what  
5           shall be included in the charges. There-  
6           fore, when it knowingly has joined together  
7           several offenses in several counts it is in  
8           a very poor position to request separate  
9           trials upon those counts without a strong  
10           showing of prejudice, which in this case it  
11           has failed to make.

12           United States v. Cappello, 209 F. Supp. 959.

13           The "prejudice" the government claimed in Cappello was that  
14           to date it had been unable to complete its proof with respect to  
15           some of the counts. Id. The Court determined that the "defen-  
16           dants' interest in a prompt and speedy trial **of all the charges**  
17           **made against them clearly outweighs such a claim.** Consequently,  
18           the interest of justice would be best served by precluding such  
19           a severance." Id. [Emphasis added.]

20           Here, where the same experienced prosecutor who drafted the  
21           superseding indictment suddenly claims prejudice in the form of  
22           potential confusion by the jurors, the government has no  
23           standing to complain, having well articulated that **the purpose**  
24           **of the superseding indictment** is to "air this thing out ... have  
25           the whole conduct before the jury: tax, money laundering,  
26           marijuana...." (RT 15:4-16:5)

27           Mr. Rosenthal agrees with the government that in this case,  
28           fairness **does** require that all issues be aired before the jury -  
29           especially because presentation of the full set of facts  
30           underlying this prosecution is necessary and essential to his  
31           ability to defend against all charges in the superseding  
32           indictment. In contrast, if these counts are not heard

1 together, manifest prejudice against Mr. Rosenthal will ensue.

2 Counsel located only three other cases where the government  
3 moved for severance, all of which involved the severance of co-  
4 defendants. In United States v. Rubin, 609 F.2d 51 (2nd Cir.  
5 1979), the government's motion was based on its need to  
6 introduce against Rubin admissions he had made which would  
7 create potential problems with respect to other defendants under  
8 Bruton v. United States (1968) 391 U.S. 123. Id. at 65.

9 Likewise, United States v. Grullon 482 F.Supp. 429 (E.D. Pa  
10 1979) involved a Bruton issue. In granting the government's  
11 motion, the District Court stated that if doing so would  
12 "accord merely a tactical advantage," the Court might be  
13 inclined to let the government "live with" its decision to  
14 indict all of the defendants together under a "sporting theory"  
15 of litigation. Id. at 430. However, as the Court recognized:

16 [T]here is more at stake here than there is  
17 at a sporting event. The hope is that in an  
18 adversary trial the truth will win out, not  
19 simply one of the parties. And it is basic  
20 to such a trial that the accused can call  
21 witnesses who may exculpate them, so too it  
22 is basic that that the Government can call  
23 witnesses who may inculcate them, provided  
24 that the rights of the witnesses and of the  
25 accused are not violated. In short, the  
26 Government's interest in severance seems an  
27 appropriate pursuit of a legitimate  
28 prosecutorial end.

23 Id.

24 In this case, the prejudice to Mr. Rosenthal outweighs the  
25 government's speculative concern over juror confusion. It is  
26 apparent the government is using the bifurcation of the tax  
27 counts, and insisting the tax counts be adjudicated first, in a  
28 calculated and manipulative endeavor to undermine this Court's

1 previous sentence of Mr. Rosenthal on the marijuana counts. By  
2 calling over seventy eight witnesses in the tax case, the  
3 government is attempting to elicit evidence in the tax case to  
4 establish Mr. Rosenthal was in a position of leadership at  
5 Mandela Parkway, in a deliberate attempt to deprive him of his  
6 entitlement to the safety valve. In addition the government is  
7 also seeking to obtain a conviction against Mr. Rosenthal on the  
8 tax counts, prior to proceeding to trial on the marijuana  
9 counts, which could impact his safety valve eligibility as well,  
10 not to mention be extremely prejudicial at a second jury trial.

11 Moreover the prolonged stress and disruption this  
12 prosecution is already causing Mr. Rosenthal and his family, by  
13 forcing him to withstand two trials (having already withstood  
14 one) is financially debilitating.

15 Additionally, as indicated above judicial economy is  
16 essentially frustrated by two proceedings where many of the same  
17 witnesses will be called (and forced to disrupt their lives  
18 twice and be subject to criminal contempt proceedings twice)  
19 especially where a substantial amount of the same evidence will  
20 be introduced.

21 Given the record up to and including November 8, 2006, it  
22 is apparent that the government is motivated by tactical  
23 reasons. When the Court asked for what purpose the government  
24 is re-prosecuting Mr. Rosenthal on the marijuana counts (since  
25 he had already been sentenced and served that sentence), the  
26 prosecutor expressly stated: that since Mr. Rosenthal "took to  
27 the microphones" after the verdict and said he didn't get a fair  
28 trial, and the jurors called it a distorted process, "this time

1 around, he wants the financial side reflected, fine, let's air  
2 this thing out. Let's have the whole conduct before the jury:  
3 Tax, money laundering, marijuana. And let's decide it on all  
4 the evidence." (RT October 25, 2006 15:4-16:5) Thus, the  
5 government structured the indictment as it did for tactical  
6 reasons, and now, is shifting the sands of this prosecution by  
7 moving for severance.

8 The government's motion for severance was denied in United  
9 States v. Zim Israel Navigation Co., 239 F.Supp. 446 (S.D.N.Y.  
10 1965). Within three months of filing an information against  
11 three defendants alleging a total of 104 counts, the government  
12 moved for severance, seeking to try the shipper immediately and  
13 separately from the steamship line. The government's claim of  
14 prejudice rested upon allegations that the principal officer of  
15 the shipper, is eighty-three years of age; that a trial of that  
16 defendant will be of shorter duration than a joint trial with  
17 the steamship lines, and that the case against the shipper is  
18 ready to proceed because its counsel did not move for a bill of  
19 particulars. Id. at 446-447.

20 The reasons advanced to support the claim of  
21 prejudice are not only unpersuasive but, to  
22 the contrary, suggest that a severance will  
23 be prejudicial to the defendant shipper  
24 whose trial is sought forthwith. If the  
25 severance is granted, then not only will the  
26 eighty-three year old witness be required to  
27 testify upon two separate trials instead of  
28 one, but since he is the chief executive  
officer of the shipper, its affairs will be  
unnecessarily interfered with; a principal  
witness of the shipper ... will be required  
to attend trials here on two separate  
occasions, again causing [interruption of  
business] and an unnecessary duplication of  
expense as to him, not matter who pays;  
finally, the defendant shipper will be  
deprived of the benefit of testimony of

1 witnesses in foreign countries, not subject  
2 to subpoena but who, as employees of the  
3 shipping lines, are under their control and  
may be brought here to testify as defense  
witnesses.

4 Id. As stated above, here the prejudice to Mr. Rosenthal  
5 substantially outweighs the government's speculative concern  
6 over juror confusion - to wit: the prospect of an enhanced  
7 sentence due to deprivation of the safety valve, being subject  
8 to a minimum mandatory sentence in the second trial, being tried  
9 in a second trial as a convicted felon on integrally related  
10 counts, prolonged stress and disruption he and his family  
11 suffer; and financial crippling. Additionally, the preference  
12 for judicial economy embodied by the Federal Rules of Evidence  
13 is eviscerated by the government's motion, causing disruption to  
14 the lives of witnesses who will twice be called, and further  
15 burdening the already overburdened judicial system.

16 CONCLUSION

17 Based on the foregoing, Mr. Rosenthal respectfully requests  
18 that this Court reconsider its order granting the government's  
19 motion for severance.

20 Dated: February 20, 2006

21 Respectfully submitted,

22 ROBERT AMPARÁN  
23 SHARI L. GREENBERGER  
24 OMAR FIGUEROA

25 /s/ ROBERT AMPARÁN  
26 by ROBERT AMPARÁN