

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

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4
5 UNITED STATES OF AMERICA,
6 Plaintiff,

7 v.

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9 RHONDA FIRESTACK-HARVEY, LARRY
10 HARVEY, MICHELLE GREGG, ROLLAND
11 GREGG, and JASON ZUCKER,
12 Defendants.

No. CR-13-24-FVS

ORDER DENYING MOTIONS TO
DISMISS ON EQUAL
PROTECTION OR DUE PROCESS
GROUNDS

13 **THE DEFENDANTS** have filed a number of motions. The Court
14 considered their motions at a pretrial conference that was held on
15 April 22 and 23, 2014. This order addresses the defendants'
16 allegations that the instant prosecution is depriving them of equal
17 protection and due process.

18 **CONGRESS AND THE DISTRICT OF COLUMBIA**

19 The defendants argue the United States Attorney's decision to
20 prosecute them in the Eastern District of Washington violates their
21 right to equal protection, as guaranteed by the Fifth Amendment, given
22 Congress' decision to allow the medicinal use of cannabis in the
23 District of Columbia. The Ninth Circuit considered and rejected a
24 very similar argument in *James v. City of Costa Mesa*, 700 F.3d 394
25 (9th Cir.2012) *cert. denied*, --- U.S. ----, 133 S.Ct. 2396 (2013).
26 There, the plaintiffs were disabled residents of the State of

1 California. They challenged attempts by certain California cities to
2 close marijuana dispensing facilities. The plaintiffs relied
3 principally upon Title II of the Americans with Disabilities Act
4 ("ADA"). 700 F.3d at 396. However, the plaintiffs also made an equal
5 protection argument based upon the fact Congress did not block
6 implementation of Initiative 59 in the District of Columbia in 2010.
7 "Initiative 59," explained the Ninth Circuit, "suspended local
8 criminal penalties for seriously ill individuals who use medical
9 marijuana with a doctor's recommendation." 700 F.3d at 404. The
10 circuit court rejected the argument that Congress' 2010 decision to
11 allow the District of Columbia to implement Initiative 59 deprived
12 disabled California residents of equal protection of the law:

13 Congress' decision not to block implementation of Initiative
14 59 did not result in the unequal treatment of District of
15 Columbia and California residents. On the contrary,
16 Congress' actions allow these jurisdictions to determine for
17 themselves whether to suspend their local prohibitions on
18 the use and distribution of marijuana for medical purposes.
19 Local decriminalization notwithstanding, the unambiguous
20 federal prohibitions on medical marijuana use set forth in
21 the [federal Controlled Substances Act] . . . continue to
22 apply equally in both jurisdictions, as does the ADA's
23 illegal drug exclusion. There is no unequal treatment, and
24 thus no equal protection violation.

25 700 F.3d at 405 (citation omitted).

26 **ENTRAPMENT BY ESTOPPEL**

Defendant Michelle Gregg claims state authorities misled her
concerning the use of marijuana for medical purposes. She claims

1 federal authorities were equally misleading. (Defendant's Motion &
2 Memorandum (ECF No. 213) at 31-32 (citations omitted).) She moves to
3 dismiss the indictment on the ground she is a victim of entrapment by
4 estoppel, which is the "unintentional entrapment by an official who
5 mistakenly misleads a person into a violation of the law[.]" *United*
6 *States v. Schafer*, 625 F.3d 629, 637 (9th Cir.2010) (internal
7 punctuation and citation omitted). Entrapment by estoppel is an
8 affirmative defense. In order to prevail, Ms. Gregg must prove five
9 elements: "(1) an authorized government official empowered to render
10 the claimed erroneous advice, (2) who has been made aware of all the
11 relevant historical facts, (3) affirmatively told him the proscribed
12 conduct was permissible, (4) that he relied on the false information,
13 and (5) that his reliance was reasonable." *United States v.*
14 *Batterjee*, 361 F.3d 1210, 1216 (9th Cir.2004) (internal citations and
15 quotation marks omitted). Ms. Gregg places great weight upon
16 information that is contained in the Washington State Department of
17 Health's website. The DOH has created a list of "General Frequently
18 Asked Questions." One of them asks, "I heard the current federal
19 administration legalized medical marijuana (cannabis). Is that true?"
20 To that question, the DOH provided the following answer:
21

22 No, medical marijuana (cannabis) is still illegal under
23 federal law. However, U.S. Deputy Attorney General James
24 Cole announced updated formal guidelines for federal
25 prosecutors in states that have laws allowing the use of
26 medical marijuana. The guidelines do not legalize medical
marijuana. The president directed federal prosecutors to
consider appropriate medical use when making criminal

1 charging decisions. The guidelines only provide direction
2 for prosecutors when reviewing medical marijuana cases.
3 (DOH, "[General] Frequently asked questions about Medical Marijuana
4 (Cannabis) in Washington State," available at
5 [http://www.doh.wa.gov/YouandYourFamily/Illnessand](http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuana(Cannabis)/GeneralFrequentlyAskedQuestions.aspx)
6 [Disease/MedicalMarijuana\(Cannabis\)/GeneralFrequentlyAskedQuestions.aspx](http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuana(Cannabis)/GeneralFrequentlyAskedQuestions.aspx)
7 x. (last visited April 21, 2014)). One cannot reasonably interpret
8 the above-quoted answer as an affirmation that federal law permits the
9 possession of marijuana for medical purposes. To the contrary, the
10 above-quoted answer states unequivocally that the possession of
11 marijuana remains illegal under federal law. Furthermore, the answer
12 represents the views of the state Department of Health. At most, one
13 could interpret the answer to suggest that, though the possession of
14 marijuana remains illegal under federal law, the state Department of
15 Health thinks there may be situations in which federal prosecutors
16 will not seek the indictment of persons who possess marijuana for
17 medical purposes. The state Department of Health does not presume to
18 give any assurance as to when federal prosecutors will refrain from
19 acting. Nor could the state Department of Health give any such
20 assurance. It cannot speak for federal prosecutors. Thus, the answer
21 given by the state Department of Health in response to a frequently-
22 asked question will not support the defense of entrapment by estoppel.

24 **PROSCRIBING THE POSSESSION OF MARIJUANA**

25 Several defendants have devoted scores of pages in multiple
26 memoranda arguing Congress lacks a rational basis for continuing to

1 proscribe the possession of marijuana for medical purposes. A little
2 over three months ago, the Ninth Circuit rejected very similar
3 arguments in an unpublished opinion. *Sacramento Nonprofit Collective*
4 *v. Holder*, Nos. 12-15991, 12-55775, 12-16710, 2014 WL 128998, at *1-*2
5 (9th Cir. Jan. 15, 2014). Although the opinion may be unpublished, it
6 accurately states the law in the Ninth Circuit.

7 **IT IS HEREBY ORDERED:**

8 1. Defendant Jason Zucker's motion to dismiss the indictment (**ECF**
9 **No. 205**) is **denied**.

10 2. "[Defendant Michelle Gregg's] Motion . . . to . . . Dismiss
11 Indictment" (**ECF No. 213**) is **denied**.

12 3. Defendant Rolland M. Gregg's "Motion to Dismiss" (**ECF No. 216**)
13 is **denied**.

14 **IT IS SO ORDERED.** The District Court Executive is hereby
15 directed to enter this order and furnish copies to counsel.

16 **DATED** this 29th day of April, 2014.

17
18 s/ Fred Van Sickle
19 Fred Van Sickle
20 Senior United States District Judge
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