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10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

CR-97-997 GHK

14 v.

15 TODD PATRICK MCCORMICK, et al.,

16 Defendant.

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19 DEFENDANT'S REPLY MEMORANDUM  
 20 IN SUPPORT OF MOTION FOR RECONSIDERATION OF BOND  
 21 AND MODIFICATION OF CONDITIONS OF RELEASE  
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I  
INTRODUCTION

1  
2 On February 11, 1998, defendant Todd McCormick filed a  
3 motion requesting a review of his bond and bond conditions. On  
4 March 2, 1998, the government filed its opposition.

5  
6 In it's opposition, the government claims that defendant  
7 has not introduced any new material information warranting a  
8 review of his bond. The government claims that Mr. McCormick was  
9 growing marijuana for commercial distribution, that his salary is  
10 unchanged, that the affidavit of the loss of his passport is not  
11 a new fact, and that there was no confusion regarding defendant's  
12 length of residence within the Central District.<sup>1</sup> The  
13 defendant's motion for a review of bond and bond conditions  
14 should be granted because he has presented material new  
15 information.

16 II  
17 THERE IS NEW MATERIAL INFORMATION  
18 WARRANTING A REHEARING OF BOND AND BOND  
19 CONDITIONS OF RELEASE

20 The government initially claims that all areas of  
21 confusion alleged by Mr. McCormick were eliminated at the bond  
22 hearing with Judge Hatter. Apparently the court did not agree  
23 with this argument since, at the end of the hearing itself, Judge  
24 Hatter said he "would welcome a review" of bond in this case.

25 / It seems inappropriate to discuss some of the other  
26 factual allegations made in the government's brief, since such  
27 allegations deal with trial issues rather than issues pertinent  
28 to a review of bond. Additionally, while Defendant's motion  
contained numerous exhibits supporting the facts presented  
therein, the government's brief contains few exhibits, documents,  
or declarations to support their allegations. Indeed, the  
government quotes documents, including letters and research notes  
without attaching copies for the court. (Gov't Opp. at 7-8.)

1 (Reh'g Tr. at A53-A54.) Further, Judge Hatter invited further  
2 review at the end of the hearing, after all of the  
3 inconsistencies were allegedly cleared up, since there still were  
4 "sketchy" areas of facts which were not clarified even at the end  
5 of the hearing.

6 Contrary to the government's assertions, defendant's  
7 motion presented facts which illustrate that there is new  
8 material information which was not available to Mr. McCormick at  
9 the time of the bond hearing with Judge Hatter. This information  
10 includes a significant reduction of charges against defendant, a  
11 dramatic drop in defendant's income due to inability to meet his  
12 publisher's deadlines, and the issuance of a sworn statement of  
13 loss of his passport. Defendant also included information to  
14 clarify confusing areas and gaps in information presented to the  
15 court.

16 A. Dropped Charges of Distribution

17 The government tries to minimize the fact that defendant  
18 is no longer charged with distribution of marijuana. This is a  
19 most significant and material piece of information not available  
20 to Judge Hatter or defendant at the prior hearing. The plain  
21 fact is that the grand jury was asked to consider charges for  
22 both manufacturing and distributing marijuana, but after weighing  
23 the evidence it only indicted Mr. McCormick for manufacturing.  
24 This reduction of the charges against defendant is a material new  
25 fact that is explicitly mentioned in the Bail Reform Act for  
26 consideration. The Act says that the court is to consider "the  
27 nature and circumstances of the offense charged." 18 U.S.C.

28

1 §3142(g)(1).<sup>2</sup> Since the nature of the charges against Mr.  
2 McCormick are a significant reduction from those originally  
3 presented to Judge Hatter, there is a material difference in the  
4 information to be considered upon review of bond. Furthermore,  
5 as set forth in Defendant's initial motion for review of bond and  
6 bond conditions, the government relied heavily on claims of  
7 distribution at the prior bond hearing in persuading Judge Hatter  
8 to increase the bond amount. (Def's. Motion at 13-14.)

9 Given the fact that Mr. McCormick was never indicted for  
10 distribution, this court should give little weight to the  
11 government's continued protestations of distribution. What is  
12 most telling is that the government failed to procure from a  
13 pliant grand jury an indictment against Mr. McCormick for  
14 distribution. That fact alone should weigh heavily against any  
15 such claim and this court should not allow the government to make  
16 one more stab at that failed effort.

17 The government's representation that Mr. McCormick  
18 "baldly" contends the grand jury refused to indict him, and that  
19 he has no proof of the same (Gov't Opp. at 13:27-28, 14:1-5.) is  
20 spurious. It is the government which refuses to acknowledge the  
21 stark evidence supporting Mr. McCormick's claim - the indictment  
22 itself - which charges only cultivation. This single count  
23 indictment makes no mention whatsoever of distribution,  
24 notwithstanding the fact that 21 U.S.C. 841 (a)(1) and FRCP 7(c)  
25 allows that language, and whenever the government indicts  
26

27 <sup>2/</sup> In its response, the government concedes, as it must,  
28 that the fact that Mr. McCormick was not indicted for  
distribution is relevant to flight risk and danger to the  
community bail concerns, recognizing United States v. Winsor, 785  
F.2d at 757. (Gov't Br. at 12:27-28 to 13:1-2.)

1 for distribution that language is always contained in the  
2 indictment itself.

3 Furthermore, a defendant is not required to prove his  
4 innocence of the charged crime at a bond hearing (Def's. Motion  
5 at 11, citing Winsor, 785 F.2d 755 (9th Cir. 1986).), much less  
6 of an offense he is not charged with. Rather, he may focus on  
7 factors such as his character, employment, and community ties.  
8 Id. Yet, the government does not focus on these issues, but  
9 instead, in the face of a failed indictment, continues to try to  
10 convince the court that Mr. McCormick is a distributor of drugs  
11 with conclusory and unsupported claims.

12 Moreover, in repeating its outdated claims of distribution  
13 the government simply ignores the evidence presented in  
14 defendant's motion which show the alleged facts in context. For  
15 example, defendant reiterates that the zip lock baggies were  
16 found in his kitchen, a fact the government neither contests nor  
17 addresses. The scale - singular, not plural as the government  
18 alleges - was also found in the kitchen and was for weighing  
19 food. It does not have the sensitivity used for weighing drugs,  
20 which the government neither contests nor addresses.

21 In regards to the alleged communication between Mr.  
22 McCormick and his publisher, Mr. McCormick disputes any  
23 government claim that such letter shows an intent to illegally  
24 distribute marijuana. Further, the government fails to include  
25 such a communication with its brief nor provide a declaration  
26 attesting to its existence and contents. Instead, the government  
27 blatantly concludes distribution from its own secret  
28 interpretations.

1 In a further attempt to infer that Mr. McCormick was  
2 involved in the distribution of marijuana, the government alleged  
3 that they seized "profit projections" from Mr. McCormick's  
4 residence. (Gov't Opp. at 7.) The government falsely  
5 characterizes any such documents seized from Mr. McCormick's  
6 residence.<sup>3</sup> Mr. McCormick made no profit projections regarding  
7 the cultivation of marijuana at his Stone Canyon residence. Mr.  
8 McCormick's open and longstanding commitment to medical marijuana  
9 and his undisputed medical condition and personal medicinal use  
10 of marijuana belies any government claim that Mr. McCormick ever  
11 intended to illegally profit from his activities. Furthermore,  
12 if the government had any such hard evidence, it is unimaginable  
13 that they would not have presented it to the grand jury and  
14 sought Mr. McCormick's indictment for distribution, especially in  
15 this case where the government seeks to have defendant imprisoned  
16 for at least ten years for his long-term efforts to alleviate  
17 human suffering, including his own.

18 The government suggests in its brief that Judge Hatter  
19 rejected Mr. McCormick's medical experimentation claim and found  
20 that Mr. McCormick's marijuana research operation was a secret  
21 kind of operation. (Gov't Opp. at 10.) Not only does the  
22 government misrepresent the hearing transcript but the government  
23 attempts to perpetrate a falsehood on this court.

24 At the bond hearing, Judge Hatter was merely inquiring of  
25 Mr. McCormick regarding the secrecy representation made by the  
26 government. (Reh'g Tr. at A48.) Mr. McCormick's counsel then  
27

28 // It is noteworthy that the government failed to provide  
this court with such documentation in order to allow for an  
unbiased analysis.



1 set forth sufficient reasons to establish that there was, in  
2 fact, no secrecy involved whatsoever, pointed out that the  
3 marijuana plants could be seen from the street in plain view,  
4 that McCormick has a past history of being open about his  
5 promotion of medicinal marijuana, and that he readily gave  
6 medical marijuana explanations at the time of his arrest. (Reh'g  
7 Tr. at A48-A49.)<sup>4</sup>

8 Even accepting as true, for the purpose of this bail  
9 hearing, the government's allegations that Mr. McCormick was  
10 growing marijuana with grow lights and potting soil, and in  
11 large quantities (although Mr. McCormick disputes the  
12 government's amount) this factor is the least important in any  
13 determination of the appropriate amount of bond. (Def's. Motion  
14 at 11, fn 4.)

15 B. Reduced Salary

16 Mr. McCormick's salary has changed significantly since the  
17 last bond hearing. Without meeting his publisher's deadlines he  
18 is no longer receiving his monthly payments on his one time, one  
19 year advance. Apparently the government still is confused about  
20 this material new difference in defendant's income. Mr.  
21 McCormick would have received an annual total of advances of  
22

23 <sup>4</sup>/ The government's representations in this regard are  
24 even more egregious because, at the time of the hearing, the  
25 government knew, but hid from Judge Hatter, the fact that law  
26 enforcement officers were aware that Mr. McCormick was an  
27 advocate of medical marijuana, suffered from cancer, and used  
28 medical marijuana to alleviate his symptoms. (Def's. Motion at  
6, fn 3.) What is more, the government also hid that information  
from defendant for many months. Id. The government fails to  
address this serious concern in its response even though this  
information, newly discovered by Mr. McCormick, is another  
sufficient grounds for review pursuant to 18 U.S.C.  
3142(f)(2)(B), especially since Judge Hatter seriously considered  
such misinformation.

1 \$250,000 if he had continued to meet deadlines. Since he has not  
2 been able to meet these deadlines, he has not received his  
3 monthly installments. As a result, Mr. McCormick has not  
4 received anywhere near his expected salary this year. As a  
5 consequence, Mr. McCormick has been forced to change his  
6 residence, a fact that the government admits. (Gov't Opp. at  
7 16.)

8 Defendant fails to understand the significance of the  
9 government's representations regarding his writings. The  
10 government's concession that Mr. McCormick was writing a book  
11 supports one of the basic claims of Mr. McCormick for this  
12 hearing. For some reason the government appears disturbed that  
13 the last writing they claim to find only occurred in 1996.

14 Without dispute, defendant was working on a book, which  
15 already had an outline, table of contents, and some chapters.  
16 (Gov't Opp. at 7, fn 1.) Defendant denies the government's  
17 unsupported allegation that there was no evidence that defendant  
18 worked on his publications after 1996. In fact, defendant  
19 continued to work on his publications through 1996 and 1997, up  
20 to the week of the seizure of his computer. Further, defendant  
21 was in a period of research. He was working with plants, and was  
22 taking extensive handwritten notes. Because it is nearly  
23 impossible to write about the results of research while that  
24 research is ongoing, his printed work was less extensive during  
25 this time.

26 Contrary to the government's other claim that the large  
27 amount of Mr. McCormick's bond is "irrelevant" (Gov't Opp. at  
28 16.), the law requires that the court examine the amount of bond.

1 As previously stated, the Bail Reform Act requires the release of  
2 a person facing trial under the least restrictive condition or  
3 combination of conditions that will reasonably assure the  
4 appearance of the person as required and the safety of the  
5 community. United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir.  
6 1991); Motamedi, 767 F.2d 1403, 1405. (Def's. Motion at 11.)

7 Under the facts here, \$500,000 is excessive, since  
8 personal recognizance or a smaller bond will reasonably assure  
9 defendant's presence before the court. It seems clear that, if  
10 Judge Hatter would have been fully informed regarding such facts  
11 as presented here and the fact that defendant was not charged  
12 with distribution, he would not have increased the initial bond  
13 set by the Magistrate.

14 C. Passport

15 While Mr. McCormick's statement of loss of his passport  
16 may not, alone, constitute a new material fact, it is a new fact  
17 that is relevant to the factors considered upon review of bond.  
18 In context with the other new material facts presented, his  
19 affidavit is further evidence that a reduced bond amount will  
20 reasonably assure defendant's presence as required.

21 D. Length of Residence and Community Ties

22 Similarly, the new information relating to Mr. McCormick's  
23 length of residence adds to the materiality of the new facts  
24 available since the last hearing with Judge Hatter. In context  
25 with the other material new information, the clarity of the issue  
26 that defendant had resided within the district for at least five  
27 complete months is new information. Further, defendant also  
28 presented in his motion new information regarding numerous

1 relatives who also live within the district.

2 In sum, Mr. McCormick has presented material new infor-  
3 mation which allows a review of bond and bond conditions. The  
4 government's repeated references to the dropped charges of  
5 distribution are not persuasive on the issue of determining bond.  
6 Mr. McCormick requests that this court grant his motion to modify  
7 his bond to personal recognizance or a reduced bond amount.

8 III

9 MEDICAL MARIJUANA

10 Defendant presented to this court substantial and well-  
11 documented research establishing the medicinal benefits of  
12 marijuana (Def's. Motion at 19-25, and Exhibits B through R.) In  
13 its response, the government seeks to persuade the court that  
14 possession and use of marijuana is unlawful under federal law as  
15 a Schedule I substance pursuant to 21 U.S.C. §812, and that,  
16 under no circumstances, can this court condone or allow its use.  
17 (Gov't Opp. at 18-28.) Defendant does not dispute the fact that  
18 marijuana is presently a Schedule I substance under federal law,  
19 although the agency responsible for such scheduling, the Drug  
20 Enforcement Agency, has recently admitted that marijuana has  
21 medicinal value and there exists sufficient grounds to remove  
22 marijuana from Schedule I designation. (Def's. Motion at 20-21,  
23 Exhibits J and K.)

24 The government rigidly suggests that this court should not  
25 be concerned that numerous states have espoused and legalized the  
26 medicinal use of marijuana. (Def's. Motion at Exhibit C.) This  
27 simplistic analysis of the complex problem of sovereignty as it  
28 relates to conduct considered by many to be therapeutic and

beneficial, ignores substantial issues and is contrary to the finding of the only federal judge to pass on the issue of California's Compassionate Use Act, enjoining the government from interfering with a physician's recommendation of medicinal marijuana. See Conant v. McCaffrey, 172 F.R.D. 681 (N.D. Cal. 1997); Def's. Motion at 20, 24.

In fact, there is nothing under federal law that restrains this court from removing drug testing as a condition of pre-trial release, and in view of the fact that numerous states now allow for medical use of marijuana, such a course of judicial restraint would seem appropriate. Further, the defendant is not asking the court to declare that marijuana is not a Schedule I substance, but is only asking the court to remove drug testing as a condition of release, a significant distinction. Mr. McCormick meets the qualifications which allow him to use medical marijuana as provided by the California Compassionate Use Act, and it seems inappropriate for the court to create such an unnecessary barrier between a physician and his patient.

Since Mr. McCormick intended to be using marijuana in full compliance with California state law, it seems a far better course of action for the executive branch of government to decide what posture to adopt in such prosecutions, if they intent to do so in the face of the California Compassionate Use Act, with potential defendant's having their full panoply of rights, including claims of selective prosecution violative of their Constitutional rights. Additionally, if the executive branch of the government itself wishes to prosecute individuals for their invocation of such a right under state law, then they must also

1 be held to a requirement that they do so in an evenhanded manner,  
2 not in violation of equal protection.

3 IV

4 CONCLUSION

5 For the foregoing reasons, defendant respectfully submits  
6 that the court should grant his motion for reconsideration of  
7 bond and bond conditions, and modify the conditions of his  
8 release to eliminate any requirement that he be subjected to drug  
9 testing.

10  
11 Dated: March 11, 1998

12 Respectfully submitted,

13  
14 DAVID M. MICHAEL  
15 Attorney for Defendant  
16 TODD MCCORMICK  
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PROOF OF SERVICE

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The undersigned declares:

I am a citizen of the United States. My business address is Pier 5 North, San Francisco, California 94111. I am over the age of eighteen years and not a party to the within action.


On the date set forth below, I caused a true copy of the within DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF BOND AND MODIFICATION OF BOND CONDITIONS OF RELEASE to be served on the following parties in the following manner:

Mail  Overnight mail  Personal service  Fax

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on March 12, 1998, at San Francisco, California.

  
\_\_\_\_\_  
PENELOPE ROSE