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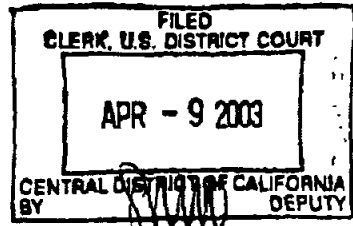
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CR 02-939 AHM

UNITED STATES OF AMERICA,

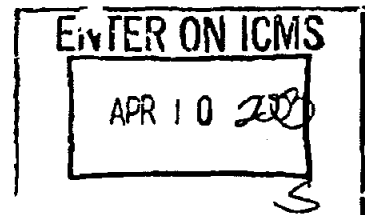
Plaintiff,

v.

LYNN OSBURN and
JUDY OSBURN,

Defendants.

ORDER GRANTING
GOVERNMENT'S MOTION IN
LIMINE



The indictment against Lynn and Judy Osburn charges them with violations of 21 U.S.C. § 841(a)(1) (manufacturing marijuana); 21 U.S.C. § 846 (conspiracy to manufacture marijuana); 21 U.S.C. § 856 (maintaining a drug establishment); and 18 U.S.C. § 922(g) (being a felon in possession of a firearm).

The government now moves to exclude evidence and argument regarding: (1) the legality of defendants' conduct under California law; (2) the existence of the Compassionate Use Act, Cal. Health & Safety Code § 11362.5; (3) a "medical necessity" defense; (4) the purported medical efficacy of marijuana; (5) the existence of "prescriptions" for defendants recommending the use of marijuana; (6) the existence of the Los Angeles Cannabis Resource Center ("LACRC"); (7) any statement by officials concerning "medicinal" marijuana; and (8) all other

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1 related issues. Defendant Lynn Osburn opposes the government's motion and
2 argues that the above evidence is relevant to his necessity defense. Defendant
3 Judy Osburn also opposes the government's motion and argues that the above
4 evidence is relevant to her public authority and entrapment by estoppel defenses.

5 The practical effect of granting the government's motion will be to
6 preclude the defendants from proffering their necessity, public authority and
7 entrapment by estoppel defenses. Although a criminal defendant always has the
8 right to have a jury resolve disputed factual issues, the district court properly may
9 grant a motion *in limine* that will preclude a proffered defense when the evidence
10 set forth by the defendant in his or her offer of proof could not, even if believed,
11 establish the required elements of a lawfully available defense. *United States v.*
12 *Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985) (affirming district court's ruling on
13 motion *in limine* which precluded defendant's proffered necessity defense).

14 This Order is organized according to the Osburns' proffered defenses. It
15 addresses the Defendants' interesting contentions in a purposefully abbreviated
16 fashion. A more thorough analysis of the Compassionate Use Act ("Proposition
17 215") and its effect on federal narcotics law is set forth in *United States v.*
18 *Cannabis Cultivators Club*, 5 F.Supp.2d 1086 (1998), and the May 3, 2002
19 unpublished memorandum decision of Judge Charles Breyer in that case, granting
20 summary judgment.

21 For the following reasons, the Court concludes that the defendants cannot
22 make out valid necessity, public authority or entrapment by estoppel defenses.
23 Accordingly, the government's motion is GRANTED and the above evidence is
24 excluded as irrelevant.¹

25 _____
26 ¹ The Court does not grant item (8) ("all other related issues") because it is too
27 vague and potentially far-reaching. Also, although the Court believes that there are
28 probably no genuine grounds to permit reference to (as opposed to focused inquiry
and argument about) the excluded matters, if at trial defendants have a good faith
belief that reference to these matters is otherwise appropriate, they may make a

ANALYSIS

1
2 **1. Necessity Defense**

3 Lynn Osburn argues that he has a valid necessity defense with respect to
4 the indictment's marijuana charges. "As a matter of law, a defendant must
5 establish the existence of four elements to be entitled to a necessity defense: (1)
6 that he was faced with a choice of evils and chose the lesser evil; (2) that he acted
7 to prevent imminent harm; (3) that he reasonably anticipated a causal relation
8 between his conduct and the harm to be avoided; and (4) that there were no other
9 legal alternatives to violating the law." *United States v. Aguilar*, 883 F.2d 662,
10 692 (9th Cir. 1989), superseded by statute on other grounds as stated in *United*
11 *States v. Gonzalez-Torres*, 309 F.3d 594, 599 (9th Cir. 2002).

12 Lynn Osburn starts with the assertion that under the Compassionate Use
13 Act, it is not unlawful for Californians and their primary caregivers to possess
14 marijuana or cultivate it for their own use, so long as they have been given
15 medical prescriptions by licensed physicians to treat an illness or a medical
16 condition with marijuana. Then he claims that on February 12, 2002, Asa
17 Hutchinson, the then-Administrator of the Drug Enforcement Administration,
18 made it clear "that the federal government is not making an effort to stop . . . ill
19 Californians from possessing and using cannabis." Lynn Osburn Opp'n. p. 5 and
20 Ex. B.² Finally, Lynn Osburn contends that on February 12, 2002, Hutchinson

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23 proffer outside the presence of the jury and the Court will rule accordingly.

24 ² Hutchinson's remarks were made on the very day and in the very locale
25 where, even according to Lynn Osburn, "individuals connected with a medical
26 cannabis dispensary" had been arrested by federal authorities. *Id.* p. 5. Moreover,
27 Hutchinson also stated that there "clearly" was "a conflict between the proposition
28 passed by the people of California and the federal law . . . [which] is still in place and
that makes marijuana possession a violation of the controlled substances law." *Id.*
So it is obvious that Lynn Osburn has misconstrued and distorted what Hutchinson
said.

1 also "addressed the drug-to-terrorism connection," stating that "there are
2 numerous connections and correlations between our efforts against terrorism and
3 our efforts against drugs." *Id.* Lynn Osburn also cites other statements
4 Hutchinson made to Congress, including one shortly after the attacks on the
5 World Trade Center, to the effect that "the degree to which profits from the drug
6 trade are directed to finance terrorist activities . . . is of paramount concern to the
7 DEA." *Id.* Ex. C.

8 From all of these stepping stones, Lynn Osburn then argues that "he was
9 faced with the choice of either letting the ill Californians help international
10 terrorists or provide medicine to those persons from a source that would not help
11 to put the United States in danger." *Opp'n*, p. 7.

12 Osburn's fanciful defense fails for various reasons. First, his proffer
13 includes no specific evidence of imminent harm to either ill Californians or to the
14 United States. Second, he does not proffer evidence that would support a
15 reasonable belief that his actions would stop or reduce international terrorism.
16 The documents he does attach deal almost exclusively with heroin and opium,
17 and they lack any indication whatsoever that Californians consume terrorist-
18 linked marijuana to deal with medical problems. Third, and no less telling, is that
19 Osburn provides no support for his grandiose assertion that his reason for
20 cultivating hundreds of marijuana plants was to fight terrorism by assisting ill
21 Californians who desired to ingest marijuana. Indeed, all of the materials
22 concerning terrorism he cites stem from events occurring *after* his cultivation of
23 the marijuana plants that are the subject of Counts 2 and 3.

24 **2. Public Authority Defense**

25 Defendants argue that they have a valid defense based on the public
26 authority doctrine and the statutory immunity set out in 21 U.S.C. § 885(d).

27 **A. Common Law Public Authority Defense**

28 This affirmative defense supports exoneration where the defendant

1 “reasonably relied on the authority of a government official to engage [her] in
 2 covert activity.” *United States v. Burrows*, 36 F.3d 875, 881 (9th Cir. 1994)
 3 (quoting *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir.
 4 1994)). In this case, Defendants contend that their marijuana activities were
 5 authorized by state and local officials pursuant to California’s Compassionate Use
 6 Act. *See* Judy Osburn Opposition at 5-6. But the Ninth Circuit has held that the
 7 public authority defense only applies where the defendant “relied on the advice or
 8 authority of *federal* officials or agents.” *United States v. Mack*, 164 F.3d 467,
 9 474 (9th Cir. 1999) (original emphasis). Defendants do not even argue that their
 10 proffered evidence of limited contacts with federal DEA officials could support a
 11 common law public authority defense. (Those contacts are summarized below, in
 12 the Court’s analysis of the entrapment by estoppel defense).

13 **B. Statutory Immunity**

14 Section 885(d) provides that: “[N]o civil or criminal liability shall be
 15 imposed . . . upon any duly authorized officer of any State, territory, political
 16 subdivision thereof, the District of Columbia, or any possession of the United
 17 States, who shall be lawfully engaged in the enforcement of any law or municipal
 18 ordinance relating to controlled substances.” Defendants claim that this
 19 immunity applies to them because their marijuana manufacture was authorized by
 20 state and local officials. As a preliminary matter, however, the Court notes that
 21 Defendants do not contend that they were themselves law enforcement officers or
 22 even that they were working undercover as part of an enforcement operation.³ *Cf.*
 23 *United States v. Fuller*, 162 F.3d 256, 261-62 (4th Cir. 1998) (no immunity for
 24 mayor who never claimed to be acting as officer or agent of state law enforcement
 25

26
 27 ³ In the main case Judy Osburn relies on, *United States v. Wilson*, 44 M.J. 223
 28 (U.S. Court of Appeals for the Armed Forces 1996), the soldier had claimed he was
 an informant.

1 division given primary responsibility for enforcing South Carolina’s drug laws).

2 In fact, the only statute Defendants claim to have been involved in
3 “enforc[ing]” is the California Compassionate Use Act, Cal. Health & Safety
4 Code § 11362.5. As mentioned above, that statute provides that California’s
5 prohibitions on the use and cultivation of marijuana will not apply to individuals
6 who have obtained prescriptions for the medical use of marijuana or to the direct
7 medical providers for those individuals. But Proposition 215 does not call for
8 any “enforcement” within the obvious meaning of § 885(d), since the latter
9 section is directed *against* narcotic trafficking. Proposition 215 may have made
10 Defendants’ cultivation of marijuana permissible under California law, but that
11 does not mean that the Defendants’ actions constituted *enforcement* of that law.
12 Under Defendants’ theory, the doing of any act that is permitted by a statute
13 would constitute “enforcement” of that statute. Such a broad reading of § 885(d)
14 essentially would render meaningless the carefully limited language of the statute.

15 Moreover, even if what Defendants did constituted “enforcement,”
16 Defendants have proffered no evidence that either one of them was ever “duly
17 authorized” by a public official to so “enforce” Proposition 215. At most,
18 Defendants have shown that they had differing ties to the LACRC, which in turn
19 had been dealing with representatives of the City of West Hollywood.

20 **3. Entrapment by Estoppel**

21 “Entrapment by estoppel is the unintentional entrapment by an official who
22 mistakenly misleads a person into a violation of the law.” *United States v.*
23 *Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000). In order to succeed with
24 an entrapment by estoppel defense, the defendant must show that he or she was
25 “affirmatively told . . . the proscribed conduct was permissible.” *Id.* This
26 requirement of “affirmative misrepresentat[ion]” means that “vague or even
27 contradictory statements” are insufficient to establish the defense. *Id.* (citation
28 and quotation marks omitted). The defendant must also show that his or her

1 reliance on the misrepresentation was reasonable, and that the misrepresentation
2 was made by a "federal government official empowered to render the claimed
3 erroneous advice, or . . . an authorized agent of the federal government who, like
4 licensed firearms dealers, has been granted the authority from the federal
5 government to render such advice." *United States v. Brebner*, 951 F.2d 1017,
6 1027 (9th Cir. 1991), distinguishing *United States v. Tallmadge*, 829 F.2d 767 (9th
7 Cir. 1987).

8 Before analyzing the parties' specific contentions, the Court notes that it is
9 close to impossible for Defendants to establish "reasonable reliance" on any
10 federal official's statement or conduct, given that the federal law enforcement
11 agencies involved in the enforcement of federal anti-narcotic laws consistently
12 and roundly pronounced their opposition to Proposition 215 and their refusal to
13 be bound by it. *See, e.g., Conant v. McCaffrey*, 172 F.R.D. 681, 686 (N.D. Cal.
14 1997) (even before Proposition 215 was enacted the then-director of the United
15 States Office of Drug Control Policy "suggested that the federal government
16 would take action against physicians for conduct protected by the [Compassionate
17 Use] Act In the months since the election, federal officials have made at
18 least fifteen separate statements verifying the government's intent."). *See also*
19 *supra* note 2 (Administrator Hutchinson's 2002 Statement).

20 **A. Reliance on Judicial Decisions**

21 The Court finds unpersuasive Defendants' contention that they reasonably
22 relied on Supreme Court precedent regarding federalism. Simply put, none of the
23 Supreme Court decisions cited comes close to an affirmative misrepresentation
24 that Defendants would be acting legally if they were to manufacture marijuana on
25 their ranch.

26 Defendants do not argue that they reasonably relied on the Ninth Circuit's
27 decision in the *Oakland Cannabis* case, but they do list it as one of the
28 "[p]ublished legal opinions relied upon" in their Rule 12.3 notice. If they are

1 claiming reliance on that decision, such reliance could apply only with respect to
2 the marijuana seized on August 4, 2000, which is the subject of Count 2 of the
3 indictment, because that is the only offense that occurred when the Ninth Circuit
4 decision still had facial authority. The Ninth Circuit issued its decision on
5 September 13, 1999 and the Supreme Court decision was filed on May 14, 2001,
6 before the violations charged in Counts 2 and 3.

7 In *Oakland Cannabis*, the buyers' cooperative was charged with
8 distributing marijuana directly to sick patients. (Here, Defendants do not claim to
9 have directly provided their marijuana to such patients). The Ninth Circuit's
10 opinion stated that a medical necessity defense "likely would pertain in the
11 circumstances," and the court ordered District Judge Breyer to take the necessity
12 defense (and the public's interest in providing medicine for the sick) into account
13 in framing a civil injunction on remand. *United States v. Oakland Cannabis*
14 *Buyers' Cooperative*, 190 F.3d 1109, 1114 (9th Cir. 1999). The Ninth Circuit did
15 not rule on whether the necessity defense would ultimately succeed at trial and
16 did not address any manufacturing offenses. Nor did the Ninth Circuit hold, or
17 even suggest, that a grower of hundreds of marijuana plants who sold the
18 marijuana for substantial sums of money would be entitled to conclude that his
19 conduct was made lawful by Proposition 215.⁴

20 The Court has found no cases where a defendant argued entrapment by
21 estoppel based on judicial decisions. It appears that all entrapment by estoppel
22 cases involve situations where government officials affirmatively misrepresented,
23 directly to the particular defendant, that his or her specific conduct was legal.
24 Even in principle, allowing an entrapment by estoppel defense here based on the

25

26 ⁴ Defendants dispute that they "sold" the marijuana they cultivated, although
27 they do not dispute that they provided it to LACRC, apparently in return for at least
28 \$ 264,500. Is that not a sale? How classify a fowl which walks and clacks like a
duck? Is it a chicken?

1 Ninth Circuit's *Oakland Cannabis* decision would be a significant expansion of
2 the defense as traditionally understood. On the facts of this case, the defense is
3 not valid.

4 **B. Reliance on Federal Government Officials**

5 Defendants point to several contacts with federal officials that they claim
6 serve as the basis for the estoppel defense. First, Lynn Osburn disclosed to the
7 DEA in 1997 that the LACRC garden was located on the Osburn property and
8 that Lynn and Judy Osburn tended the garden. Fed. R. Crim. P. 12.3 Notice at 4-
9 5. Next, DEA agents were present during some of the later raids on the Osburn
10 property, and the Osburns were not immediately charged for any offenses based
11 on those raids. *Id.* at 5. Next, in early 1999, LACRC also applied to the DEA for
12 a permit to cultivate marijuana, and, during a visit to LACRC to discuss the
13 application, DEA agents gave Scott Imler forms to be used for employee
14 background checks. *Id.* at 5. Finally, LACRC applied for and received an FDA
15 labeling code for cannabis manufacture in 1999. *Id.* at 5.

16 None of these contacts with federal agencies can support an entrapment by
17 estoppel defense for the Osburns. First, several of the contacts involve LACRC,
18 as opposed to the Osburns.⁵ Second, no federal official ever "affirmatively told"
19 the Osburns that their marijuana cultivation was legal. *Cf. United States v. Clegg*,
20 846 F.2d 1221, 1222-23 (9th Cir. 1988) (high-ranking government officials in
21 Pakistan affirmatively told defendant that the United States wanted him to
22 smuggle arms to Afghan rebels); *United States v. Tallmadge*, 829 F.2d 767, 770
23 (9th Cir. 1987) (licensed firearms dealer affirmatively agreed with defendant that

24
25 ⁵It is undisputed that Judy Osburn was a member of the LACRC board. Lynn
26 Osburn apparently attended some of its meetings. If board membership, which does
27 not inherently or necessarily involve personal or executive authority, and attendance
28 at board meetings were enough to entitle someone to act in reliance, the defense
would be available without any showing of the kind of direct relationship it
traditionally has been held to require.

1 he could legally buy guns). At most the Osburns' evidence reflects inaction or
2 delay on the part of federal officials, but "governmental inaction is insufficient to
3 establish [entrapment by estoppel]." *United States v. Woodley*, 9 F.3d 774, 779
4 (9th Cir. 1993). *See also Ramirez-Valencia*, 202 F.3d at 1109 (inaccurate
5 statement on INS form that any deportee who returned to the United States within
6 five years would be guilty of a felony did not constitute "active misleading" that
7 would support entrapment by estoppel defense where deportee returned more than
8 five years after deportation) (quoting *United States v. Aquino-Chacon*, 109 F.3d
9 936, 939 (4th Cir. 1997)); *Brebner*, 951 F.2d at 1025-26 (failure to make further
10 inquiries following disclosure insufficient to support defense).

11 C. Reliance on State or Local Officials

12 The Defendants contend that they worked openly and extensively with Los
13 Angeles Sheriff's Department officials and members of the West Hollywood City
14 Council in implementing Proposition 215. Fed. R. Crim. P. 12.3 Notice at 4-5.
15 The Defendants state that they disclosed their activities to these officials.
16 LACRC also obtained a business license from the California Franchise Tax Board
17 and forwarded various marijuana-related documents to the California Attorney
18 General's office. *Id.* at 5.

19 Even if the conduct of some of these state and local officials could qualify
20 as "affirmative misrepresentat[ions]" regarding the legality of Defendants' actions
21 *under federal law*, the Defendants have not proffered evidence that any of these
22 officials was authorized by the federal government to render the type of advice on
23 which Defendants claim to have relied. The Ninth Circuit has held that state or
24 local law enforcement officials are not necessarily federal agents for purposes of
25 an entrapment by estoppel defense. *See United States v. Mack*, 164 F.3d 467, 474
26 (9th Cir. 1999) (defendant could not rely on local sheriff's department having
27 given him prohibited weapons); *United States v. Collins*, 61 F.3d 1379, 1385 (9th
28 Cir. 1995) (defendant could not rely on statement by state employee that his right

1 to possess firearms had been restored because he could not demonstrate that the
2 employee was an agent of the federal government); *Brebner*, 951 F.2d at 1024
3 (defendant could not rely on sheriff's department official, who agreed with him
4 that he could lawfully possess firearms, and could not rely on police departments'
5 actions in returning firearms to him despite his prior felony conviction). In this
6 case, as in the cases cited *supra*, the Defendants have not shown that the state and
7 local officials were authorized agents of the federal government who had "the
8 authority to bind the federal government to an erroneous interpretation of federal
9 law." *Brebner*, 951 F.2d at 1026.

10 The Defendants cite *United States v. Tallmadge*, 829 F.2d 767 (9th Cir.
11 1987) as support for their position. In that case, the defendant was charged with
12 unlawfully purchasing firearms despite his prior felony conviction, and he sought
13 to advance an entrapment defense based on statements made to him by a federally
14 licensed firearms dealer regarding his ability to purchase firearms legally despite
15 the conviction. The Ninth Circuit held that Tallmadge could make out an
16 entrapment defense based on the dealer's statements because the court found that
17 "the United States Government has made licensed firearms dealers agents in
18 connection with the gathering and dispensing of information on the purchase of
19 firearms." 829 F.2d at 774. In so holding, the court relied heavily on statutes and
20 regulations that placed a specific and affirmative duty on licensed arms dealers to
21 familiarize themselves with the federal law, to inform prospective buyers of the
22 law and to make sure that any given sale is lawful. *Id.*

23 In this case, Defendants have pointed to no similarly specific statutory or
24 regulatory provisions. Defendants do point to government statements that federal
25 officials should "work with" and may "utilize the services of" state agencies in
26 cracking down on illegal drugs, Judy Osburn's Opp. at 19, but these vague policy
27 pronouncements are not like the specific duties imposed on federally licensed
28 firearms dealers. Moreover, that level and kind of cooperation is all about
enforcing prohibitions *against* use and distribution of controlled substances.

1 Defendants also point to various statutes that have created training
 2 programs in federal law for state and local officials, that allow state and local
 3 agencies to retain proceeds from property seized pursuant to federal law, that
 4 have created multi-jurisdictional task forces, and that have allowed for state and
 5 local officers to be "cross-designated" for work for a federal agency. *Id.* at 20.
 6 Only the last two of these statutory schemes might give rise to a situation where
 7 particular state and local law enforcement officers could be considered agents of
 8 the federal government. Defendants have not proffered any evidence, however,
 9 that the state and local officials involved in this case were on federal drug task
 10 forces or were assigned to federal agencies for the enforcement of federal drug
 11 laws. Nor have Defendants proffered any other evidence that any of these
 12 officials was federally authorized or duty-bound to advise the Defendants on the
 13 status of their activities under federal law. As a result, Defendants' entrapment
 14 by estoppel defense fails as a matter of law to the extent it depends on these state
 15 and local officials.

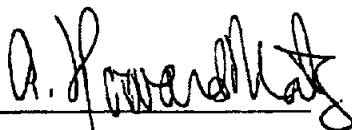
16 **CONCLUSION**

17 For the foregoing reasons, the Court GRANTS the government's motion *in*
 18 *limine* to the extent (at least) that the Court will not allow evidence or argument
 19 in support of Defendants' necessity, public authority and entrapment by estoppel
 20 defenses.

21
 22 This Order is *not* intended or approved for publication.

23
 24 IT IS SO ORDERED.

25
 26 DATE: April 9, 2003

27 
 28 _____
 A. Howard Matz
 United States District Judge