No. 10-50219, 10-50264

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES C. LYNCH,

Defendant-Appellant.

GOVERNMENT'S SECOND BRIEF ON CROSS-APPEAL

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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No. 10-50219, 105264

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES C. LYNCH,

Defendant-Appellant.

GOVERNMENT'S BRIEF ON CROSS-APPEAL

I

ISSUES PRESENTED

A. Whether the court erroneously admitted evidence proving overt acts and elements of the charged conspiracy.

B. Whether defendant's entrapment-by-estoppel defense was legally invalid because he failed to establish a prima facie case.

C. Assuming the entrapment-by-estoppel defense was valid, whether the court properly excluded repetitive and inadmissible evidence concerning it.

D. Assuming the entrapment-by-estoppel defense was valid, whether the court properly instructed the jury on it.

E. Whether the court properly instructed the jury on nullification after finding it had been injected into the case by defendant's voir dire questioning.

F. Whether the court properly refused to instruct on the post-trial consequences of guilty verdicts.

G. Whether the court plainly erred in its handling of jury communications before deliberations.

H. Whether the court properly denied defendant's Brady-based new-trial motion where there were no undisclosed materials.

J. On cross-appeal, whether the court erred by refusing to impose a five-year mandatory-minimum sentence by creating a new exception to 18 U.S.C. § 3553(f)(4) and USSG § 3B1.1's safety-valve provision.

K. On cross-appeal, whether the court's strongly stated views and unusual efforts opposing the required mandatory-minimum sentence warrant reassignment.

L. Whether the court made other errors at sentencing.

II

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE DISTRICT COURT

Defendant Charles Lynch ("defendant") appeals his convictions for conspiracy to possess, distribute, and manufacture controlled substances, and related charges arising from his ownership and operation of a marijuana store. The government appeals the district court's sentence below the applicable five-year mandatory minimum.

1. Offense Conduct

In Summer 2005, defendant opened a marijuana store in Atascadero, California. (PSR ¶ 10).[1] The city received complaints about customers' disruptive behavior, and in January 2006 closed the store for zoning violations. (Id.). In February 2006, defendant leased a new store location in Morro Bay, California, and opened it in April 2006, calling it Central Coast Compassionate Caregivers ("CCCC"). (PSR ¶ 9). As part of his operation, defendant obtained permits and licenses from the City of Morro Bay, and employed at least ten people to help run

[1] "CR" refers to the Clerk's Record and is followed by the document control number. "AOB" refers to appellant's opening brief, "ER" to defendant's Excerpt of Record, and "GER" to the government's Excerpts of Record; each is followed by page references. "GX" and "DX" refer to government's and defendant's exhibits, respectively, followed by exhibit number. "PSR" refers to the Probation Office's Presentence Report, followed by paragraph number.

the store, grow marijuana, and provide security. He also worked there most days, assisted with sales, oversaw employees, controlled the store's bank account, and carried cash in a backpack between his home and the store each day. (Id.).

In June 2006, San Luis Obispo Sheriff's Department ("SLOSD") deputies began surveillance and undercover operations at the CCCC. (PSR ¶ 11). In March 2007, DEA agents searched the CCCC and defendant's home. (PSR ¶ 10). They seized bulk marijuana, hashish, and marijuana plants from the store, and small amounts of marijuana and over $27,328 from defendant's home. (PSR ¶¶ 29-31). They also seized CCCC business records from both the store and defendant's home. (PSR ¶ 33-37). After the searches, defendant re-opened his store and operated it for five more weeks. (PSR ¶¶ 7, 30; ER 409).

2. In-Limine Rulings on Medical Marijuana

On July 14, 2007, defendant was charged in an indictment containing five charges: narcotics conspiracy, in violation of 21 U.S.C. §§ 846, 841(a)(1), 856, and 859 (Count One); aiding and abetting the sale of marijuana to minors, under the age of twenty-one, in violation of 21 U.S.C. §§ 841(a)(1), 859(a), and 18 U.S.C. § 2 (Counts Two and Three); possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count Four); and operation and use of a drug-involved premises, in violation of 21 U.S.C. § 856(a)(1) (Count Five). (CR 1).

Under the federal Controlled Substances Act ("CSA"), marijuana is a Schedule One controlled substance with no acceptable medical use that is illegal to possess, manufacture, or distribute in all circumstances. 21 U.S.C. § 812; Gonzales v. Raich, 545 U.S. 1, 27 (2005). The government moved in limine to exclude evidence and argument based on California law, which in limited circumstances does not criminalize medical marijuana use. (CR 71; ER 474-506).[2] It also sought to exclude potential defenses inconsistent with the charged statutes such as mistake of law, advice of counsel, or entrapment-by-estoppel based on statements of state officials. (Id.).

Defendant "partial[ly]" opposed. (CR 82; GER 1-10). He conceded Ninth Circuit law expressly precluded reliance on "the advice of state agent[s] in the presenting an entrapment by estoppel defense to federal crimes." (GER 5). However, he claimed the "jury should know that the elected officials of his home town [and] his state, his local police department, and a wide majority of his fellow Californians believed that his decision to operate a medical marijuana dispensary in Morro Bay

[2] California's two primary medical marijuana laws are: (1) the Compassionate Use Act of 1996 ("CUA"), passed by voters as Proposition 215, Cal. Health & Saf. Code § 11362.5; and (2) the Medical Marijuana Program Act ("MMPA"), introduced in pertinent part as Senate Bill 420, and enacted by the legislature in 2003, Cal. Health & Saf. Code § 11362.7-.9. See generally People v. Mentch, 195 P.3d 1061, 1063-64, 1066-72 (Cal. 2008). In district court, the CUA was frequently referred to as "Proposition 215," and the MMPA as "Senate Bill 420."

was a very good thing." He claimed local and state officials implied he would be "okay" if he followed their rules and claimed such evidence would show his "compliance with state law." (Id. & n.1). Defendant also sought to call witnesses to "talk about the nuts and bolts" of purchasing marijuana at the CCCC and argued that evidence concerning marijuana's medicinal use was "inextricably intertwined" with the government's case. (Id. at 5-6).

Two weeks before trial, the court granted the government's motion in substantial part. (ER 541-55). It concluded defendant's positions were either "incorrect as a matter of law" or "do not amount to a defense and hence would be irrelevant and confusing to the jury." (ER 543). It noted the absolute federal ban on marijuana and that defendant's knowledge or intent to violate the CSA was not an element of a charged crime. (ER 543-47). It said "defendant has not claimed that he was somehow misled by federal agents which might give rise to an entrapment or estoppel claim." (ER 544-45).

It found defendant had not articulated the relevance of the "nuts and bolts" of purchasing marijuana at the CCCC other than to advance precluded issues such as "the purported medicinal necessity [of] defendant's customers." (ER 545-46, 552-53). It also said witnesses on the nuts and bolts of the operation seemed "at best repetitive." (ER 545). It would consider such

evidence, however, if responsive to the government's presentation of evidence. (ER 545, 552-53). The court rejected the view that defendant's purported efforts to distribute marijuana for medical purposes would be "inextricably intertwined" with the government's evidence. (ER 546-47). It concluded by saying defendant appeared to be offering evidence to make an argument involving improper issues or to "obtain juror nullification." (ER 546).

Defendant did not contest the court's ruling, its finding that defendant was not raising entrapment-by-estoppel based being misled by on federal officials' statements, or its remarks on nullification. (ER 547).

3. The Secret Defense

Upon receiving discovery from defendant about medical marijuana, the government proposed a written order clarifying the court's in-limine ruling excluding, among other things, any entrapment-by-estoppel defense. (CR 99; GER 28-35). Defendant opposed. (CR 104; GER 36-38). The day before trial, the court held an in-camera conversation with the defense which revealed defendant planned to assert an entrapment-by-estoppel defense based statements by the DEA in a phone call. (ER 681-87). On each of the next three court days as jury selection began, the court considered the defense and held two additional in-camera discussions with the defense. (ER 759-77, 856-72, 1099-1102,

1126-53). The court concluded it would not disclose the defense to the government until after the jury was sworn, and the government would not learn its evidentiary basis until opening statements. (ER 748-49, 765-73, 775-77). The court decided to rule on the defense's sufficiency based on an in-camera evidentiary proffer. (CR 142; GER 51-98; see CR 185). Throughout these proceedings, the government objected to the in-camera discussions, to changes in the in-limine rulings, and to defendant's failure to disclose its defense. (ER 748-49, 778-82, 792-93, 857-73, 1099-1102). The court twice said in-camera that the government had been "clearly misled" and prejudiced by defendant's failure to disclose the defense. (ER 1118, 1136, 1139, 1142).

After the jury was sworn, the court informed the government defendant was raising entrapment by estoppel based on conversations with federal employees. (ER 1316). The government objected the defense had been excluded during in-limine proceedings. (Id.). The next day, the court considered the government's objections including the assertion that defendant had failed to provided notice of a public authority defense under Federal Rule of Criminal Procedure 12.3. (ER 1344-63). Defendant conceded that if Rule 12.3 applied, he had violated it, but the court held Rule 12.3 inapplicable. (ER 1350, 1360-63).

The court deferred ruling on whether defendant had made a prima facie case for the defense but decided to allow some reference to California law to (1) contextualize defendant's purported DEA call and (2) permit defendant to discuss efforts to establish and operate the store, including his contacts with local government. (ER 1362-72). It confirmed that the "nuts and bolts" and the "medical efficacy of marijuana" would be excluded along with defenses based on mistake of law and advice of counsel. (ER 1365-66, 1370-72).

After defendant testified about his DEA call, the government moved again to exclude the defense. (CR 150; ER 2375-81; GER 99-109). The court ruled the defense could proceed. (ER 2394-2412). However, because defendant had never mentioned sales to under-21 minors in his DEA call, it did not permit the defense for Counts Two and Three. (ER 2413-16, 2971-72).

4. Trial

a. Voir dire and the nullification instruction

During voir dire, the court and attorneys questioned jurors. Many jurors expressed confusion, difficulty, or disagreement about the differences between California's medical marijuana laws and the federal prohibition on marijuana. (E.g., ER 978-80, 986-93, 995-1007, 1012-13, 1040-49, 1055-62, 1065-67, 1070-71). The court repeatedly explained that it would instruct

on the law, but jurors would determine the facts and make the decision as to guilt. (ER 930, 989-90, 999-1001, 1054-55). The court permitted defense counsel to tell jurors that the judge would only say what the law is, but that jurors would make the "ultimate decision." (ER 1075-76).

On jury selection's second day, one juror, then-designated "Juror No. 25," said she had "strong opinion[s]" on the difference between state and federal marijuana law and "sided with the state of California." (ER 1216). The court asked whether, despite the strong feelings, she "could put those feelings aside and follow the court's instruction on the law in this case." She said, "[b]ased on what I have heard so far, no," and that "I not only side with the state of California, I think that the federal law is seriously flawed." (ER 1217). She could follow the court's instructions only if something "persuaded" her that her "position was incorrect." (Id.). The court informed the jurors that federal law was "already on the books," so neither the court nor jurors could change it. (Id.). While the court could explain "what the law is" and answer legal questions, it was beyond the trial's scope to "justify the law." (ER 1217-18).

Juror No. 25 said she understood this explanation, twice more said she could not follow an instruction on the elements of the federal crime of possession and distribution of marijuana,

and expressed other doubts about the case. (ER 1218, 1236, 1238-39).

At side bar, the defense refused to agree to dismiss Juror No. 25 although she had three times said she could not follow the law. (ER 1258). The government warned that defense counsel previously asked questions that seemed to suggest jury nullification, and the court advised the government to object if it happened again. (ER 1259).

Soon thereafter, defense counsel chose to question Juror No. 25 before the venire:

> [DEFENSE COUNSEL]: [Y]ou mentioned that you felt the federal laws were seriously flawed. Why is it you feel that way?
>
> [PROSECUTOR]: Objection, Your Honor.
>
> THE COURT: I'll sustain the objection.
>
> [DEFENSE COUNSEL]: You also mentioned that it would be difficult for you to follow the law as instructed by the judge. . . . Do you understand that the court is going to instruct you on the law but will not instruct you about the decision that you need to come to after being instructed on the law? Do you understand the difference.
>
> [PROSECUTOR]: Objection. Misstates the law.
>
> THE COURT: I'll sustain the objection. You can attempt to rephrase the question.
>
> [DEFENSE COUNSEL]: Do you understand that the ultimate decision as to whether to find a person guilty or not guilty is your decision?
>
> JUROR: You finally said something I can relate to. I understand completely. I believe there is something called jury nullification, that if you believe --

THE COURT: No --

JUROR: -- the law is wrong --

THE COURT: No. Let me stop you --

JUROR: -- you don't have to convict a person. That's it.

(ER 1263-64).

The court excused the venire. (ER 1264). The court said defendant had evoked Juror No. 25's response. (ER 1266 ("you did that")). It had been clear the juror could not be rehabilitated, but counsel had asked questions "so close to jury nullification that it's somewhat surprising." (ER 1266). While counsel asserted he "sincerely did not see that coming," the court responded, "Counsel, you must be smarter than that." (ER 1267-68). The court further noted it "was clear" that Jury No. 25 "would engage in nullification" if kept on the jury. (ER 1268). The court told the defense, "you interjected [nullification] into play at this point in time. The question is what should be done." (ER 1274, 1277-78).

The government requested the court give the instruction given in United States v. Rosenthal, 266 F. Supp. 2d 1068, 1085 (N.D. Cal. 2003), aff'd in part, rev'd in part, 454 F.3d 943, 947 (9th Cir. 2006), and affirmed by this Court. (ER 1275-76). The court agreed to include that instruction. (ER 1276). Defendant suggested the court instruct to follow the law. (ER 1276-77). The court rejected this approach because

nullification had already "been injected" by the defense and it was "[t]oo late" to merely instruct to follow the law, as that instruction had been given "ad nauseum" and there still was a juror "indicating that she doesn't feel she has to follow the law . . . in response to the defense questions." (ER 1277-79). Instead, the court instructed that:

> Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a . . . juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.

(ER 1282).

The court asked each juror whether they could follow that instruction. All jurors except Juror No. 25, who was later excused, said they could. (ER 1283-86).

b. Defendant's opening statement

After a jury selection with controversy about the differences between California and federal marijuana law, defendant highlighted his connection to California during his opening statement. Defendant referred to the CCCC's customers five times as "3000 or so Californians" or "Californians." (ER 1395). Prospective character and other witnesses were also described as "some of your fellow Californians." (ER 1399). At the conclusion, the defense told the jury it would ask them

to find defendant not guilty and "send him back to his home, his California home." (ER 1400).

c. The government's case

The government's evidence focused on defendant's involvement in the CCCC's distribution and growing of marijuana and related activities at the Morro Bay store from its opening in April 2006 through the DEA's searches in March 2007. The government offered two categories of evidence: (1) surveillance of and undercover operations involving the CCCC and its operators, as testified to by SLOSD officers, and (2) analysis of records, marijuana products, and other evidence seized from defendant's home and the CCCC, during testimony by federal agents.

With respect to the first category, four times SLOSD deputies oversaw purchases from the CCCC by a confidential informant of bulk marijuana, hashish and/or marijuana plants. (ER 1489-1522). An SLOSD detective posing as a customer twice completed similar undercover purchases. (ER 1522-39, 1641-60). Deputies also observed between 50 and 100 customers leaving the store three times during longer surveillance. (ER 1417, 1660-70).

CCCC employees were also observed distributing the store's products to people and places outside the store. In May 2006, the SLOSD observed employee John Candelaria distribute a package

to a man on the street outside the CCCC, and later deliver a CCCC shopping bag to a home associated with the man. (ER 1407-16, 1806, 2073, 2078, 2081). On July 12, 2006, the CCCC's security chief, Abraham Baxter, sold three-quarters of a pound of marijuana for $3,200 to an SLOSD undercover detective and an informant after first arranging the transaction in a recorded phone call the day before. (ER 1457-88, 1574-77, 1582-83; GX 3A; GER 758-61). On December 5, 2006, another CCCC security employee, Ryan Doherty, was seen twice leaving the CCCC and distributing marijuana. He was pulled over by the SLOSD while delivering marijuana plants, which he said he was doing for defendant. (ER 1713-41, 1726-27; GX 41-42; GER 762-63). On February 14, 2007, a CCCC employee was seen leaving the CCCC with a small box, which he sniffed multiple times before mailing it at a post office. (ER 1418-20). Throughout these and other SLOSD surveillance and undercover operations, defendant was observed frequently travelling between the store and his home with money or other items, or meeting with employees like Baxter. (ER 1416-17, 1428-34, 1539-40, 1650, 1654, 1657, 1660-67).

The government's second category of evidence included marijuana, money, and records seized at defendant's home (ER 1746-51; GX 47-51; GER 764-79), and records, computer files, bulk marijuana, hashish, marijuana plants, growing equipment,

and marijuana products like THC oils seized at the CCCC. (ER 1786-81, 1818-20, 1860-79, 1891-01). While the case agent testified that she counted 104 marijuana plants seized at the CCCC, DEA destroyed the rotting plants before the count was corroborated with video or photographs. (ER 1883-89, 2232-34). Accordingly, in the verdict on Count Four, the jury found defendant had not possessed over 100 marijuana plants on the day of the search, as requested by the government, but rather between 50 and 100 plants. (ER 3770).

The government offered records seized from the CCCC and summary charts of these records. These showed inventory of over 100 marijuana plants multiple times, purchases of over 3,000 total plants, and agreements with 50-60 customers to grow over 3,000 total plants. (ER 1947-73; GX 103-106, 108, 111; GER 810-20, 823-24). CCCC sales records confirmed by banks records and cash seized from defendant showed over $2.1 million sales and over 2,300 customers. (ER 1749-59, 1789, 1969-82, 2238-39; GX 50, 112-113, 115; GER 825-70; ER 3737-38). The government also analyzed records of purchases from CCCC suppliers, and using information about the strains and quantity on these and other documents, calculated that the conspiracy involved at least 153kg of bulk marijuana. (ER 1928, 1984-86, 2272-99; GX 165, 167; GER 873-908, 918).

The government also presented evidence of sales to under-21 customers including the transactions charged in Counts Two and Three regarding customer and employee Justin St. John. (ER 2007-20). Using customer files and related information, along with driver's license records, it admitted a chart showing the CCCC had 271 under-21 customers. (ER 1990-2006, 3778-82). It also showed CCCC sales room surveillance video of marijuana sales to under-21 customers. (ER 2020, 2052-86; GX 139-40; ER 3790-3802).

The records also reflected defendant's central role in the conspiracy, including that he signed the store's lease, and that his name or signature were on many store documents, receipts for supply of marijuana, the agreement forms for growing marijuana, the store bank account, and other material. (ER 1901-10, 1926, 1929-35, 1937, 1953-55, 1960, 1967-68, 1988, 2263-67, 2283-85; GX 89, 91, 98, 101, 106, 109, 166, 183, 184; GER 783-88, 792, 798-805, 814-17, 821-20, 909, 947-1002).

d. Defendant's case

i. Customer Beck

Defendant's first witnesses, Owen Beck, was a CCCC customer offered to testify about defendant's "character for law-abidingness." (ER 2021). The government expressed concern that Beck, who was missing part of one leg, lacked a sufficient foundation to establish defendant's character within the

community. (Id.). After conferring with defense counsel, the court said the witness would not testify about the store's operation, but defendant's "law-abiding nature." (ER 2023). The government noted its prior in limine request to exclude witnesses called "solely for the purpose to show that they were customers of the store and were ill to invoke sympathy." (Id.). The court warned the defense that it would strike the testimony if that was is only purpose. (ER 2023-24). Defense counsel said that Beck was not ill-looking but "a handsome man." (ER 2024). The court said the witness should "not . . . be testifying about his condition." Defense counsel said Beck would not, adding: "It's not relevant frankly." (Id.).

Despite these assurances, defense counsel asked Beck, who entered the courtroom on crutches (ER 2045),[3] how he knew defendant. (ER 2026). Beck replied, "[a]bout two years ago I was diagnosed with bone cancer and my oncologist at Stanford University prescribed me marijuana in order to alleviate my symptoms." (Id.).

The court excused the jury. (ER 2027). The court allowed defense counsel a proffer with Beck in which Beck's health and medical treatment continually arose. (ER 2028-29, 2032-33).

[3] After trial, the government presented evidence that Beck typically walked on a prosthetic limb without crutches. (GER 136-38, 161-62).

Defense counsel represented that Beck would establish a foundation for defendant's law abiding nature as a customer of the store who observed the store's operations and defendant's compliance with state and local laws for ill customers. (ER 2027-47). On the store's operations, the court said that "the defense is, for lack of a better term, hell bent on getting those items which the court has already ruled they could not get into the evidence." (ER 2034). The initial testimony and proffer "made it evidently clear that there are so many [Federal Rule of Evidence] 403 problems with this witness," and that Beck's foundation to testify about defendant's law-abidingness was so limited that the testimony's strength "would be minimal." (ER 2040, 2044).

The government asked for a limiting instruction about the irrelevance of state law and the medical use of marijuana, but the court said it would strike the testimony and provide an instruction at the end of the case. (ER 2036, 2045-46). The court told the jury to disregard Beck's testimony. (ER 2050).

ii. Defendant's calls to the DEA

Defendant testified seeking to establish an entrapment-by-estoppel defense based on a telephone call to the DEA. Defendant said that in Summer or Fall 2005, he considered opening a marijuana "dispensary," noting that they were common in California, but there were none in his county. (ER 2355-56).

He read two California medical marijuana statutes, Proposition 215 and Senate Bill 420. (ER 2357-63, 2446-49; DX 420; GER 1011-26). He also read the Tenth Amendment to the Constitution "a couple of times." (ER 2363-64, 2559). Additionally, he did research on the DEA's website, where he learned that marijuana was illegal and classified in "schedule one" as a prohibited drug just like heroin, LSD, "ecstasy," and on a higher schedule than cocaine. (ER 2364-65, 2557).

Defendant decided to call the DEA. Using his phone bill as a reference, he testified that, in September 2005, he called a DEA number in Oakland to ask about "their policies regarding medical marijuana" and received the number of an office near him in Camarillo, California. (ER 2368-69; DX 421; ER 3701-02). Calling that second number with the same question, defendant spoke to an unidentified man who gave defendant a third DEA number in Los Angeles. (ER 2370). Defendant testified he called the third number and an unidentified man number gave him a fourth Los Angeles number. (ER 2370-71). According to defendant, a female answered the fourth number, "marijuana task force." (ER 2372-73). Defendant said he asked her, "what you guys are going to do about all of the medical marijuana dispensaries around the state?" (ER 2373). Defendant said he was then put on hold until a man came on the phone. (ER 2374). Defendant asked the same question to the man who, according to

defendant, "told me it was up to the cities and counties to decide how they wanted to handle the matter." Defendant's testimony continued:

> Q: And what did you say in response, if anything?
>
> A: Yes. Actually, then I said well, what if I wanted to open up my own marijuana dispensary.
>
> Q: And did he say anything in response to your next question?
>
> A: Yes. Actually, he seemed a bit perturbed, possibly may be the word, and he slowed his words down to make sure I understood him and he said it's up to the cities and counties to decide how they want to handle the matter.

(Id.). Defendant testified that the man's response "made sense" based on defendant's reading of California law and the Constitution. (ER 2378). Defendant explained that, under his interpretation of the law, the Tenth Amendment allowed the California legislature to make medical marijuana legal. (ER 2451-55).

On cross-examination, defendant acknowledged that he did not know the names, titles, or job functions of anyone on the four calls to DEA, and he never asked. (ER 2537-43). He was not sure, for example, whether the people on the first or third calls were receptionists, and all he knew about the identity of the person he spoke to on the second call was that he called the

local DEA field office. (ER 2538-40). He said the female on the fourth call answered "marijuana task force" but never said she was an agent or gave her title. (ER 2542-43). She never said whether she was a law enforcement officer, and he never asked. (Id.).

Regarding the man on the fourth call, who he claimed spoke to him about marijuana dispensaries, defendant admitted: he never told the man his name nor was he asked it; he never said where he lived; he never obtained the man's name or wrote it down; he never learned (or asked for) the man's title or any information about the man's job position or if he was a law enforcement officer. (ER 2542-45, 2576). The man on the phone did not say he had authority to speak for the DEA, and defendant did not ask whether he was the only person with whom defendant needed to speak. (ER 2565-66). Although defendant kept detailed business records, he was unaware of any notes he took of the call, nor sent a confirming letter. (ER 2571-72, 2576).

Regarding the facts he provided during the fourth DEA call, defendant admitted that he did not tell the man that he would be growing marijuana plants; that he would be selling hashish; that he would be selling marijuana to people under 21; or that his future store would be selling to thousands of customers. (ER 2545, 2548, 2550-51). Defendant also never called the DEA back after opening his store, including after he started selling

significant amounts of marijuana, marijuana plants, or to under-21 customers. (ER 2563-65, 2689-90). Defendant assumed the man on the fourth call had been to a marijuana dispensary but admitted that he did not know who the man was. (ER 2548-49). Nobody on the call discussed or referenced marijuana dispensaries' typical practices. (ER 2549-50, 2552).

During the fourth call, defendant never discussed the Tenth Amendment, Senate Bill 420, Proposition 215, his "confusion" about the law, or Schedule One substances. (ER 2558-63). There was never reference to what the law was, or the words "law" or "legal," and defendant admitted the person on the call did not tell him that marijuana dispensaries were legal. (ER 2555-56 ("Q: [T]he person never said it's legal, did they? A: No."), 2559, 2563). Defendant claimed he would not have opened his store if the people on his calls had told him it was not "okay," but admitted they never said it was "okay." (ER 2555, 2568). When asked if he would have opened the store absent the conversation with the DEA, defendant did not answer affirmatively, but instead said that "he would not have opened the store if they had told me not to." (ER 2813). He also declared that he did not "completely" rely on his call to the DEA to determine whether his store would be legal, because he also relied on his reading of California state law and the Tenth Amendment. (ER 2568).

iii. Challenges to defendant's reliance on the DEA phone call

During defendant's cross-examination, the government challenged whether defendant reasonably relied on the unidentified man's advice from the fourth DEA phone call to be misled about his marijuana operation's legality under federal law. Defendant admitted that, before and throughout CCCC's operation, he read memos and letters and had communications from various local officials indicating, among other things, that marijuana's use and distribution was prohibited by federal law regardless of California law, that he could be federally prosecuted, and that the CCCC's specific activities violated federal law. These included:

- A January 2006 Atascadero report on marijuana dispensaries stating that the federal CSA "prohibits the possession, cultivation, and dispensing of marijuana regardless of purpose." (ER 2648-54; GX 177; GER 921-24).
- A February 2006, memo by the Morro Bay police chief refusing to sign CCCC's business license application and stating that the federal "prohibition on possession and/or use of marijuana is still law" and that "following California law will not protect a person from prosecution under federal law." (ER 2671-81; GX 179; GER 934-36).
- A March 2006 Atascadero planning commission report stating that federal law prohibits all marijuana activities without exception, and distribution "even for medical purposes" under California law "could still lead to criminal prosecutions" without mention of city or county rules. (ER 2655-62; GX 178; GER 925-33).
- An April 2006 Atascadero city attorney report on the current state of the law regarding medical marijuana dispensaries saying that marijuana distribution, even

for medical purposes under state law, "could still lead to criminal prosecution" under federal law. (ER 2662-70; GX 185; GER 1007).

- A May 2006 county health department letter to defendant refusing to approve the sale of marijuana brownies at CCCC because "your business appears to be illegal under federal law." (ER 2690-95; GX 181; GER 938-39).

- A July 2006, email from the Morro Bay police chief refusing to sign CCCC's marijuana plant nursery permit, stating that growing and selling marijuana "violates federal law" even if state law permitted it. (ER 2683-90; GX 180; GER 937).

Defendant did not tell the Morro Bay police chief about his call to DEA when the chief refused to sign CCCC's business license, wrote a memo about the CCCC's violations of federal law, or later refused to approve defendant's nursery permit. (ER 2671-88). When county health board officials told defendant his business violated federal law defendant did not tell them about his DEA calls. (ER 2690-95). Nor did defendant call the DEA after these events to see if anything had changed since his September 2005 calls. He also did not call the DEA for clarification after its March 2007 warrants or soon thereafter when federal authorities sent defendant three notices stating they were going to forfeit over $50,000 of his cash seized during the searches. (ER 2700-08; GX 182; GER 940-46).

When asked if he believed he could still rely on what he had learned from the September 2005 DEA phone call after the DEA's March 2007 warrants, he said he could not remember his thoughts. (ER 2720). On redirect he said he had "always"

relied on the DEA call, but sometimes it was more in the "back of his mind." (ER 2813).

iv. Defendant's compliance with local law

In addition to his calls to the DEA, defendant testified about his efforts to open CCCC, including preliminary efforts in Atascadero and successful efforts in Morro Bay. This included defendant's compliance with local laws, such as obtaining a business license and permits from Morro Bay (which were admitted into evidence), meetings and communications with Morro Bay officials, extensive efforts to comply with each of his business license's eight provisions, and his understanding that his store "had the blessing of the City of Morro Bay Officials". (ER 2461-65, 2467-84, 2486-2501, 2713; DX 425, 428-31; GER 1031-44). Defendant bolstered his testimony with testimony from the Morro Bay mayor and city attorney. (ER 2783-2788, 2820-22).

v. Defendant's role in the conspiracy

Defendant testified he was uninvolved, unaware, and betrayed by Baxter's $3,200 sale to an undercover officer, and discussed his hiring of Baxter and employment relationship as well as rules and restrictions he had imposed on Baxter's activities. (ER 2508-17; DX 478, GER 1044-46). Defendant also called two witnesses who testified that they grew fewer marijuana plants than listed in their CCCC agreements. (ER 3009-18).

Defendant admitted a central role in and knowledge of CCCC's activities and operation. For example, he testified about his handling cash, paying for marijuana, and preparing the store's forms. (ER 2491-99). He monitored or participated in approving the store's plant supply and specifically acknowledged participating in several plant transactions involving as many as 300 plants each. (ER 2748-53 (admitting involvement in different shipments of 301, 10, 52, 44, 141, 95, and 41 marijuana plants); GX 183-84; GER 947-1002). He also admitted selling under-21 customers marijuana, and to the specific transactions and quantities reflected on receipts for the under-21 sales underlying Counts Two and Three. (ER 2753-58).

e. Rebuttal

DEA Special Agent ("SA") Deane Reuter testified in rebuttal. (ER 2825-51). The phone number in defendant's phone records for his fourth call to the DEA on September 12, 2005, was her number. (ER 2826). Defendant's third call was to a number handled by a receptionist. (ER 2833). SA Reuter said there was no "marijuana task force" at her number or in her building because task forces were joint federal-state operations and her office was federal. (ER 2830, 2854). She did not work in the same office as the DEA case agent who investigated defendant, and did not learn defendant claimed to have called

her phone number until defendant's opening statement, when someone called and told her. (ER 2852, 2858-59).

From checking records, SA Reuter knew she was working on September 12, 2005, and although not the duty agent, had been the person in her group working that day with the most marijuana case experience. (ER 283). She did not recall any conversation that day, acknowledged that she did answer questions from the public, but stressed that she never told people on the telephone that "state or local matters were relevant to federal law" because state or local matters "have nothing to do with federal law." (ER 2841-43). Nor did she know of a situation when she would have told someone that opening a marijuana store "would be referred to local officials." (ER 2843-44). On this point, she noted that "federal law has nothing to do with state and local officials" and that it did not "matter what state and local officials say or do." (ER 2844).

She had many times advised people running marijuana stores how to avoid prosecution, telling them to "close down your store or don't open your store." (ER 2845). She had never personally given advice that opening a marijuana store was a question of state or local law, and based on her work with agents in her enforcement group, she was not aware of any who would do so. (ER 2850). At the specific time of defendant's call, all the members of her group were involved in two on-going

investigations of marijuana stores; one targeting a single store in Los Angeles and the other multiple stores in Los Angeles and Northern California. (ER 2872-77). These investigations led to arrests and prosecutions. (ER 2873-74).

5. Verdict

The jury convicted defendant on all five counts. (CR 169, 175). On Count One, the jury found that defendant's conspiracy involved at least 100 marijuana plants and also at least 100 kilograms of marijuana, triggering a five-year mandatory-minimum sentence. (ER 3764-76); 21 U.S.C. § 841(b)(1)(B)(vii). On Counts Two and Three, the jury found that each crime involved over five grams of marijuana, triggering one-year mandatory-minimums. (ER 3767-68); 21 U.S.C. § 859(a).

B. JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 18 U.S.C. §§ 3731, 3742(a), and 28 U.S.C. § 1291. The district court entered its amended judgment on May 4, 2010. (CR 328). Defendant timely noticed his appeal on May 6, 2010. (CR 330). The government timely noticed its cross-appeal on May 28, 2010. (CR 336; GER 752-57). Defendant is on bond.

III

ARGUMENT

A. THE COURT PROPERLY ADMITTED PROBATIVE EVIDENCE OF OVERT ACTS AND ELEMENTS OF THE CHARGES

Defendant claims error in the court's admission of evidence he claims to have been "inflammatory" and "irrelevant." This includes testimony and evidence regarding: (1) Baxter's sale of marijuana to an undercover officer; (2) the transportation and distribution of marijuana outside the CCCC by three store employees; (3) the CCCC's sale of marijuana to under-21 customers; (4) strains of marijuana sold at the CCCC; and (5) the total dollar amount of CCCC marijuana sales and defendant's role in those sales. (AOB 32-40).

All this evidence was directly relevant to charges in the indictment, especially the conspiracy charged in Count One. Several of the acts defendant now objects to as prejudicial were listed in the indictment as overt acts. Defendant never moved to strike these or other parts of the indictment. (ER 438-44; GER 113-16). The evidence probative of these allegations was highly relevant to show defendant's guilt. Defendant's undeveloped arguments fail to clearly specify how this probative evidence was "inflammatory" or unfairly prejudicial under Rule 403. Viewed properly, this evidence's admissibility is straight-forward and defendant's arguments unfounded.

1. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. United States v. Alvarez, 358 F.3d 1194, 1205 (9th Cir. 2004). Trial judges have "wide discretion" in determining evidence's relevancy. Id. Preserved errors are reviewed for harmlessness and will be reversed only if the error more likely than not affected the verdict. United States v. Morales, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc). Where defendant did not object at trial, or where defendant asserts a different objection on appeal than he asserted at trial, review is for plain error. United States v. Chung, 659 F.3d 815, 833 (9th Cir. 2011). This Court may affirm on any basis supported by the record. United States v. Lemus, 582 F.3d 958, 961 (9th Cir. 2009).

2. Relevance in Conspiracy Cases

Evidence is relevant if it has it has "any tendency to make the existence of an element of a crime slightly more [or less] probable than it would be without the evidence." Jackson v. Virginia, 443 U.S. 307, 320 (1979). To be "relevant," evidence need not be conclusive or even strong evidence of a fact to be proved; rather, it need only have a "tendency" to establish the fact at issue. United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007). Under Federal Rule of Evidence 403, relevant evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice. Id.

Evidence tending to show the existence of a conspiracy is admissible even though such evidence does not implicate defendant. United States v. Vega-Limon, 548 F.2d 1390, 1391 (9th Cir. 1977). Once a conspiracy is established, the government need only present evidence of a "slight" connection between a defendant or a co-conspirator and the conspiracy. Alvarez, 358 F.3d at 1201-02. Every member of a conspiracy need not know every other member or be aware of all acts committed in furtherance of the conspiracy. E.g., United States v. Escalante, 637 F.2d 1197, 1200 (9th Cir. 1980). A defendant is liable for acts committed in furtherance of the conspiracy, so long as they were reasonably foreseeable. United States v. Alvarez-Valenzuela, 231 F.3d 1198, 1202 (9th Cir. 2000).

Moreover, when the government seeks to offer evidence of an overt act in a conspiracy, this Court has instructed that the link between overt act and the defendant is for the jury, not the court, to determine. United States v. Dicesare, 765 F.2d 890, 899-900 (9th Cir. 1985), as amended, 777 F.2d 543.

3. The Court Properly Admitted Evidence of Baxter's Marijuana Sale

Defendant argues that Baxter's $3,200 sale of diesel marijuana should have been excluded because there was no evidence of a "link" between the transaction and defendant. (AOB 35).

The argument is waived. A defendant waives an asserted error when he relinquishes it knowingly or intentionally, or causes or induces the error. United States v. Perez, 116 F.3d 840, 845 (9th Cir. 1997). Baxter's sale was charged as an overt act in Count One. (ER 442 ¶ 18; GER 115 ¶ 7). Defendant filed a short in-limine motion seeking to exclude the transaction. (CR 102). The government opposed partly based on Dicesare, 765 F.2d at 899-900, where this Court rejected the defendant's attempt to strike evidence of a co-conspirator's charged overt act with which the defendant was not directly involved. (CR 111; GER 43-45). In its tentative ruling, the court reasoned the event was admissible under Rule 403. (ER 40). During argument, defendant admitted the evidence was admissible:

> [T]hey allege it in the Indictment, and that's the conspiracy they want to prove. I don't like it. I don't see what their argument really are, but I guess I would have to concede that they do have a right to put on evidence to support it.

(ER 696-95). On hearing this, the court adopted its tentative ruling. (ER 696). Defendant knowingly abandoned the argument, and it is thus waived. Perez, 116 F.3d at 845.[4]

[4] Defendant threatened to renew his objection if the government proceeded without the Baxter overt acts in the indictment (ER 1315-17), but that prospect did not transpire, and the overt acts remained in the case. (ER 602 ¶ 7; GER 115 ¶ 7).

Even if not waived, the issue is controlled by Dicesare. As in Dicesare, it was proper for the jury, not the court, to decide whether the disputed transaction was part of the charged conspiracy. 765 F.2d at 899-900.

Alternatively, ample evidence connected defendant to Baxter's transaction. The deal occurred on a day defendant was working at the CCCC, and Baxter made reference to the diesel marijuana coming from defendant's store and said he could get other products from the store. (ER 1484-85, 1582-83, 1902-08; GX 3A, 91; GER 760, 792). The diesel marijuana Baxter sold was in frequent supply at the CCCC, including at the time of the deal, and defendant personally signed for payment on some diesel supply. (ER 1936-40; GX 101-02; GER 804-09). The SLOSD had observed Baxter and defendant together doing store business. (ER 1428-34, 1539-40, 1654, 1657). Defendant personally interviewed and hired Baxter, and knew about his six prior misdemeanors convictions before he hired him (ER 2724-28; DX 478; GER 1044); the two worked together most days the store was open in same room a few feet away, both very close to the store's marijuana supply (ER 1790, 2729-31; GX 89; GER 783-88); Baxter was frequently in the sales room and would sometimes be where large quantities of marijuana were prepared for distribution (ER 2742, 2745, 2747-48); and defendant advanced salary to Baxter. (ER 1975, 2496-97; GX 112; GER 826). There

was well more than the necessary "slight" connection to defendant.

4. The Court Did Not Plainly Err In Admitting Evidence that the Conspiracy Included Marijuana Distribution Outside the Store by Other Employees

For the first time on appeal, defendant challenges the admission of evidence proving distribution of marijuana outside the CCCC by employees Doherty, Candelaria, and the employee who delivered a marijuana box to the post office. (AOB 36-38). This evidence was directly probative of the narcotics conspiracy and sufficiently linked to it.

All these activities were conducted by defendant's employees during their periods of CCCC employment. (ER 1418-19, 1902-10; GX 89-92; GER 783-94). They were observed during or at the end of store hours, and observations of each employee began at the CCCC. Given that defendant himself hired the store's employees (ER 2721, 2724, 2727), and that the store distributed marijuana, there was a sufficient connection to the conspiracy.

Each set of employee activity had additional links to the conspiracy and defendant. Doherty left the CCCC and drove to meet a pickup truck, which then drove in tandem with Doherty to a retail store's parking lot where Doherty handed a small brown bag to the truck's driver before returning to the CCCC. (ER 1713-22, 1726-27). Later, Doherty left the CCCC with two brown bags that he put in his car and drove away with until pulled

over by an SLOSD deputy. Doherty's brown bags contained three marijuana plants with a CCCC receipt attached. (ER 1722-41; GX 41-42; GER 762-63). Doherty told an SLOSD officer that he worked at the CCCC, and, as a favor to the CCCC's owner, was bringing the plants to a grower who was going to grow marijuana and distribute it to the store. Doherty was released and drove with the plants to a residence. (Id.).

Doherty's delivery of three marijuana plants was specifically charged in the indictment. (ER 442 ¶ 25). As with the Baxter transaction, Dicesare controls, and for that reason alone, defendant's argument fails. Further, the shopping bags, the receipt, and Doherty's statements about defendant makes the event relevant to the conspiracy to grow marijuana plants and defendant's connection to this conspiratorial object. It also further ties Doherty's earlier distribution at the parking lot to the conspiracy and defendant. (ER 1713-22, 1726-27).

Candelaria's activities took place directly outside the CCCC where he met a man who had just left the CCCC. (ER 1408-11). After a short conversation with the man, Candelaria looked back and forth to observe the area and then gave the man a small brown bag (consistent with bags used for smaller CCCC sales) from inside his jacket. (ER 1411-13). At the end of the day, Candelaria took a brown shopping bag (consistent with bags used for larger CCCC sales), drove it to the address where the same

man's car was registered, and brought the shopping bag inside to several other men. (ER 1407-16, 1806, 2073, 2078, 2081). Like Doherty, Candelaria distributed packages similar to those used by the CCCC for its marijuana customers, which strengthened the connection already established by his employment, the proximity of events to the CCCC, and the evidence that Candelaria signed for CCCC plant purchases. (ER 1949-52; GX 106, 184; GER 814, 964-65).

In the February 14, 2007 transaction, a man known to SLOSD as a CCCC employee, but otherwise unidentified, left the CCCC with a small box, which he sniffed multiple times before mailing it at a post office. (ER 1418-20). It is reasonable to infer that the employee was insuring that marijuana odor was masked before he delivered the package to the post office and returned to the CCCC. His activities thus tend to show he was engaged in CCCC business.

As these events took place over the length of the conspiracy, they tended to prove the CCCC's continuous operation. The surveillance and undercover observations and the Baxter transaction also corroborated and supported the CCCC's historical records and drug quantity evidence. (See ER 3080 (government closing argument that jury could consider Baxter and Doherty transaction in drug quantity determination)).

5. The Court Did Not Plainly Err in Admitting Direct and Summary Evidence of Sales to Under-21 Customers

Defendant asserts error in the admission of two pieces of government evidence offered regarding marijuana sales to minors: (1) video footage from CCCC's security cameras of under-21 customers purchasing marijuana, and (2) a chart summarizing visits to the store by under-21 customers in March 2007. (AOB 36-38). Defendant claims the evidence is unfair because it tended to show CCCC marijuana sales were for recreational rather than medical purposes. (Id.).

The video evidence was 13 excerpts (lasting a total of about 20 to 25 minutes) taken from 9 1/2 hours of security video of CCCC's marijuana sales room from mid-March 2007 to March 29, 2007. (ER 2064-67). The excerpts depicted specific sales by store employees, identified by the case agent based on records as over age 18 at the time of the sale, to 10 different customers, identified as under 21. (ER 2064-79, 3199). The chart, government's Exhibit 140, was a summary spreadsheet reflecting the case agent's review of minor sales for the entire 9 1/2 hours of video from March 2007. (GX 140; ER 3797-3802). Exhibit 140 was derived entirely from another chart, Exhibit 139, which listed chronologically the day and time of each sale to an under-21 customer as reflected on the video and CCCC sign-in sheets. (ER 2057-61; GX 139; ER 3789-95). Exhibit 140 sorted

Exhibit 139 in order of the customer name rather than the time of the sale. (ER 2081).

Defendants never objected to the video on the basis he now asserts. Instead, he objected on customer privacy grounds (abandoned on appeal), and made one unspecified Rule 403 objection to a portion of the video. (ER 2064, 2066, 2069, 2070, 2080). Defendant raised a Rule 403 objection to Exhibit 140 on the ground that the total number of sales to individual minors was "irrelevant," but did not mention the recreational use of marijuana or object to Exhibit 139, from which Exhibit 140 was derived, besides an abandoned privacy objection. (ER 2059, 2083). Review is for plain error, and there was none.

An object of the charged conspiracy was distribution of marijuana to persons under 21, in violation of 21 U.S.C. § 859. (GER 113). The indictment also included a specific allegation that defendant and CCCC employees sold marijuana and THC products to "approximately 281 different individuals" under 21, plus two counts of aiding and abetting the sale of marijuana to under-21 store employee, Justin St. John. (GER 115).

The video was relevant to establish the conspiracy to violate § 859 and was circumstantially relevant to the charges concerning St. John, who was seen distributing marijuana plants in some excerpts. (ER 2067-69, 2077). It also was probative of defendant's participation in the distribution of marijuana to

under-21 customers because the video showed defendant in one of the sales. (ER 2069).

Defendant claims the evidence was not necessary because the government already introduced a chart listing each under-21 customer. Yet that chart, Exhibit 116, was based on each customer's first visit to the store and was not typically based on proven evidence of a specific sale. (ER 1998-2006; GX 116; ER 3778-82). By contrast, the video clearly reflected specific sales and with more evidentiary weight than historical records. Unlike the charts, the video also showed that the specific employees distributing marijuana were over 18, a required element of § 859. (ER 2068-69); see United States v. Durham, 464 F.3d 976, 980-81 (9th Cir. 2006). Exhibit 140, showed, like Exhibit 139, that the sales in the video excerpts were not isolated events or limited to a small portion of March 2007. Rather, given the repeat visits reflected in the chart, the evidence tended to prove that the sales to minors were part of a longer, extensive conspiracy to violate § 859. (See ER 2064-79, 3072-73 (government closing argument that video was evidence of "object of conspiracy" in Count One that defendant "distributed to individuals under 21.")).

Although none of the customers looked ill, there was no reference to this or to the recreational use of marijuana during testimony or argument or in any objection by defendant. In

fact, there is no "use" depicted in the evidence, merely distribution. Given the probative value of the evidence, the court did not abuse its wide discretion admitting it.

6. The Court Properly Admitted Evidence Concerning the CCCC's Marijuana Strains

Defendant challenges two pieces of evidence concerning the CCCC's different marijuana strains: (1) a reference to the strain "AK-47" on a price board, and (2) Government's Exhibit 100, a chart found at the store that depicted various strains, growing information, and the "type of high" associated with strains. (AOB 36-37). The challenged references were trivial, and the evidence not unfairly prejudicial.

The brief reference to "AK-47" brought no objection. It occurred while the case agent was testifying about the relationship between marijuana price and quantity on Exhibit 56, a photograph of a price list from the CCCC's sales room. (ER 1814-16; GX 56; GER 781). During the testimony, government counsel referenced the first four strains on that list:

> Q: And what was the pattern again?
>
> A: One gram was about $20, three-and-a-half grams ranged about $50 give or take, and 14 grams is around $200.
>
> Q: [A]gain, these are strains you either saw in the records or at the store itself, nebula, strawberry cough, TW, AK47?
>
> A: Yes
>
> Q: And those are strains of regular marijuana?

A: Some of those are shortened, but yes.

(ER 1816; GX 56; GER 781). The supposed "violent" nature of the AK-47 strain was not referenced then or thereafter, and there was no error admitting the relevant testimony.

Exhibit 100 combined three similar charts of marijuana strains, and was recovered in the sales room. (ER 1935-36, 3724-32). Defendant objected to its admission, arguing that its references to the "type of high" for each strain was unfairly prejudicial. (ER 1924). The court found any prejudice from references to the "high" did not substantially outweigh the document's probativity because it showed which strains the CCCC was growing and helped to differentiate the various strains, which the court said it had not previously understood itself. (ER 1924-25).

The court's reasoning was sound. The document was probative not only for the reasons the court specified, but also because it had information and handwriting probative of the CCCC's efforts to grow marijuana (ER 3724-26, 3728-31 (describing "weeks to grow each strain")), and because it assisted the case agent in determining which strains were grown at the store. (ER 1935-36). Strain information was also useful to calculate the total quantities of marijuana at the CCCC. (ER 1928, 1984-86, 2272-99). On the other hand, the government did not reference the "type of high" in testimony. (Id.). Nor is

it unfairly prejudicial for a jury in a narcotics case to see evidence that marijuana has a narcotic effect.

7. The Court Properly Admitted Evidence Regarding the CCCC's Total Marijuana Sales

The court abused no discretion in admitting evidence about the financial aspects of the CCCC, such as its total sales and defendant's control of the store's bank accounts and cash. (See AOB 38-39). This evidence was probative of the quantities of marijuana and defendant's role in the charged conspiracy, and the court limited any potential prejudicial effect.

As an overt act in Count One, the indictment alleged that between April 2006 and March 2007, defendant and his employees sold $2.1 million of marijuana and THC products. (GER 115 ¶ 3). Before trial, the government moved, on multiple grounds, to exclude a defense financial expert who purported to show that defendant profited less than $100,000 from the CCCC. (CR 108; ER 564-89). Defendant argued the testimony rebutted the idea that he became wealthy from the store, and showed the government's sales total was incorrect. (ER 592).

The court held that the total sales amount charged in the indictment was relevant to prove the scope and length of the conspiracy and the quantity of marijuana sold, and that defendant's expert,

> should be able to offer testimony to demonstrate that the $2.1 million figure is incorrect . . . , but there

> is no need for Defendant to attempt to offer evidence to the jury as to whether or not the dispensary's operation made him a wealthy man. If defendant is concerned about prejudice as to this point, he can propose a reasonable limiting instruction.

(ER 38; see also ER 630, 710).

Defendant never sought that instruction. The government proved the total sales amount by adding CCCC daily sales reports, as corroborated by bank account records and the cash found in defendant's backpack, which matched daily sales reports. (ER 1749-59, 1969-1982; GX 50, 112-13, 115; GER 768-76, 825-69; ER 3737-38). Defendant chose not to call his expert to challenge the government's sales calculations, but defendant explained at length his view of the CCCC's sales reports. (ER 2482-99). The government made no reference to whether defendant profited, and the parties redacted the indictment sent to the jury to remove all reference to profits. (See GER 110). During closing argument, the government argued that the $2.1 million total helped show the quantity of marijuana in the conspiracy. (ER 3080-82).

Defendant does not challenge the court's ruling on its expert, but argues that he was unfairly prejudiced by the admission of a check that defendant wrote to himself on the store's bank account, which DEA found in the backpack alongside $27,328 in cash. (ER 1759). This argument is grounded on the misleading statement that the court "refused to redact" the

check. (AOB 39). At defendant's request, the court did redact the $15,000 amount on the check, but left reference to the fact that the check was written to defendant because it was probative for showing defendant "controlled the account." (ER 1759-63; GX 51, GER 778).[5] Later, during an IRS agent's testimony, another copy of the check was received into evidence with the amount redacted, but with defendant's endorsement to himself remaining. Defendant did not object. (ER 2266-67, GX 161; GER 871-72). The IRS agent said defendant's endorsement demonstrated his control over the CCCC's account. (Id.). Defendant's failure to object at this later time forfeited his claim that the mere fact that the check was written to defendant was prejudicial. In any event, the fact defendant wrote checks on the account, including to himself, is more probative of his control and use of the account than his mere name on it.

In closing argument the government referenced cash seized from defendant's house, not to show defendant profited (AOB 39), but to prove the sales reports relied on by the case agent were corroborated by the cash found in defendant's backpack. (ER 3079-80). The government also used the cash in defendant's house, sales reports there, and the video of defendant

[5] Defendant's Excerpts of Record has the unredacted check, Government's Exhibit 51. (ER 3717). A copy of the redacted version received into evidence is in the Government's Excerpts. (GER 778).

controlling the store's cash resister, to prove defendant had knowingly joined the conspiracy. (ER 3079-80).

In sum, the challenged financial evidence was not used to show defendant became wealthy, and was relevant to prove he had a central role in the conspiracy and responsibility for the all CCCC marijuana sales. There was no error.

8. Any Hypothetical Error Was Harmless

Even if the court had excluded some or all of this evidence, it would not have affected the verdict. Though the evidence was probative, it represented only portion of the government's affirmative evidence. Defendant himself eventually admitted the elements of the charges against him. (ER 2748-58; see also ER 337-38). Nor has defendant articulated any unfair prejudice undermining confidence in the verdict. Defendant suggests the evidence unfairly rebutted his entrapment-by-estoppel defense by countering his "strict compliance with local rules," and his "reasonable reliance on the DEA phone call." (AOB 36, 38). Yet the challenged evidence was offered in support of allegations in an indictment returned long before defendant disclosed his defense and presented primarily in the government's case-in-chief, and defendant proposed no limiting instructions. The jury also clearly was not inflamed, as it determined the government had not proved over 100 marijuana plants seized at the CCCC, as charged in Count Four.

B. DEFENDANT'S ENTRAPMENT-BY-ESTOPPEL DEFENSE WAS LEGALLY INVALID

Defendant claims error in some of the court's evidentiary rulings and jury instructions regarding his entrapment-by-estoppel defense. (AOB 20-32, 43-57). As explained further below, the court's rulings and instructions were correct. However, this Court should affirm on the independent basis, contrary to the district court's conclusion, that the defense was invalid as a matter of law, because there was insufficient evidence to establish a prima facie case. The defense never should have been presented to the jury.

1. Standard of Review

A district court may preclude a defense if the defendant fails to make a prima facie showing a reasonable inference as to each element. United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996). Whether a defendant has made a prima facie case of entrapment by estoppel is a question of law reviewed de novo. United States v. Brebner, 951 F.2d 1017, 1024 (9th Cir. 1991). Whether a jury instruction adequately covers a proffered defense is reviewed de novo. United States v. Morsette, 622 F.3d 1200, 1201 (9th Cir. 2010). If the instruction fairly and adequately covers the defense's elements, its precise formulation is reviewed for abuse of discretion and harmlessness. United States v. Woodley, 9 F.3d 774, 780 (9th Cir. 1993). Mere

proposal of an instruction is inadequate to preserve a claim for review; the defendant must object to the jury instructions with sufficient specificity to make clear the objection's basis. United States v. Hofus, 598 F.3d 1171, 1174 (9th Cir. 2010).

2. Defendant Failed to Establish Several Required Elements of Entrapment by Estoppel

Entrapment by estoppel is a "narrow exception to the general rule that ignorance of the law is no excuse." United States v. Spires, 79 F.3d 464, 466 (5th Cir. 1996). It is the "unintentional entrapment by an official who mistakenly misleads a person into a violation of the law." United States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9th Cir. 2000). The defense "rests on a due process theory" focusing on the conduct of "the government officials rather than on a defendant's state of mind." Brebner, 951 F.2d at 1025. It is the objective circumstances, not the defendant's subjective misunderstanding, that controls. United States v. Lansing, 424 F.2d 225, 226 (9th Cir. 1970) (defense inapplicable where "defendant was as a subjective matter misled, and that the crime resulted from his mistaken belief."); accord United States v. Burrows, 36 F.3d 875, 882 (9th Cir. 1994).

"A defendant has the burden of proving entrapment by estoppel." United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004). To carry that burden, the defendant "must show that

(1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) that [the defendant] relied on the false information, and (5) that [the] reliance was reasonable." Id. The defense is unavailable if the defendant was "put on notice to make further inquiries" about his conduct's legality. Lansing, 424 F.2d at 227.

As a matter of law, defendant did not satisfy the second through fifth elements of the defense, and each failure provides an independent basis for this Court to affirm the court's other rulings on the defense. For efficiency, the government also addresses here defendant's challenges to the court's jury instructions on the second and third elements concerning (a) historical facts, and (b) affirmatively misleading statements, (AOB at 47-51), and his related argument, as part of the historical-facts analysis, that the defense should have been applied to Counts Two and Three. (AOB 51-54).

3. Defendant Did Not Provide Sufficient Facts about His Crimes in His Short Phone Call to the DEA

Defendant failed to establish entrapment by estoppel's second element -- that defendant made the unidentified man on the phone aware of "all the relevant historical facts." Batterjee, 361 F.3d at 1216. It is improper to bind the

government unless the government official was made aware of all the necessary information before its erroneous advice. United States v. Triana, 468 F.3d 308, 317-18 (6th Cir. 2006); United States v. Trevino-Martinez, 86 F.3d 65, 70 (5th Cir. 1996). As the Second Circuit has explained, the disclosed facts must be compared to the indictment, and there is no defense where the defendant "did not disclose the conduct alleged in the indictment." United States v. Giffen, 473 F.3d 30, 42 (2d Cir. 2006).

Here, the court recognized that defendant had not met this standard with respect to the disclosure that he would be selling to under-21 minors, an offense set forth in a separate statute, 21 U.S.C. § 859, and in separate counts from others in the indictment. (ER 2414-16, 2971-72). Yet the court should have gone further, and excluded the whole defense. Defendant did not communicate to the government the most basic facts set forth in the indictment -- his own name and identity, his location or the location of his future store, or when and how it would operate. He did not discuss growing marijuana plants, selling hashish -- both objects of the conspiracy in Count One -- or give any idea of the large size or scope and duration of his operation with several-thousand customers and millions in sales.

Defendant's communication to the DEA was far too limited and hypothetical to fairly bind the government to its supposed

response. Where this Court has found entrapment by estoppel viable, a defendant engaged in a specific transaction or began an active course of potentially criminal conduct. See Batterjee, 361 F.3d at 1212 (purchasing a firearm from store); United States v. Tallmadge, 829 F.2d 767, 769-71 (9th Cir. 1987) (same); United States v. Clegg, 846 F.2d 1221, 1222-24 (9th Cir. 1988) (transporting weapons); United States v. Timmins, 464 F.2d 385, 386-87 (9th Cir. 1972) (applying for conscientious objector status to local draft board). That posture gave concrete context to the information provided by the defendant, and the government fair warning that it was dealing with something real with potentially important consequences to its advice. Here, defendant's short, anonymous "what if" hypothetical question provided no such notice.

Defendant makes two contrary arguments. First, he claims for the first time on appeal that the court should have instructed the jury the he could prevail even if he did not tell the DEA "every fact that might potentially be relevant to the lawfulness of his conduct." (AOB 47-49). Defendant does not articulate what alternative instruction should have been given, but his argument is contrary to the case law above requiring a defendant's to disclose "all" relevant facts about his crime. In any event, the argument is waived, for defendant himself, in his proposed jury instruction on this element, asked the court

to instruct that defendant had to make the government aware of "all the relevant facts." (ER 1594-95).

Second, defendant argues that the DEA agent with whom he spoke would know what he meant by reference to "marijuana dispensary," so that he made a prima facie case as to Counts Two and Three. (AOB 51). Preliminarily, a mere reference to "marijuana dispensary" does not provide identifying information about defendant, the location or times of his operation or whether, for example, he would not only distribute marijuana, but grow it as well (something that changed over the conspiracy). The argument also highlights the lack of evidence that defendant actually spoke to an agent. (ER 2542-43, 2576). Moreover, that record contains no information as to what DEA agents supposedly understood by defendant's bare reference to "marijuana dispensaries." SA Reuter testified that she knew what defense counsel "means" when using the term "medical marijuana dispensary" and that she knows "what one is." (ER 2862-63).[6] When asked if she understood that a person calling and asking about a medical marijuana dispensary was asking about "all of the state laws under which they may be legal" she said,

[6] Defendant suggests that marijuana dispensaries "are authorized to distribute to anyone eighteen and older." (AOB 52). Yet his citations reference age requirements only for a few California cities researched by the Morro Bay city attorney. (See id.; ER 3462, 3467-68, 3552-71).

"no." (ER 2870). There was no testimony that the term had a fixed meaning to cover all of the illegal activities set forth in the indictment, such as sales to under-21 customers. And defendant conceded he never spoke about typical marijuana store practices in his call. (ER 2549-50, 2552). Defendant did not meet his burden on this element.

4. Defendant Never Received the Required Affirmative Statement that His Conduct Was Legal

The court instructed the jury that the third element of the defense was that the official "affirmatively told the Defendant that the proscribed conduct was permissible" and that the permission from the official must be more than "vague or even contradictory statements." (ER 324). These instructions were correct, as they were both nearly verbatim quotations from this Court's opinion in Ramirez-Valencia, 202 F.3d at 1109. Even taking all of defendant's testimony as true, defendant never showed that a federal government official affirmatively told him his marijuana store was lawful. The defense was thus invalid.

This Court and others have consistently emphasized that it is "critical[]" to the entrapment-by-estoppel defense that there be evidence that the official "expressly" told the defendant that the conduct at issue was "lawful." Brebner, 951 F.2d at 1025. Thus, in Ramirez-Valencia, 202 F.3d at 1109, this Court held, as a matter of law, that an INS form stating it was

unlawful for a deported person to return to the country without permission within five years, was insufficient "because [the form] did not expressly tell defendant that it was lawful for him to return to the United States after five years."

Brebner, 951 F.2d at 1025-26, and Ramirez-Valencia, 202 F.3d at 1109, noted their distinctions from this Court's decisions in Tallmadge and Clegg, where there were affirmative representations as to the legality of the defendant's conduct or direct participation in the conduct itself. See Tallmadge, 829 F.2d at 777 (official affirmatively told defendant "that there was no problem owning a gun because the felony conviction had been reduced to a misdemeanor"); Clegg, 846 F.2d at 1222-23 (high ranking military official actively solicited, encouraged, and assisted defendant's arms smuggling).

Brebner also set forth the long history of cases in the Supreme Court, this Court, and other circuits requiring active, affirmative misleading by the relevant official. Brebner, 951 F.2d at 1026. One such case, United States v. Smith, 940 F.2d 710 (1st Cir. 1991), is instructive. There, the First Circuit held that "mixed messages" or "conflicting indications" sent by a federal agent were insufficient as a matter of law to establish entrapment by estoppel. Id. at 715. While the agent told defendant he could not legally possess a firearm, he also told the defendant he could keep his firearms to facilitate his

work for the government. Id. Dispositive was that the agent never "represented that keeping the guns was, in fact, legal." Id. The court thus found any reliance by defendant on the mixed messages unreasonable as a matter of law. Id.; see also United States v. Eaton, 179 F.3d 1328, 1333 (11th Cir. 1999) (no defense as a matter of law where federal official's statement "could be construed several ways").

Defendant did not satisfy this element. His purported facts are weaker than Brebner's and the immigration cases from this Circuit. Defendant confirmed that his short conversation with an unnamed person at DEA never directly contained an explicit affirmative statement regarding his later conduct's legality under federal law. (ER 2555-56, 2559-60). Moreover, assuming the person at DEA was an authorized official, the representation about what DEA was going to do about marijuana stores in California, and defendant's hypothetical plan to open a store -- "it's up for to the cities and counties to decide how they want to handle the matter" -- could be interpreted several ways beside a statement that cities and counties would determine their legality. It could have meant, for example, that DEA did not involve itself in opening or permitting marijuana stores, which was handled by cities and counties; that the speaker felt city and county officials were best positioned to handle the proliferation of marijuana stores, including defendant's; that

cities and counties were the cause of the proliferation of marijuana stores; that DEA would assist in closing dispensaries only if asked by cities and counties; or that DEA was basing its enforcement priorities and actions on action by cities and counties. At best, this was an ambiguous statement, and far from the affirmative statement of legality required. Courts have consistently held that the defense cannot be grounded on a "vague or even contradictory statement" or an ambiguous one. Ramirez-Valencia, 202 F.3d at 1109.

Defendant appears to have relied on the DEA's failure to tell him to stop. When asked whether he would have opened the store without the conversation with the DEA, he did not answer affirmatively, but instead said "he would not have opened the store if they had told me not to." (ER 2813). A failure by the government to inform or take action with respect to a defendant does not qualify as "affirmatively misleading." United States v. Hancock, 231 F.3d 557, 567-68 (9th Cir. 2000); Lavin v. Marsh, 644 F.2d 1378, 1382 (9th Cir. 1981) (party claiming estoppel cannot rely on failure to inform or assist).

Defendant claims that the court should have instructed the jury that he could have been "affirmatively mislead" either "expressly or impliedly." (AOB 49-50). This is counter to the cases discussed above. Defendant cites Batterjee for the proposition that an "affirmative statement need not be

expressed" (AOB 50), but the case holds no such thing. Batterjee was an unlawful-firearm-possession case where two federally licensed dealers "affirmatively represented" to the defendant that he would be eligible to purchase the firearm if he provided photo identification and proof of residency -- advice that was wrong. 361 F.3d at 1218. Defendant cites Raley v. Ohio, 360 U.S. 423, 438 (1959), for the proposition that statements can be combined with conduct to show active misleading (AOB 49-50), but this is merely consistent with Clegg and this Court's other holdings that affirmative misleading can include direct conduct with the defendant. Brebner, 951 F.2d at 1025-26. Here, there was no conduct at all, just a short, highly ambiguous phone conversation. Defendant's flawed instruction was an attempt to bolster his insufficient evidence on this element.

5. Undisputed Evidence Demonstrated that Defendant Never Actually Relied on His Phone Call with the DEA

Defendant failed as a matter of law to carry his burden on the fourth element -- that he actually relied on the DEA's erroneous advice in committing his crimes. Batterjee, 361 F.3d at 1216. He always knew that marijuana was illegal under federal law and could subject him to prosecution. The only legal misunderstanding (if at all) on which he relied came not from anything said to him in his DEA phone call, but from his

mistaken views about the interaction between California state law and the 10th Amendment. That mistake of law -- which had nothing to do with any actions by the government -- is not a valid basis for a defense. United States v. Schafer, 625 F.3d 639 (9th Cir. 2010), is directly on point.

There, a doctor and her husband were convicted of conspiring to manufacture and distribute large amounts of marijuana as part of a medical-marijuana business. Id. at 632-33. They challenged the district court's preclusion of evidence of their entrapment-by-estoppel defense. Id. at 637. They had submitted materials to show that two local detectives working with federal authorities erroneously told them their business was legal. Id. at 633-64, 637. The government submitted material seeking to negate the defense. Id. This Court assumed that the two officials were authorized to bind the federal government and that they erroneously advised the defendants that their operation was legal. Id. at 637-38. Schafer determined, however, that the defendants had not relied on the erroneous advice as a matter of law.

The defendants' distributed recommendation forms to all their "patients" saying that "cannabis remains illegal under federal law," and made no contrary representations. Id. at 638. Additionally, the doctor defendant admitted in another proceeding that marijuana was a Schedule One controlled

substance and that federal law prohibited her from prescribing it. The defendants submitted no admissible evidence refuting the recommendation form and doctor's admission about their understanding of federal law or supporting an inference that they relied on the law enforcement officers' representations. Thus, the Court held:

> the government's uncontested evidence established that Appellants were aware that marijuana was illegal under federal law during the time [law enforcement officials] allegedly stated that it was legal under federal law -- Appellants were not mislead into believing that their conduct was permissible under federal law.

Id. Accordingly, Schafer concluded that the defendants failed to make a prima facie case of entrapment by estoppel. Id.

This case is just like Schafer. In his in-camera pre-trial proffer about his defense, defendant informed the court that each customer at his store had signed a caregiver agreement. (GER 55-56). He admitted that "[s]ignificantly, and as relevant here, each caregiver agreement" provided:

> I understand medical cannabis could be prosecuted as a federal crime, but I also understand that medical cannabis have been granted to me by the California State Legislature based on the tenth amendment of the Constitution to the United States of America and that I expect my state, which granted me these rights to protect me from federal government prosecution.

(GER 56 (emphasis added)). Defendant attached a copy of his own caregiver form (entitled "Membership Agreement Form") containing this language and signed by him. (GER 86). Each customer's

form had defendant's name at the bottom. (Id.). In his in-camera submission, defendant said that the legal view quoted above was identical to his understanding in July 2007 when he was arrested, and submitted a report of his arrest containing his statements about the law to DEA agents. (GER 56, 92 ¶ 8). Further, at trial, defendant offered into evidence Baxter's employment agreement, dated in April 2006, just as the CCCC was opening in Morro Bay. (ER 2508-14; DX 478; GER 1044). Defendant had all CCCC employees sign this agreement as "regular practice." (ER 2508-14). The employment agreement reflected the same legal view as the customer agreements. (DX 478; GER 1044 ("I understand that Federal Law prohibits Cannabis but California [law provides an exception] based on the 10th Amendment") (emphasis added)).

Defendant also testified he visited the DEA website before his September 2005 phone call and learned that marijuana was a Schedule One prohibited drug. (ER 2364-65, 2557). Thus, as reflected in his testimony, his proffer to district court, and both his customer and employment agreements, defendant always knew, just like the Schafer defendants, that marijuana was illegal under federal law, and that it could get him "prosecuted [for] a federal crime." (GER 56). His relationships with all CCCC customers and employees was based on this understanding, and thus covered all activities charged in indictment. And

nowhere in any of these documents or any of these statements was there any reference to his September 2005 calls to the DEA. Thus, just as the defendants in Schafer did not establish a valid entrapment defense as a matter of law, defendant's defense was also invalid.

The only difference between defendant's understanding of federal law and the Schafer defendants' is immaterial. Defendant claimed to rely on a mistaken understanding about the interplay between California marijuana law and the Tenth Amendment. But that mistake of law provides no defense. All the charges were general intent crimes where knowledge of legality and mistake of law is irrelevant. See, e.g., United States v. Valencia-Roldan, 893 F.2d 1080, 1083 (9th Cir. 1990) (21 U.S.C. § 859); United States v. Delgado, 357 F.3d 1061, 1067 (9th Cir. 2004) (21 U.S.C. §§ 841, 846); United States v. Basinger, 60 F.3d 1400, 1405 (9th Cir. 1995) (21 U.S.C. § 856). That defendant relied on a misconception of state and federal law -- one that made no reference to statements by federal officials -- cannot be the basis for a defense.

Defendant testified at trial that he "always" relied on his discussion with the DEA, though sometimes in the "back of his mind." (ER 2813). However, this statement of subjective reliance is also insufficient as a matter of law to establish entrapment by estoppel, which is based on objective facts, not

defendant's subjective state of mind. As this Court has held, there is no defense where the "defendant was as a subjective matter misled, and that the crime resulted from his mistaken belief." Lansing, 424 F.2d at 226; Burrows, 36 F.3d at 882.

6. Any Reliance by Defendant on His Conversations with the DEA Was Objectively Unreasonable

To establish entrapment by estoppel's last element, defendant must show objectively reasonable reliance on the DEA's statement. That is, that "a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries." United States v. Weitzenhoff, 35 F.3d 1275, 1290 (9th Cir. 1993). Defendant should have inquired further once he spoke to the DEA in light of the ambiguous response he purportedly received, the incomplete information he provided, and his not knowing to whom he spoke or their job. (ER 2542-45, 2548-52, 2558-63, 2565-68, 2576). It was legally unreasonable for defendant to rely on his September 2005 conversation without further inquiry. See, e.g., United States v. Smith, 940 F.2d 710, 715 (1st Cir. 1991); Eaton, 179 F.3d at 1332-33 (reliance on ambiguous statement by minor official objectively unreasonable). Similarly, it was unreasonable to not further inquire when he was confronted with adverse results based on his store's illegality, such as the Morro Bay police chief refusing

to sign his business license and later his nursery permit, the county health board telling him his store was illegal, receiving numerous memoranda showing he could be prosecuted, and especially when the DEA executed warrants and seized his assets -- all while he was entering into agreements with his employees and customers indicating that his conduct was federally prohibited. Yet it is undisputed that defendant never called the DEA or a federal law enforcement agency to make further inquiries. (ER 2563-88, 2689-95, 2700-09). Any reliance was objectively unreasonable as a matter of law.

C. IN ANY EVENT, THE DISTRICT COURT PROPERLY EXCLUDED INADMISSIBLE AND REPETITIVE EVIDENCE OFFERED IN SUPPORT OF THE ENTRAPMENT-BY-ESTOPPEL DEFENSE

Defendant challenges the district court's exclusion of evidence offered in support of his defense including: (1) evidence about his compliance with Morro Bay's local rules and ordinances (2) references to the medical use of marijuana at the CCCC, (3) a videotaped statement by an SLOSD spokesman, and (4) statements by his former attorney, live and on the radio, concerning what defendant's told him about call with the DEA call. Because, as explained above, the defense was invalid as a matter of law, this Court may affirm without reaching the rulings' merits. However, the rulings were correct. Moreover, proper examination of the record shows that these rulings went to topics that were undisputed, of limited probative value, or

about which defendant offered extensive evidence. and therefore harmless.[7]

1. Standard of Review

As noted, evidentiary rulings are generally subject to abuse of discretion review and stringent harmless-error analysis. (See Section III(A)(1), supra). If a ruling precludes presentation of an entire defense, review is de novo. United States v. Lynch, 437 F.3d 902, 913 (9th Cir. 2006). Where, as here, a defendant is permitted to present a defense's substance to the jury, however, evidentiary exclusions are reviewed for abuse of discretion. United States v. Waters, 627 F.3d 345 (9th Cir. 2010).

2. The Court Abused No Discretion Excluding Cumulative and Inadmissible Testimony About Defendant's Compliance With Local Law

A central theme of defendant's brief is that the court's rulings hampered his defense by excluding evidence of his compliance with local law. (AOB 28-31). He points to the

[7] The court incorrectly rejected the government's contention that entrapment by estoppel was a public-authority defense under Federal Rule of Criminal Procedure 12.3, and the entire defense beside defendant's testimony should be excluded because defendant failed to give notice and the court found the government prejudiced. (ER 1136, 1139, 1335-38, 1342-63). The failure to comply with Rule 12.3 provides an independent basis for this Court to affirm the evidentiary rulings on the defense. Fed. R. Crim. Pro. 12.3; 1A Wright & Leipold, Federal Practice & Proc. § 211, at 545-46 (4th ed. 2008); Burrows, 36 F.3d at 881-82; United States v. Jackson, 1998 WL 149586 (N.D. Ill. July 25, 1998).

court's limitation on the testimony from Morro Bay's mayor and city attorney. (AOB 29). Defendant provides little context for these decisions, nor exactly what evidence was unfairly excluded. In fact, because defendant's theory was that the DEA had told him that his conduct's legality would be handled by city and county officials, and the court allowed extensive evidence about defendant's interaction with local officials and compliance with city and county rules. (ER 2102-07). It also let both the mayor and city attorney add to this evidence, though it properly limited their testimony to avoid repetition, hearsay, and other problematic aspects.

a. Defendant offered ample evidence on the undisputed issue of his compliance with local law

Proper evaluation of defendant's claim that his defense was harmed by the court's rulings requires consideration of what defendant does not discuss in his brief -- the evidence the court did admit about his compliance with city and county rules. Defendant testified he:

- Researched the organization of local cities and counties and their processes for business licenses.
- Approached a landlord and the county clerk's office in Cayucos, California to obtain a business license.
- Had discussions with a landlord and county officials in Cayucos as part of his licensing process.
- Secured a lease in Atascadero, then moved when found to have violated zoning ordinances.
- Went to "the City of Morro Bay and told them [his] intentions."

- Completed a business license application in Morro Bay, which he gave to the city planner.
- Picked up his approved business license from Morro Bay's city hall.
- Displayed the business license in his store.
- Complied with all eight provisions for obtaining Morro Bay's business license, including:
    - running background checks on employees to assure they had no felonies;
    - obtaining security workers to assure that customers had a valid California state identification and a doctor's recommendation;
    - preventing customers from smoking or consuming marijuana on premises;
    - not growing marijuana plants until he obtained a nursery permit;
    - obtaining and displaying his nursery permit, and providing officials with a diagram of his business; and
    - complying with the California Health and Safety Code.
- Met and conferred often with the Morro Bay city attorney.
- Understood that the Morro Bay mayor knew he had opened his store.
- Had discussions with a Morro Bay Police Department officer, filled out emergency contact information for the officer, and later updated that information.
- Discussed with the Morro Bay Police Department how to check his employees for felony records.
- Reopened his store after the DEA's search because he had "the blessing of the City of Morro Bay officials."

(ER 2462-91, 2519). The court also received into evidence defendant's business license application, business license, nursery permit, and the emergency information form defendant

provided to the Morro Bay Police Department. (ER 2469, 2472, 2478, 2489-09; DX 425, 428, 429, 431; GER 1031-43). Defendant further testified that he reviewed a memorandum from the Morro Bay city attorney regarding the city's proposed business license requirements for marijuana stores, which contained analysis of state marijuana laws and was admitted to "explain defendant's conduct." (ER 2801; DX 422; GER 1027-30).

The court allowed the Morro Bay mayor and city attorney to add to this evidence. The mayor testified that defendant had a good reputation for law abidingness and that defendant had called her before he opened his store. (ER 2783-88). The city attorney testified over government objection that he knew defendant since early 2006 and "[i]n my dealings with him [defendant] followed all of the rules of the City of Morro Bay and he was law abiding." (ER 2819-22). Further, the city attorney explained that he advised the city on all legal matters, wrote its ordinances, spoke to the city council daily, met with businesses, and spoke to business people at city council meetings and other events. Based on those interactions, over government objection, the city attorney testified that he "never heard anything other than [defendant] was a law abiding citizen. That he complied with everything the city wanted him to do as a business member." (ER 2822).

b. The court correctly limited further evidence as repetitive and inadmissible hearsay

Given this undisputed and overwhelming evidence on the topic, further details about defendant's compliance with local law would not have been probative of any issue in dispute. Defendant now criticizes the court for having found his compliance with local law undisputed, but at trial defendant had the same view. (See ER 2502 (conceding government had presented no evidence that defendant failed to comply with city rules), 3108 (arguing "[w]e heard evidence that was undisputed that Mr. Lynch complied with every single thing the City of Morro Bay asked him to do."), 3106-07 (similar), 3109 (similar)).[8] Thus, the court was well within its discretion to find that additional details from the major or city attorney about defendant's compliance with local rules would have been repetitious or offered merely to make defendant seem sympathetic. See Fed. R. Evid. 403; United States v. Butcher, 926 F.2d 811, 816 (9th Cir. 1991) (court abused no discretion in concluding that testimony

[8] Defendant conjures a dispute from a segment of closing argument where the government countered defendant's contention he ran a "tight ship" with reference to Baxter and Doherty's marijuana distribution. (AOB 29 (citing ER 3146-47)). The reference and the employee transactions did not pertain to the estoppel defense but the drug conspiracy that charged the employees' distribution as overt acts. (ER 442). The government argued the acts were foreseeable parts of the conspiracy despite defendant's denials. (ER 2432, 2440-43, 2508-17). Only defendant sought to link Baxter's distribution to local law compliance. (ER 2994).

was cumulative); cf. United States v. Harris, 491 F.3d 440, 447 (D.C. Cir. 2007).

Consistent with this ruling, the court alternatively found that additional testimony from the mayor and city attorney about defendant's compliance with local rules was hearsay or lacked foundation. Defendant proffered that the mayor would testify that she "went around and passed out her card to all the neighboring businesses and she solicited their opinions as to Mr. Lynch's operation and as to Mr. Lynch himself." (ER 2762). She could not say defendant was "always" in compliance. (ER 2761). The court said that the mayor's proposed testimony would be hearsay and she had limited first-hand knowledge. (ER 2753, 2764). Defendant had no response at trial to the hearsay problem and has not addressed the issue here, so the issue is waived though the court was manifestly correct.

The city attorney would have testified to conversations with defendant "to determine [defendant's] compliance with the City of Morro Bay's requirements." (ER 2817). As the court noted, defendant's statements to the city attorney were "not an admission," but hearsay offered by the party making the statement. (Id.). See United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000). Again, defendant does not address this issue or that defendant was allowed to offer testimony from the city attorney on defendant's compliance with city law.

Defendant argues, citing Tallmadge, 828 F.2d at 775, that the court erred in holding that defendant could not rely on a non-federal official's statement to support his defense. (AOB 30-31). Although mentioned by the court, it did not clearly use this rationale to exclude further testimony from the local officials. In any event, in Tallmadge, 828 F.2d at 775, the comments by a state judge and attorney were relevant to the defendant's reasonable reliance only because they directly mirrored the erroneous legal advice given to the defendant by the federal officials at issue -- that the defendant could possess a certain type of firearm. Here, the Morro Bay city attorney did not tell defendant that marijuana stores' legality was a matter of city and county concern -- the alleged DEA statement that formed the basis of the defense -- but rather how to comply with Morro Bay's ordinances. In fact, at sentencing, the city attorney testified that he had not even formed an opinion about whether defendant's store complied with state law, and warned defendant about the conflict between state and federal law and the prospect of federal "raids" and related enforcement. (ER 3473-74, 3476).

The court's rulings were supported on multiple grounds and any error was manifestly harmless given the evidence admitted.

3. The Court Abused No Discretion in Excluding Evidence About Medical Marijuana

Defendant challenges the court's exclusion of medical marijuana evidence. The only items specifically referenced are the redaction of basic CCCC operating documents saying that marijuana sold there was for "medical use only" and, through citation but little discussion, Beck's testimony. (AOB 29).

As a Schedule One controlled substance, Congress has found marijuana has no acceptable medical uses, and accordingly a defendant may not bring a medical necessity or related defense to a marijuana charge even if the defendant has complied with California's marijuana laws. E.g., Raich, 545 U.S. at 27; Schafer, 625 F.3d at 638. This Court has upheld the exclusion of evidence relating to a defendant's medical marijuana use, and made clear a defendant's constitutional right to present a defense is not violated by such exclusion. See United States v. Rosenthal, 334 Fed. Appx. 841, 844 (9th Cir. 2009); Rosenthal, 454 F.3d at 947 (affirming and adopting district court's reasoning in Rosenthal, 266 F. Supp. 2d at 1074, that medical motive for growing or distributing marijuana irrelevant). The district court thus correctly determined that CCCC customers' medical needs and conditions, as reflected in the basic forms and procedures referencing medical use, were irrelevant to the

charges and "not essential to the defendant's defense." (ER 544-45, 1605, 1608-09).

The court admitted references to medical marijuana where it found the evidence relevant to a disputed issue. For example, in support of defendant's argument that Baxter's marijuana distribution was unforeseeable, the court admitted Baxter's employment agreement which, among other things, referenced the CCCC as a "private medical facility with patients that are seriously ill." (ER 2442, 2508-14; DX 478; GER 1044). Defendant also testified that his compliance with local law included assuring that all customers had proper paperwork, including a doctor's recommendation. (ER 2475-76). Similar information was admitted during cross-examination of the SLOSD undercover. (ER 1684-88). Defendant described himself in testimony as a "patient." (ER 2709).

Defendant's claim that the "medical use" references or the Beck testimony were relevant to show compliance with state law ignores again the overwhelming and undisputed evidence of defendant's compliance with the rules of his city and county, and the lack of reference to state law in his DEA call. Moreover, when the court heard Beck testify about his bone cancer after defendant admitted that Beck's condition was "not relevant", the court was entitled to conclude, after a further proffer, that the witness's weak probative value would be

outweighed by the danger the testimony was meant to play on the jury's sympathies or create animus or confusion about federal law. E.g., Trevino v. Gates, 99 F.3d 911, 922 (9th Cir. 1996); United States v. Adames, 56 F.3d 737, 746-47 (7th Cir. 1995). This view was especially supportable after defendant's attempts to emphasize these improper issues in voir dire and his opening statement.

This concern was confirmed when defendant called Beck's mother to testify supposedly about the disparity between the number of marijuana plants in her agreement with the CCCC and the number she actually grew. She testified that she only grew one plant "because of [her son's] illness. . . . [H]e was too sick to grow plants." (ER 3013). The whole thrust of the Beck testimony, and defendant's interest in referencing medical marijuana generally had nothing do to with an element of his defense, but was meant to invoke sympathy about health conditions and controversy about differences between federal and state law. The court was within its discretion to exclude the evidence. Any error was also harmless given the admitted evidence, and the undisputed evidence of defendant's compliance with local rules.

4. The Court Abused No Discretion in Excluding a Sheriffs' Department Spokesman's Video As Minimally Probative, Repetitious, and Confusing

Defendant challenges the exclusion of video from a news broadcast in which an SLOSD spokesperson stated that defendant was free to re-open his business after the March 2007 DEA search. (AOB 30-32; ER 2769). The court was within its discretion to exclude the evidence, which repeated defendant's own, unchallenged testimony, was minimally probative, and potentially confusing.

On direct, defendant provided several reasons for re-opening his store after the DEA's search, including that he "had the blessing of the City of Morro Bay officials." (ER 2519). Although the court initially denied defendant's request to testify he had also seen the SLOSD spokesman, defendant was able to volunteer the information on cross-examination. (ER 2710). While government counsel attempted to concentrate questioning on the DEA and federal officials, defendant testified that, at the time of the search, he was "getting mixed messages" because he was not arrested, he spoke to his landlord, he spoke to the "city," and the city reissued the CCCC's nursery permit. (Id.). He added, "I did happen to see the local Sheriff on the television saying that he was returning the keys to Mr. Lynch and he could do as he pleases." (ER 2710). Later, in response to a question about whether other marijuana stores opening after

DEA raids was a factor in his own decision, he volunteered several additional factors. (Id.). These included his landlord, the city reissuing his business license and nursery permit, and the "statement of the Sheriff on the local TV station." (Id.). Defendant confirmed that "none of these people were federal officials." (Id.). Defendant also testified that he could not remember if he was still relying on the September 2005 DEA call when he was making his decision to re-open after the search. (ER 2720-21). On re-direct, defendant said he always relied on the DEA call, but sometimes in the back of his mind. (ER 2813).

The defense requested to play the video of the SLOSD spokesperson, arguing the video was probative to rebut the government cross-examination about defendant's re-opening the store, and that the spokesperson qualified as a federal official because the SLOSD had assisted with the DEA search. (ER 2769-74, 2809-11). The court denied the request, finding that the purpose of the government's questioning was to show that defendant was not relying on a statement by DEA, rather than challenging defendant's credibility about his other reasons for re-opening. (ER 2770). It found the agency theory "not close," and concluded the video was "repetitive." (ER 2771, 2808-11).

The court's ruling was justifiable on multiple grounds. First, defendant testified twice, without contradiction, that

the SLOSD statement was one of several reasons for reopening his store. The video thus had little probative value, and was correctly excluded under Rule 403 as cumulative. Butcher, 926 F.2d at 816. Second, defendant's agency theory is supported by no case, and the basic rule in this Circuit, as elsewhere, is that actions by state officials cannot form the basis for entrapment by estoppel. United States v. Mack, 164 F.3d 467, 471, 474 (9th Cir. 1999); United States v. Collins, 61 F.3d 1379, 1385 (9th Cir. 1995).

Defendant's citation to Tallmadge does not assist him. As noted previously, Tallmadge held evidence of a state judge's advice could be relevant to a defendant's reasonable reliance on misleading by a federal official, but only in a case where the advice directly tracked that of the pertinent federal official. Tallmadge, 828 F.2d at 775. Here, the spokesman was not offering any advice about marijuana stores' general legality, and defendant's own testimony indicates that his decision to re-open the CCCC was tenuously connected, if at all, to the September 2005 DEA call. Thus the video could have confused the jury regarding which erroneous advice formed the basis of the defense. The court was within its discretion to exclude the video on an issue that was unchallenged and of limited value and this unimportance renters harmless any purported error.

5. The Court Abused No Discretion in Excluding Defendant's Hearsay Statements to His Attorney

a. Background

Defendant sought admission of an audio recording of defendant's CCCC attorney Lou Koory talking about defendant's phone call to the DEA in a segment of an unidentified radio program. According to the defense, the audio would not be offered "for the truth" but bolster defendant's testimony during cross-examination that his attorney had made these radio statements. (ER 2768-69, 2774, 3284 (transcript of audio)). If the audio was inadmissible, the defense planned to offer Koory's testimony that defendant told Koory about the September 2005 DEA call in terms similar to defendant's testimony. (ER 2775, 2897-98). Defendant's conversation with Koory occurred in "late January 2006." (ER 2647, 2919, 2920).

Defendant argued that defendant's statements to Koory were admissible under the prior-consistent-statement exception to the hearsay rule. (ER 2926-30). In a written tentative decision and oral rulings at trial, the court found the exception inapplicable, the audio recording was double hearsay, and the government had not opened the door to the evidence in its cross-examination. (ER 274-274A, 2935-65). The hearsay issue was argued again as part of defendant's third new-trial motion. (ER 3262-84; GER 227-33). The court reaffirmed its ruling, and

alternatively, held the excluded evidence was insufficiently probative to have altered the verdict. (ER 338-39, 3288-3297).

Defendant also failed to comply with the court's order to produce CCCC attorney-client files regarding Koory. The government seized the files during its CCCC search but had returned them unreviewed. (ER 1357-60). After the court disclosed the estoppel defense on July 25, 2008, the government requested their production, but the court denied the request, reasoning that the defense did not itself waive defendant's attorney-client privilege. (Id.). The government renewed its request on Friday, July 31, 2008, after defendant first suggested during his cross-examination that he might waive his Koory attorney-client privilege, then later revealed his plan to offer the audio recording or Koory's testimony. (ER 2577, 2776). Three times that day, the court specifically ruled defendant would have to waive his attorney-client privilege and turn over the Koory files for government review before it would allow Koory's testimony. (ER 2776-77, 2898, 2902-06).

Moreover, because the defense had first provided notice of this evidence on Friday before Koory's potential testimony on the final day of trial the following Monday, and because defendant had prior warning about the issue, the court ordered the defense to produce the materials that Friday evening within three hours of the court's tentative ruling on hearsay

admissibility. (ER 2902-04, 2906, 2918, 2922-24). Though acknowledging its ability to comply and understanding of the court's order (ER 2776, 2898), the defense did not wish to produce the documents unless the court first ruled that Koory's testimony was admissible. (ER 2917). The court rejected this approach, noting that defendant had played "hide the ball" with his defense. (Id.).

The court's tentative hearsay ruling that evening noted it was open to further legal argument, but reminded defendant the court "would require the Defendant to waive his attorney-client privilege on the record and provide the government with the available attorney-client materials." (ER 274-274A). Defendant filed a brief that night, but did not turn over the materials. (ER 2926-30). On Monday, August 4, 2008, while confirming its evidentiary ruling, the court noted that defendant had not provided the attorney-client materials, finding surprising "the machinations of the defense." (ER 2951-52). The court noted the defense had previously disclaimed "an attorney/client communication as a defense," and found it "troublesome" defendant had opposed production knowing Koory had made public radio statements inconsistent with the attorney-client privilege. (Id.). Later, in rejecting defendant's third new-trial motion, the court noted that defendant never complied with its requirements on the attorney-client privilege. (ER 3293-94).

b. The court correctly held that Koory's statements about defendant's phone call to the DEA were hearsay

Prior consistent statements are admissible as an exception to the hearsay rule under Fed. R. Evid. 801(d)(1)(B) in limited circumstances. They are not admissible "to counter all forms of impeachment or to bolster the witness merely because [the witness] has been discredited." Tome v. United States, 513 U.S. 150, 157-58 (1995). The "Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." Id. Thus, among other elements, the rule requires the proponent show (1) the consistent statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive, and (2) the statement was made before the time of the witness's alleged motivation to falsify or fabricate. United States v. Collicott, 92 F.3d 973, 979 (9th Cir. 1996). The court correctly found neither element satisfied.

On the first element, defendant could not show a government charge of recent fabrication. Instead defendant sought to use a general attack on his credibility and defense to open "the floodgates to any prior consistent statement. . . ." Tome, 513 U.S. at 163. The court found "the Government did not charge Lynch with having recently fabricated the contents of his conversation with the DEA -- it argued that he either fabricated or mis-remembered the contents of that conversation from the

beginning" in September 2005. (ER 338; see also ER 274A (any fabrication occurred in 2005 when defendant "heard what he wanted to hear"). Defendant argues the government had alleged defendant fabricated his story for trial by introducing SA Reuter's testimony to contradict defendant's account of his DEA call. (AOB 24; ER 2926, 2927). The court rejected this argument (ER 338, 2937), recognizing that "[m]ere contradictory testimony cannot give rise to an implied charge of fabrication." United States v. Bao, 189 F.3d 860, 865 (9th Cir. 1999). Moreover, SA Reuter's testimony went to circumstances at the time of the September 2005 call, not the time of trial, confirming the court's analysis.

Defendant also points to a government cross-examination question of defendant: "Isn't it true that the first time you told anyone in the federal government that you had a conversation with the DEA in September of 2005 was when you came to testify in the case?" (ER 2706; AOB 23). However, the court recognized this was one of a series of questions about an element of the defense -- whether defendant reasonably relied on his September 2005 phone conversations -- not a charge that defendant falsified his story after indictment. (ER 338, 2769-70, 2957-59). Reasonable reliance requires a person "would not have been put on notice to make further inquiries." Weitzenhoff, 35 F.3d at 1290. The government's question helped

show defendant had not made further inquiries to federal officials despite events putting him on notice to do so, like the DEA's execution of warrants. There is no charge of recent fabrication when a questions is directed at another relevant topic, a disputed element, or when there was only "faint implication" of fabrication. See Bao, 189 F.3d at 865. Defendant's reliance on United States v. Whitman, 771 F.2d 1348, 1351 (9th Cir. 1985) is misplaced. That case that does not concern Rule 801(d)(1)(B), but the broader standard for relevance. Id. It does not address the carefully drawn limitations on prior consistent statements described by Tome and this Court.

On the second disputed element, the court found any motivation to fabricate or misconstrue the DEA call arose before defendant's conversation with Koory, at the time of the call, for "he knew that his plans [to open a marijuana store] were in conflict with federal law." (ER 338, 2941-42 (explaining difference between defendant's motive to fabricate and credibility)). The court recognized, this case was similar to Tome, where the relevant motivation arose before the defendant was charged with the crime, and the hearsay exception was not satisfied. (ER 274A); Tome, 513 U.S. at 165; see Collicot, 92 F.3d at 979; Breneman v. Kennecott Corp., 799 F.2d 470, 473 (9th Cir. 1986).

Defendant does not specify when the necessary motivation arose. During trial he argued it was after he was indicted and met with defense attorneys. (See ER 2929). Yet this argument is inconsistent with the contention in his estoppel defense that he relied on his September 2005 conversation all relevant times. His motive to frame the DEA conversation in a manner that legally authorized his activities, whether through wishful thinking, misperception, or artifice always existed. It became heightened when defendant opened his store in Atascadero in January 2006 and received memoranda saying marijuana violated federal law -- before the Koory statements later than month. (ER 2647, GX 176-78; GER 919-33).[9]

Koory's statements on the radio occurred out-of-court, and contain an extra layer of hearsay. As the court recognized, even if defendant's statements to Koory were admissible, there was no hearsay exception for Koory's statements to the broadcaster. (ER 338). Nor did the statements have probative value if not offered for the truth, but merely to show that they existed, for the government never contested defendant's testimony that the radio segment existed. (Id.; see ER 2698).

[9] Defendant notes the court once incorrectly said the Koory conversation occurred in June 2006, after the CCCC opened. (ER 274). Given defendant's motive to falsify arose at the time of the DEA call in 2005 that oversight was inconsequential. Regardless, defendant opened his Atascadero store before the conversations with Koory. (ER 2647, 2919, 2920).

Defendant argues that even if inadmissible hearsay, the court should have admitted Koory's testimony on due process grounds because it was reliable and "crucial" to corroborate his story. (AOB 27). However, as the court noted, defendant himself showed the evidence was far from crucial by not putting Koory on his witness list or offering the audio in his case-in-chief. (ER 2943, 2945, 3212). Moreover, the court correctly found Koory was not sufficiently "disinterested" to have "demonstrably shored up any shortcomings in Defendant's credibility." (ER 339). As defendant's former attorney, Koory was interested in vindicating the legality of his client's actions, and he was a CCCC customer. (GER 164, 189-90). Further, the short radio segment had weak probative value as it had "no reference to date, no reference as to subject matter, no reference as to pretty much anything." (ER 2775, 3284).

As noted in the court's post-trial ruling, any error was harmless, for even had Koory testified, he would have not addressed the many deficiencies of a defense that was a "borderline call as to its prima facie sufficiency." (ER 337-39). For example, defendant notes the government closing argument reference to defendant's lack of "corroboration." (AOB 23). This concerned the absence of any contemporaneous notes, letters, or documentation of defendant's supposedly important phone call, and defendant not knowing to whom he spoke -- issues

not addressed by a conversation with Koory months later. (ER 3090-91). Nor would a private attorney conversation bolster weak evidence of reasonable reliance given defendant did not mention his DEA conversation to important officials like the police chief, or the DEA after it executed warrants.

c. Alternatively, the preclusion of the Koory evidence should be upheld for defendant's violation of the court's discovery orders

The court's exclusion of Koory's testimony and radio interview should be upheld for the alternative reason that defendant did not comply with the court's discovery order, which was an express condition precedent to allowing the evidence at trial. Defendant suggests that the issue should be ignored because defendant "was prepared" to waive his attorney-client privilege (AOB 27), but the record shows otherwise. After multiple warnings, the court clearly ordered defendant to produce the attorney files within three hours of the court's tentative decision. Defendant not only failed to comply, but never produced the material while continuing to press his admissibility argument through his third new trial motion. The court never wavered in its view that defendant needed to produce the attorney-client files before Koory testified. Defendant has not argued on appeal that the court's order was inappropriate, with the exception of an undeveloped contention that the radio statement was not an attorney-client communication. Any

remaining claim is thus waived. Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).

Defendant made a strategic choice to ignore the court's order and withhold the materials, at risk of exclusion of the evidence. In such circumstances it is appropriate to enforce the court's order. See United States v. Duran, 41 F.3d 540, 545-46 (9th Cir. 1994); United States v. Aceves-Rosales, 832 F.2d 1155, 1157 (9th Cir. 1987).

6. The Court Abused No Discretion in Excluding Baxter's Hearsay Statements to a Defense Investigator While Baxter Was Represented

The court could correctly excluded proposed testimony from a defense investigator about out-of-court statements allegedly made by Baxter when the investigator served Baxter with a trial subpoena.[10] (ER 2777-82, 2877-89). Defendant filed a brief with the proposed testimony set forth in the investigator's report, along with argument seeking admission of Baxter's statements that "Charlie didn't know anything about his deal," and that defendant was a "really good guy," as non-hearsay statements against penal interest under Fed. R. Evid. 804(b)(3) and United States v. Paguio, 114 F.3d 928, 933 (9th Cir. 1997). (CR 155; ER 2593-2609). Defendant repeated his arguments in his third

[10] This ruling is analyzed here with evidentiary rulings on entrapment-by-estoppel. However, the Baxter evidence was not part of that defense, but the government's affirmative case, so this issue would survive if the defense is held invalid.

new-trial motion. (ER 3270-72). The court carefully analyzed all of these arguments, found defendant's analysis mistaken, and ruled the testimony inadmissible on multiple grounds. (ER 337, 2877-99).

The court abused no discretion holding that Rule 804(b)(3) was unsatisfied. It correctly held the proposed Baxter statements were not admissible against penal interest because the statements (1) did not tend to subject the declarant to criminal liability, and (2) were not made under circumstances corroborating the trustworthiness of the statement. (ER 2881). Both elements were required for admissibility. See United States v. Satterfield, 572 F.2d 687, 690-91 (9th Cir. 1978).

On the first element, a statement against interest must (a) "solidly inculpat[e] the declarant," and (b) "be one that a reasonable person in the declarant's position would not have made unless it were true." United States v. Magana-Olvera, 917 F.2d 401, 407 (9th Cir. 1990). Here, Baxter never admitted criminal liability, but, at best, exculpated defendant. (ER 2601). This contrasts sharply with Paguio. There, the hearsay declarant clearly confessed his criminal liability in detail. Paguio, 114 F.3d at 931 & n.1, 933; see also (ER 2884, 2894 (distinguishing Paguio), 337-38 (same)).

Nor does the context of Baxter's statements contain objective indicia he thought he could be inculpating himself.

Whether a statement is against interest is determined "from the circumstances of each case" and "by viewing it in context." Williamson v. United States, 512 U.S. 594, 601, 603 (1994)). As the court noted, in the investigator's report, Baxter expressed great confusion about whether his statements would help or hurt him: he asked the investigator, among other things, where the trial was, whether he was supposed to come, whether the "Sheriff's would be mad at him" for testifying, and "who else would be testifying." (ER 2601 ¶¶ 2-3, 2891-93, 2895). After being told by the investigator to contact his attorney, Baxter asked "if this could harm or help his case." (See ER 2891-92 (concluding report does not show "admission against interest by Baxter")).

The court also correctly found that the circumstances in which the statements were obtained did not corroborate their trustworthiness, because Baxter was a represented party with criminal charges against him. (ER 2779-87; see Cal. Rule Prof. Conduct 2-100(A) (barring attorney communications, directly or indirectly, with a represented party)). Defendant knew for a month that Baxter was represented but sent an investigator to serve him with a subpoena after leaving a voice message for his attorney. (ER 2779-80 ("we did believe he was represented")). Baxter's counsel was not present when the statements were made, and the investigator did not inform Baxter the statements could

be used against him. (ER 2880). The court concluded that "engaging in a conversation with an individual whom the investigator should have known faces possible criminal penalties is problematic." (ER 2779-81 (defense counsel "would be upset" and would be arguing for exclusion of statements if government obtained statements in similar manner); GER 212, 238-39). Paguio supports the court's ruling. There, before any conversation happened, the declarant was advised by his interviewers that they were not his attorney, represented another party, and any subsequent conversation was unprivileged. Paguio, 114 F.3d at 931. As the court noted, none of that occurred here. (ER 2893).

For the first time on appeal, defendant also seeks admission of the statements on due process grounds under Chambers v. Mississippi, 410 U.S. 284, 285 (1973). Chambers is inapplicable given the problems with the statements' trustworthiness described above. Additionally, the Baxter evidence was far from "critical," as in Chambers. Defendant testified himself about his relationship with Baxter, denied knowledge of Baxter's marijuana sale, and explained his employment relationship with Baxter and various restrictions on Baxter's activities. (ER 2508-17; DX 478, GER 1044). Further, any error was harmless given the comparatively small amount of marijuana Baxter sold compared to the overall conspiracy. As

the court noted, "there was no dispute that Defendant sold large amounts of marijuana. Therefore, even if the jury were to believe Baxter's testimony entirely, it is difficult to see how Lynch's trial would result in an acquittal." (ER 337-38).

D. DUE TO THE DEFENSE'S INVALIDITY, THE COURT SHOULD NOT HAVE INSTRUCTED THE JURY ON ENTRAPMENT BY ESTOPPEL, BUT THE INSTRUCTIONS WERE CORRECT

As asserted in Section B, defendant's entrapment-by-estoppel defense failed as a matter of law. Thus, this Court need not reach whether the jury was properly instructed on the defense. Assuming that there was a valid defense, however, the court made no errors in its instructions. In Section B, the government addressed defendant's arguments as to instructions on the defense's second and third elements and defendant's argument the defense applied to Counts Two and Three. As explained below, defendant's additional argument that the court erred in instructing on the first element and on the relevance of the medical marijuana use to the defense also fail.[11]

1. The Court Properly Instructed on Entrapment By Estoppel's First Element

As this Court has twice said, the first element of entrapment by estoppel is "an authorized official, empowered to render the claimed erroneous advice." Schafer, 625 F.3d at 637 (quoting Batterjee, 361 F.3d at 1216). The court tracked this

[11] The standard of review is described in Section IV(B)(1) above.

language in its jury instruction, properly adding the words "who was" to "empowered" and that the authorized official must be "federal." (ER 324). See Brebner, 951 F.2d at 1027 (defendant must show "federal government official . . . or . . . an authorized agent of the federal government"); Mack, 164 F.3d at 474 (state official not authorized to render advice on federal criminal law). This instruction was correct.

Defendant argues the word "empowered" prevented him from arguing that the official could have "apparent" instead of "actual" authority. (AOB 46-47). First, defendant waived this argument below by proposing an instruction defining this element as "an authorized government official empowered to render the claimed erroneous advice," nearly the precise language he objects to on appeal. (ER 1594). Second, the court's language is taken directly from several decisions by this Court, and to the extent they narrows the defense to actual authority, that is circuit law. See Schafer, 625 F.3d at 637; Batterjee, 361 F.3d at 1216; Brebner, 951 F.2d at 1027.

Third, regardless, defendant failed to show apparent authority. Defendant learned no information about the man who rendered the alleged incorrect advice in the final DEA call. He did not know the man's title, job, or position, or whether he was an agent or law enforcement officer. (ER 2542-45, 2576). He did not know whether the person could speak for the DEA or

the federal government; nor did defendant ask whether this was the only person to whom defendant needed to speak. (ER 2565-66). There were insufficient facts showing someone "who clearly appeared to be the agent of the State in a position to give such assurances." Raley, 360 U.S. at 437 (Chairman and members of commission where questions were asked gave erroneous legal advice about import of not answering their questions); see also United States v. Baker, 438 F.3d 749, 755-58 (7th Cir. 2006) (no apparent federal authority where state officer showed United States Marshal badge and said he had "no problems at all working with the Feds").

2. The Instructions on State Law Were Correct and Did Not Undercut the Defense

Defendant challenges the court's instructions on marijuana law, specifically Instructions 2 and 3 concerning the interaction between state and federal marijuana law; Instruction 19 describing federal law's prohibition on marijuana; and the court's similar preliminary instruction regarding federal marijuana law. He contends they unfairly excluded evidence in his defense about state law or medical marijuana use. (AOB 54-57). His contentions fail.

First, defendant does not specify which admitted evidence would have been ignored by the jury because of the instructions as he interprets them. Defendant offered ample evidence of his

compliance with the rules of "cities and counties", so prelusion of evidence on state law or marijuana's medical use was harmless as these topics were not discussed in the DEA call from which his defense allegedly arose. Though not discussed at trial, even Morro Bay officials never determined whether defendant complied with state law, and the court held at sentencing that defendant had not. (ER 3473-74, 423 n.25). Defendant's true concern appears to be that the instructions hindered his attempt to convert a specific (though invalid) entrapment-by-estoppel defense into a vehicle for jury nullification by highlighting differences between state and federal law and the sympathetic circumstances of some CCCC customers -- defense tactics seen from pre-trial motions through closing argument. (ER 3099 (arguing in closing defendant "made available safe access to medical marijuana to Californians who were eligible to receive it under state law.")).

In any event, the instructions read as a whole did not constrain the defense. (ER 313-26). They properly defined state and federal law's interaction as they applied to the charges in the indictment and the estoppel defense. Instruction 2 accurately stated the interaction between state law and the federal criminal charges described in Instruction 3. (ER 314). That is, that federal law makes marijuana illegal for all purposes and state law cannot override it. (Id.). This is an

accurate statement of the law. E.g., Raich, 545 U.S. at 27. The portion of the instruction about which defendant complains: "For example, unless I instruct you otherwise, you should not consider any references to the medical use of marijuana" is given as an example of the type of state law activity -- medical marijuana use -- that does not override the federal charges against defendant, as shown by the fact that "for example" refers back to the instruction's prior sentence about the primacy of federal law. Instruction 19 also accurately defines the illegal status of marijuana under federal law for "any purpose" and states that state law cannot "trump" that status. (ER 318). It again provides accurate context to the description of the elements of the federal marijuana offenses set forth in Instructions 20 through 33. (ER 314-33).

Similarly, the discussion of the 10th Amendment in Instruction 2 is correct, and specifically designed to avoid jury confusion in light of defendant's erroneous 10th Amendment views. (E.g., ER 2363, 2367, 2450-53, 2558-59; DX 420, GER 1014 ¶ (e)). Instruction 34, explains that the entrapment-by-estoppel defense is an exception to the applicable federal law previously defined in Instructions 2, 3 and 20-33. It is the "otherwise instructed" language referenced in Instruction 2 because "[e]ntrapment by estoppel is the unintentional entrapment by government officials who mistakenly misleads a

person into a violation of the law." (ER 324 (emphasis added)). Thus, read together, the instructions explain that state law does not override the federal law that applies to the charges in the indictment. However, entrapment by estoppel is a defense based on a mistaken violation of federal laws. That defense thus logically could incorporate information and conduct in mistaken violation of federal law, such as medical marijuana use. The court did not err in giving these instructions.

Defendant cites Tallmadge, 829 F.2d at 775, for the proposition that he could reasonably rely on state officials or state law. As stated previously, the comments by state officials were relevant in Tallmadge because they mirrored the erroneous legal advice of federal officials. Id. Here, defendant offered no statement by a local official that his marijuana store's legality was a matter only of city and county concern, as he claimed the DEA had advised. In any event, while Instruction 34 prohibited reliance on state officials for entrapment by estoppel's first element -- a point defendant conceded (GER 5) -- it had no such restriction, as defendant suggests, on what evidence the jury could consider with respect to defendant's reasonable reliance, the defense's fourth element (ER 324). Thus the instructions were correct even under defendant's overly-broad view of Tallmadge.

E. THE COURT'S ANTI-NULLIFICATION INSTRUCTION DURING VOIR DIRE WAS PERMISSIBLE

1. Standard of Review

Procedures and questions in voir dire are reviewed for abuse of discretion. United States v. Pimentel, 654 F.2d 538, 542 (9th Cir. 1981). A "trial judge, as governor of the trial, enjoys wide discretion in the matter of charging the jury." Arizona v. Johnson, 351 F.3d 988, 994 (9th Cir. 2003). Accordingly, this Court reviews for an abuse of discretion a court's formulation of jury instructions, and de novo whether a jury instruction misstates the law. United States v. Cortes, 732 F.3d 1078, 1084 (9th Cir. 2013).

2. Neither the Jury Nor Defendant Has a Right to Nullification

Defendant claims the court's anti-nullification instruction "stripped the jury of its power to nullify and Lynch of his right to trial by jury." (AOB 65). The argument lacks merit.

As this Court has held, "while jurors have the power to nullify a verdict, they have no right to do so." Merced v. McGrath, 426 F.3d 1076, 1079 (9th Cir. 2005); see also United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996). Trial courts "manifestly do not have a duty to ensure a jury's free exercise of this power" because nullification is contrary to the duty of jurors to take the law from the court and apply that law to the facts as they find them to be. Merced, 426 F.3d at 1079.

Importantly, although courts have no means to undo nullification after an acquittal, they "'have the duty to forestall or prevent such conduct.'" Id. at 1080; see United States v. Thomas, 116 F.3d 606, 615 (2d. Cir. 1997).

3. Anti-Nullification Instructions Have Been Widely Accepted

Defendant claims that anti-nullification instructions are "so far out of the norm, this Court has not yet addressed the propriety of such a charge." (AOB 64). Defendant is wrong. This Court has approved of anti-nullification instructions. First, in Merced, 426 F.3d at 1080, this Court quoted with approval the following language from Thomas, 116 F.3d at 616: "trial courts have the duty to forestall or prevent such conduct [jury nullification], whether by firm instruction or admonition."

Second, in Rosenthal, 454 F.3d at 947, the defendant claimed that the district court "erroneously instructed the jury regarding its right to engage in nullification." The Rosenthal court had interrupted defense counsel's closing argument to provide the following instruction:

> [Y]ou cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It's not your determination whether a law is just or whether a law is unjust. That can't be your task.

Rosenthal, 266 F. Supp. 2d at 1085, aff'g in part, rev'd in part, 445 F.3d 1239 (9th Cir. 2006).[12] In ruling on the defendant's new-trial motion, the Rosenthal district court found no error in that instruction because it was consistent with the court's obligation to prevent nullification. Id. It also noted, as a practical matter, that "[t]he jury always retains the power to make that decision [to nullify], no matter how the court instructs it" because nullification is, by definition, the jury's decision to ignore the court's instructions. Id. On appeal, this Court found no error in the anti-nullification instruction and adopted the district court's "reasoning in whole." Rosenthal, 454 F.3d at 947. Moreover, the instruction in Rosenthal, like the instruction here, is consistent with this Court's prior holding that "the jury may not substitute its own determination of objective reasonableness as to the interpretation on the law." United States v. Powell, 955 F.2d 1206, 1212 (9th Cir. 1991).

Furthermore, in the habeas context, this Court held that no Supreme Court case establishes that California's anti-nullification instruction violates an existing constitutional right. Brewer v. Hall, 378 F.3d 952, 956 (9th Cir. 2004). Rather, this Court noted that Supreme Court authority

[12] The court here modeled its anti-nullification instruction on Rosenthal. (ER 1275-76).

"emphasized that 'the right to a representative jury [does not include] the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." Id. Other Circuits to address anti-nullification instructions have likewise upheld them. See, e.g., United States v. Stegmeier, 701 F.3d 574, 582-83 (8th Cir. 2012); United States v. Carr, 424 F.3d 213, 219-20 (2d Cir. 2005); United States v. Bruce, 109 F.3d 323, 327 (7th Cir. 1997); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); see also United States v. Appolon, 695 F.3d 44, 65 (1st Cir. 2012); United States v. Pierre, 974 F.2d 1355, 1357 (D.C. Cir. 1992).

4. The Court Properly Gave a Curative Instruction in Light of Defendant's Injection of Nullification into Voir Dire

Anti-nullification instructions are particularly appropriate where potential or sitting jurors have been exposed to the concept of jury nullification, as here. As discussed above, a trial court has an affirmative duty to "forestall or prevent" nullification. In this case, as described in full above, during voir dire Juror No. 25 expressed an extreme reluctance and inability to follow the court's instructions. (ER 1216-18, 1236-39). Defendant refused to stipulate to dismiss the juror. (ER 1258). Instead, defense counsel asked additional provocative questions, which elicited the juror's praise of nullification over the court's attempt to intervene.

(ER 1263-64). It was obvious from the juror's continued interruption of the court that Juror No. 25 intended to taint the entire jury pool with the concept of nullification. The court also found that defense counsel had, despite warnings, invoked the issues. (ER 1266-68, 1274, 1277-79). To stay silent and not provide an anti-nullification instruction after the jury pool had been exposed to nullification would have been a dereliction of its duty to prevent nullification. See Thomas, 116 F.3d at 616 ("[I]t would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath."); see also United States v. Blixt, 548 F.3d 882, 892 (9th Cir. 2008) (court acted within its discretion when it gave "curative instructions in light of the jury nullification arguments made during closing argument").

F. THE COURT DID NOT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHTS WHEN IT REFUSED TO INSTRUCT THE JURY ON THEIR GUILTY VERDICTS' CONSEQUENCES

1. Standard of Review

This Court reviews de novo the court's refusal to give a defendant's jury instructions based on a question of law. United States v. Burt, 410 F.3d 1100, 1103 (9th Cir. 2005).

2. The Supreme Court and This Court Have Already Ruled that Juries Should Not Be Instructed on Punishment

Defendant's claim that he had a Sixth Amendment right to "trial by a jury with knowledge of the penalty for conviction" (AOB 66), is foreclosed by binding precedent. In United States v. Frank, 956 F.2d 872, 879 (9th Cir. 1992), this Court held:

"It has long been the law that it is inappropriate for a jury to consider or be informed of the consequences of their verdict." Rather than requiring a court to inform juries of the possible penalties a defendant faces, this Court recognized that "[i]t is the practice in the federal courts to instruct juries that they are not to be concerned with the consequences to the defendant of the verdict, except where required by statute." Id.

The Supreme Court has likewise held that a jury "should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" Shannon v. United States, 512 U.S. 573, 579 (1994). The Court explained that "[t]he principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system" with juries finding facts and determining guilt and judges imposing sentence. Id. It held, "[i]nformation regarding the consequences of a verdict is therefore irrelevant to the jury's task," as it "distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." Id. Although Shannon addressed whether juries should be informed of the consequences of a not-guilty-by-reason-of-insanity verdict, the Court also noted that "as a general matter, jurors are not informed of mandatory minimum or maximum sentences, nor are they instructed regarding probation, parole, or the sentencing range accompanying a lesser included

offense," regardless whether jurors harbor misunderstandings about these sentencing options. Id. at 586-87.

While defendant concedes that "precedent is against him on this point," he claims these cases have been abrogated by Crawford v. Washington, 541 U.S. 36 (2004), or Apprendi v. New Jersey, 530 U.S. 466 (2000). This claim is unsupported by any controlling case law, but is premised on an Eastern District of New York decision later expressly rejected by the Second Circuit. See United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009). There, the Second Circuit found the district court could not ignore binding precedent based on a prediction of what the Supreme Court might hold in the future. Id. at 160. Id. Accordingly, the Second Circuit found that, applying binding precedent, "it is clear that Polizzi had no Sixth Amendment right to a jury instruction on the applicable mandatory minimum sentence." Id. at 161.

Further, this Court's continued reliance on Frank and Shannon in cases decided well after Apprendi and Crawford shows no abrogation of the general rule that juries should not be instructed on their verdicts' consequences. See, e.g., United States v. Garcia, 500 Fed. Appx. 653, 654 (9th Cir. 2012) (citing Frank to support holding "district court did not err when it denied [defendant's] request to inform the jury of the mandatory minimum sentence."); United States v. Jones, 346 Fed.

Appx. 253, 256 (9th Cir. 2009) (citing Shannon and Frank to hold "argument that the district court should have instructed the jury that [defendant] faced a mandatory fifteen-year sentence is likewise foreclosed").

3. This Case Did Not Fall within Shannon's Narrow Exception

Defendant claims that jury should have been informed of the mandatory-minimum sentences "to counter a misstatement" -- namely, that the jury was "actively misled to believe that the district court would be able to exercise discretion in sentencing" defendant, because they were instructed that "[t]he punishment provided by law for this crime is for the court to decide." (AOB 68).

Defendant's argument is foreclosed by United States v. Wilson, 506 F.2d 521, 522-23 (9th Cir. 1974). There, this Court rejected the argument that "it was error for the trial judge to instruct the jury that punishment is exclusively a matter for the court when, as here, there is a statutorily imposed sentence." Id. at 522. Instead, this Court held, "[e]ven if the statutory sentence were mandatory, it is still the exclusive province of the court to pronounce it." Id. at 522-23. Thus, there was no error or misstatement in the court's instruction.

The Supreme Court in Shannon articulated a narrow exception about when it would be appropriate for a jury to be informed of

the consequences of a not-guilty-by-reason-of-insanity verdict. The Court explained that in some limited instances, for example if a prosecutor or witness stated that a defendant would "go free" if the jury found him not guilty by reason of insanity, the court would have to intervene to correct that misstatement. Shannon, 512 U.S. at 587.

This exception's reasoning is clear: without an intervening instruction, a jury could find the defendant guilty, rather than not guilty by reason of insanity, because the jury feared the defendant would go free. Thus, the verdict would be based on its consequences, rather than the defendant's actual guilt or innocence, which is the very reason jurors are ordinarily not informed of punishment.

Here, defendant cannot articulate a similar misstatement by the court, a prosecutor, or a witness that would have resulted in a verdict based on the jury's misunderstanding of the consequences of its verdicts, rather than on defendant's guilt. Rather, his argument rests (again) on impermissible nullification: if the jury had been informed of the mandatory-minimum sentence, it would have acquitted, despite his guilt. As discussed above, defendant is not entitled to instructions that would further his nullification defense.

G. THE COURT DID NOT PLAINLY ERR IN ITS HANDLING OF JURY COMMUNICATIONS BEFORE DELIBERATIONS

For the first time on appeal, defendant complains about the court's handling of jury questions before deliberations. He seeks reversal because the court told jurors that it would not answer their substantive questions during trial, and did not show counsel pre-deliberation jury notes. (AOB 68-76). Defendant neither raised these issues at trial, nor requested a post-trial hearing trial despite filing four new-trial motions. The court had wide discretion to answer questions before deliberations, and any improper handling of jury communications during trial was cured by the court's later jury instructions.

1. Background

At a pre-trial conference, upon the government's objection, the district court determined that jurors would not be allowed to question witnesses during trial. (ER 806-07). On July 24, 2008, the jury was empaneled, and in part of its preliminary instructions to the jury, the court said, "if you need to communicate with me, simply give a signed note by means of handing it to the clerk who will give it to me." (ER 330, 1304, 1313). It also instructed "you should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be." (ER 328, 1308).

On July 25, 2008, after opening statements, the court informed counsel that a juror had asked whether jurors could ask questions. The court said "we have raised that issue" and said it would inform the juror that there would be no juror questions. (ER 1402). Defendant did not ask to see the communication from the juror. Defendant also never objected to either the procedure for informing the clerk of questions, nor the court informing the jury that questions would not be permitted. (Id.). After the first witness, the court spoke to the jury, and told them it would not let jurors ask questions. (ER 1425). Later that day, a juror asked for a play back of an audio recording, and the court complied. (ER 1467).

On July 29, 2008, the court informed the parties during a recess that a juror had asked the court clerk a question:

> Let me indicate for the record. Earlier there was a question that one the jurors had addressed to my clerk which was taken care of by the questioning of [government counsel], but I just want to make sure it was noted on the record . . . that a juror had asked a question as to the status of the sheriff's department and also the DEA agent and that matter was taken care of by the government's subsequent questioning. Let me ask. I presume there is no problem for either side in that regard.

Defense counsel responded, "I don't think so, Your Honor." (ER 1941). Again, defense counsel did not request more information about the juror communication, nor object to the jury's means of communicating with the clerk. (Id.).

Later that day, the court told counsel that a juror had asked the clerk for a definition of the term "minor" as used in trial. The court assumed the parties would address that during questioning, but the defense said it had "no objection to the court instructing." (ER 2049). The court then said "that same juror indicated that he does not understand what hash is." (ER 2049-50). Government counsel said that a subsequent witness would cover the topic, and without objection the jury was recalled. (ER 2040). The court checked with counsel to see if it could instruct the jury on the "minors" issue based on the proposed jury instructions, and both parties agreed. The court gave an instruction. (ER 2051). Defendant did not object to the procedure for communicating with the juror who raised the issue.

On July 30, 2008, after a recess, the court addressed the jury stating that "my clerk has indicated to me that some of you have a question as to when a counsel objects on the basis of 403 or when the court rules on the basis of 403, what does it mean." (ER 2208). The court explained to the jury that it would not explain its rulings on objections. (ER 2208). Defendant did not object to this explanation, the court's speaking to the jury without warning the parties, or seek information about the juror's communication with the clerk.

On July 31, 2008, during a recess, the court told the parties that jurors had been asking the clerk questions:

> THE COURT: Also, one other thing. You can bring in the jury, Javier. Javier is continually getting questions from the jury. I will inform the jury that -- I've already indicated that the jurors are not going to be allowed to ask questions during the course of the trial. So we won't be responding to questions.
>
> [DEFENSE COUNSEL]: To the extent they have already, we'd be curious as to what the questions are.
>
> THE COURT: I know you'd be curious, but the answer is no.
>
> [DEFENSE COUNSEL]: Yes, your honor.

(ER 2505).

The jurors then entered the courtroom. (Id.). After discussing scheduling, the court addressed jury questions:

> THE COURT: [M]y clerk informs me that he has periodically been getting questions from jurors. Let me indicate to jurors that I've already indicated at the start of this case that the jurors were not going to be allowed to ask substantive questions. If you have some procedural question of how the case is going or some aspect of the procedure, I would be able to answer that. But in terms of substantive questions, no, there will be no questions from the jurors in the course of this trial. Do all of you understand that?
>
> THE JURY: (Nodding heads.)
>
> THE COURT: In so far as substantive questions, there was a question as to exhibits.

The court told the jurors they would eventually receive all admitted trial exhibits in the jury room with the exception of contraband. (ER 2506-07). The court asked the jurors if "any of you have any questions on that," and one juror replied,

asking whether jurors could learn why a given witnesses' question had not been answered. (Id.). The court responded that it ruled on objections based on rules of evidence and the jury should not speculate about answers to excluded questions. (Id.). It asked the jurors if they understood, and they nodded their agreement. (Id.). The case continued, and defendant never objected to the court's explanation. (Id.).

On August 4, 2008, after the close of evidence, the court was preparing to hand out and give instructions. It informed the jury:

> If while I'm reading [the jury instructions] you have a question, please feel free to raise your hand or tell me to stop and I will give you a further explanation if what is stated in the jury instruction is not clear to you.
>
> Also, if at any point in time during your deliberations in the jury room if you have a disagreement as to what the instructions mean, again feel free to give a note to either the bailiff or to the clerk, and again, I will endeavor to give you clarifying instruction or explain the meaning of the instruction that I'm about to give to you.

(ER 3061).

The court then read the jury instructions. These included an instruction that the verdict be "based solely on the evidence and on the law" and nothing the court had said was "intended to suggest the verdict" which was solely the jury's to decide; that the jurors could request the transcript of any witness' testimony be read back to them; and that the jurors could

communicate with the court during deliberations by sending a note through the bailiff or court clerk. (ER 325 (Instructions 37, 38, 41)). After reading the instructions, the court asked the jury, "any questions on those instructions? No. All right." (ER 3064).

2. Standard of Review

This Court should review defendant's challenge to the court's handling of jury communications for plain error. United States v. Romero, 282 F.3d 683, 689 (9th Cir. 2002); United States v. Throckmorton, 87 F.3d 1069, 1072-73 (9th Cir. 1996). Defense counsel knew that as part of its preliminary instructions the court told the jury they could send questions to the clerk during trial by means of a signed note, and did not object. Despite learning of a jury notes on July 25, 2008, two notes on July 29, 2008 with three questions, an unspecified communication on July 30, 2008, and other questions on July 31, 2008, counsel never objected to the procedures for these communications, requested the court to direct the jury to handle its communications differently, nor objected when the court instructed the jurors without first consulting the defense on July 30, 2008.

While defendant now complains that the court did not share the notes' specific contents with the parties, on four separate occasions the court discussed juror communication without a

request from the defense to see the communications. With that background, when defense counsel on July 31, 2008, said he was "curious" to see the jury notes that day, followed by "Yes, your honor" rather than an objection when his request was denied, it cannot be said that defendant raised the constitutional and statutory claims he makes on appeal.

Tellingly, though asking this Court for a hearing on the matter, defendant failed to request a hearing below, even after trial, despite filing four separate new-trial motions in post-trial proceedings that stretched over a year after the verdict. Defendant cites an unsworn letter from a juror about questions not answered during trial, but when defendant filed that letter below, to the surprise of the court, defendant did so merely to support its sentencing arguments. (ER 3348-49 (district court: "Why would you submit [the letter] if you are not going to make some sort of motion?")). Defendant did not use the letter, as it does now, to assert error in the court's handling of jury communications. Review must be for plain error.

3. The Court's Handling of Juror Communications Did Not Alter the Verdict

It is not clear that there was any error at all. A defendant has a statutory right under Fed. R. Crim. P. 43(a) to be present at every stage at trial and a constitutional right to be at all critical stages. To protect those rights, the Supreme

Court established procedures for handling jury notes during jury deliberations including answering them in open court after consulting first with defense counsel. See Throckmorton, 87 F.3d at 1073. Yet defendant cites no binding case for the proposition that these procedures apply to jury communications outside the deliberation context. United States v. Smith, 31 F.3d 469, 471 (1st Cir. 1994), cited by defendant, held that an ex parte personal jury visit by the judge before deliberations began violated Rule 43(a), but did not concern procedures for jury notes. Here, there was no ex parte visit, and the only communications by the court to the jury were in open court and without objection. Defendant's reliance on United States v. Arriagada, 451 F.2d 487, 488 (4th Cir. 1971), is unpersuasive. Arriagada said that Rule 43(a) applied to pre-deliberation communications between the jury and court, but did so in a case involving contacts during deliberation. Id.

The court's handling of pre-deliberation jury notes should be analyzed not like notes during deliberations, but in light of a court's "broad discretion when it comes to trial management." Graves v. Arpaio, 623 F.3d 1043, 1047 (9th Cir. 2010). Under that power, the court did not have to take any questions from the jury. The court was within its discretion to ignore pre-deliberation questions from the jury seeking factual information. See United States v. Huebner, 48 F.3d 376, 383

(9th Cir. 1994); United States v. Richardson, 233 F.3d 1285, 1288-89 (11th Cir. 2000) (collecting cases); United States v. Douglas, 81 F.3d 324, 326 (2d Cir. 1996) (questioning by jurors allowed but discouraged). And juror discussion of the evidence prior to the close of evidence is prohibited. United States v. Pino-Noriega, 189 F.3d 1089, 1096 (9th Cir. 1999). For example, the post-sentencing juror letter referenced in defendant's brief lists three factual questions that the court did not have to answer. (ER 3328). Similarly, the court could reasonably defer any response to legal questions until after the close of evidence given its wide discretion in handling charging the jury. See Johnson, 351 F.3d at 994. Courts must frequently wait until then to know which legal issues are appropriate to present.

Even if one relies on deliberation cases, there was no error, plain or otherwise. Throckmorton, 87 F.3d at 1071-73, a plain-error case, is instructive for evaluating defendant's claim he should have been privy to undisclosed jury notes and communications. In Throckmorton, during deliberations, the judge informed the parties that he had "received a few notes which [he] responded to" regarding playback of a videotape. Id. at 1071. The parties were shown the notes but did not object or ask how the court responded. Id. This Court found the ex parte

communications with the jury violated Rule 43 and was plain error. Id. at 1073. Nonetheless, the Court refused to reverse:

> If counsel had been concerned about this they could have voiced their concern to the district court and an appropriate record could have been made. . . . Now when the case is on appeal to this court, the defendants ask us to hold that the district court's ex parte communication to the jury . . .'affect[s] substantial rights' independent of its prejudicial impact. We will not do this.

Id. at 1073. Just as the defendant in Throckmorton could not complain about the ex parte communication between the judge and jury when he had made no effort to develop the record in the trial court, so too should this Court bar relief for defendant's failure to request copies of the jury notes or additional information beyond one reference to being curious.

As to the claimed failure to respond to unspecified jury notes, even in a deliberation case this Court has said it would not presume a trial court had inadequate reasons for failing to respond to a jury communication, where defense counsel did not raise the issue in a new-trial motion and give the court a chance to explain its reasoning. See United States v. Barragan-Devis, 133 F.3d 1287, 1289-90 (9th Cir. 1998) ("we will presume the best of the district judge, not the worst"). Moreover, because these events took place during trial, rather than during deliberations, any undisclosed questions of law by the jury were logically addressed by the jury instructions and

three separate invitations to communicate if jurors had problems with the instructions.

Deliberation cases also demonstrate there was no error when the court answered jury questions without first consulting counsel on July 30, 2008. Defendant does not challenge the substance of the court's instruction, and even in deliberation cases, communication without such prior consultation is harmless where the instruction did not adversely affect the jury. United States v. Rosalez-Rodriguez, 289 F.3d 1106, 1111 (9th Cir. 2002); Barragan-Devis, 133 F.3d at 1289-90.

Finally, there was no plain error affecting substantial rights in the court's July 31, 2008, instruction barring further "substantive" questions, to which defendant objects for the first time on appeal. Again, the court never had to answer any factual question from jurors. Nonetheless, the court's later jury instructions contained a procedure for testimony read-backs and for communicating with the court generally. Defendant suggests that the court's earlier bar on substantive questions might have somehow overridden the later jury charge, making the jurors feel their questions were unimportant. In the absence of any evidence, this Court should not presume such prejudice, especially on this record. On July 31, 2008, even after the court said it would answer no more substantive questions, it nonetheless immediately answered a question about exhibits, and

-- after asking for follow-up -- responded in detail to another jury question. The court instructed the jury before and after trial that they should not infer from its actions any comment about the evidence or the verdict. Before reading the final instructions, the court invited jury questions about the instructions during deliberations, informed jurors they could ask questions during the reading of the instructions, and invited questions once the instructions were read. Defendant's arguments should fail.

H. THE GOVERNMENT DID NOT SUPPRESS EVIDENCE OR OTHERWISE VIOLATE BRADY

The court properly rejected defendant's fourth new-trial motion asserting violations of Brady v. Maryland, 373 U.S. 83, 87 (1963). The motion, summarily re-asserted on appeal (AOB 40-43), was based on a clear misinterpretation of remarks by a prosecutor about marijuana charging decisions during a sentencing hearing to create a false contrast between those remarks and SA Reuter's rebuttal testimony. The Court need not reach this issue if the estoppel defense was invalid, but regardless, there was no contradiction and no material undisclosed or "suppressed."

1. Background

Defendant said he called a phone number, which SA Reuter testified belonged to her at DEA Los Angeles. (ER 2828).

During her rebuttal testimony, SA Reuter testified she never told people on the telephone that "state or local matters were relevant to federal law" because state or local matters "have nothing to do with federal law." (ER 2843). Nor did she know of a situation where she would have told a member of the public that opening a marijuana store "would be referred to local officials." (ER 2843-44). On this point, she noted that "federal law has nothing to do with state and local officials" and that it did not "matter what state and local officials say or do." (ER 2844). Nor would it have mattered in phone calls with the public to her or her group if a marijuana store owner said it would comply with state law, because "it's still illegal under federal law." (ER 2845).

On March 27, 2009, during a telephonic sentencing conference, the court asked the government about news reports that Attorney General Eric Holder had made statements that federal law enforcement efforts would be directed only at marijuana stores that violated both state and federal law. (ER 3382, 3385-89). Government counsel responded by explaining the "charging policies" of its "office." (ER 3389). The prosecutor said that before the Attorney General's statement, federal prosecutors generally were not required to focus on marijuana stores that violated both state and federal law. (Id.). However, "in this district we already made the determination

that in allocating our resources we would focus on those that more clearly violate state law." Thus, the recent statements by the Attorney General had no impact in the district and were "somewhat of a red herring." (Id.). The USAO considered state law only a "factor" in its charging decision as it allocated resources, and retained the right to prosecute any violation of federal law. (ER 3395-96).

With respect to this case, counsel noted that the court could "read from the [search warrant] affidavit in this case and from the whole nature of the prosecution" to see that violations of state law "were always factors in the investigation at the beginning." (ER 3389-90). The discussion of government charging policy did not reference advice given to the public generally or to defendant specifically. (Id.). Nor did the government discuss SA Reuter, her group's practices, or the interaction between the DEA's various investigations and prosecutorial decisions. (Id.).

On June 4, 2009, defendant filed a new-trial motion. (ER 3537-38). He claimed he could have impeached SA Reuter with the prosecutor's information form the hearing, arguing that "it has 'always' mattered for the DEA investigative purposes whether an operator was violating state law" and that "in essence, it has always effectively been up to the counties or states to decide how to handle the matter of medical marijuana dispensaries,"

which he claimed was what DEA told him in his September 2005 phone call. (Id.).

The government's opposition asserted that it had turned over all facts relevant to defendant's violations of state law in discovery almost a year before trial. (GER 659-743; CR 295). It highlighted the case agent's search warrant affidavit that the prosecutor referenced at the hearing, which discussed defendant's state law violations. (GER 670-71, 736 ¶ 53). It included other materials showing that state law violations had been part of defendant's investigation and that this material was produced to the defense over a year before trial. (GER 670-72, 683-733). The government also showed that there was no inconsistency between the remarks at the sentencing hearing and the testimony of SA Reuter. (GER 673-76).

At a hearing on the motion, government counsel clarified that its remarks had nothing to do with DEA's investigative practices, but rather the government's charging decisions. (ER 3589). When defense counsel asserted that state law was "always relevant to a [DEA] investigation" the court twice countered "[t]here is no evidence of that." (ER 3591, 3592-93).

The district court noted that violations of state law were clearly spelled out in the case agent's affidavit. Further, defense counsel could not articulate any specific

materials the government failed to produce. (ER 3597). The court denied the motion. (ER 3598).

2. Standard of review

This court reviews de novo denials of motions for a new trial based on a Brady violation. United States v. Pelisamen, 641 F.3d 399, 408 (9th Cir. 2011).

3. There Was No Brady Violation

To establish a Brady violation, defendant must show that: (1) the evidence was exculpatory or impeaching, (2) the evidence should have been but was not produced, and (3) the evidence was material. United States v. Jernigan, 451 F.3d 1027, 1030 (9th Cir. 2006). "The materiality of omitted evidence is assessed in the light of other evidence, not merely in terms of its probative value standing alone." United States v. Ross, 372 F.3d 1097, 1108-09 (9th Cir. 2004). Defendant met none of these elements.

There was no undisclosed exculpatory or impeaching materials. Had defense counsel wished to cross-examine SA Reuter on whether state law violations were potentially relevant to DEA and defendant's case, they had all the relevant material. The search warrant and other disclosed materials reflect that the CCCC investigation included violations of state law, and this was disclosed in the search warrant affidavit and other discovery materials long before trial. See (GER 682-743; ER

2174 (at time of affidavit case agent did not know if case would be prosecuted by state or federal prosecutor)).

There was no contradiction or inconsistency between SA Reuter's testimony and the prosecutor's remarks. As was confirmed at the hearing on the motion, the prosecutor's remarks about state law only concerned the USAO's charging decisions; they had nothing to do with DEA investigation. As SA Reutter accurately testified at trial, there is a difference between which cases the DEA investigates and which cases the USAO prosecutes in federal court, stating that the latter decision "is not up to me." (ER 2864); see United States v. Hooton, 662 F.2d 628, 634 (9th Cir. 1981) (in vindictive prosecution case distinguishing between decisions of agents and prosecutors); United States v. Hastings, 126 F.3d 310, 314 (4th Cir. 1997) (same in selective prosecution context). Moreover, defendant's testimony regarding his estoppel defense was that the DEA told him that it was up "to cities and counties to decide how they wanted to handle" marijuana dispensaries. (ER 2374). Using state law violations as a factor in prosecution decisions is far different from defendant's testimony that federal agencies would leave the matter of marijuana stores to cities and county officials.

There was also a large time difference between defendant's call to DEA Group 2 and the USAO's charging decisions, and

different agents and offices involved. SA Reuter's testimony concerned the activities a Los Angeles DEA group in September 2005. (ER 2836). The decision to indict defendant was based on a DEA investigation that started in January 2007, and a search warrant executed in March 2007. (GER 738, 740). Defendant called SA Reuter's group over a year before DEA's Ventura Office began investigating him. As SA Reuter testified, the case agent, worked in a different office, and SA Reuter was unaware that she might testify until informed during defendant's opening statement. (ER 2852, 2859).

Third, nothing in the warrant affidavit or the prosecutor's remarks about charging concerns advice given to the public regarding marijuana stores' legality, which was the entire focus of defendant's testimony and that of SA Reuter. That the USAO considered state law violations for charging purposes in 2007 and that the factual predicate for those state law violations were documented in the March 2007 warrant says nothing about what advice DEA agents gave to members of the public generally, or to defendant specifically in 2005. There was no Brady violation, and the court correctly denied the motion.

I. THE COURT'S REFUSAL TO IMPOSE THE FIVE-YEAR MANDATORY-MINIMUM WAS ERRONEOUS AS A MATTER OF LAW

At sentencing, the government sought no more than Count One's five-year mandatory-minimum sentence. To avoid the

mandatory minimum, the court crafted a new discretionary exception to USSG § 3B1.1's aggravating-role enhancement to find defendant had satisfied 18 U.S.C. § 3553(f)'s so-called safety-valve provision. This ruling was incorrect as a matter of law. Section 3B1.1 by its express terms provides no discretion. Because its predicates were indisputably met, the court had to apply the enhancement and bar safety-valve relief. The court erroneously ignored § 3B1.1's plain language and controlling precedent.

1. Sentencing Proceedings

Immediately following the verdict, the court said it wanted the parties to address at some point whether "an argument [can] be made that the mandatory minimums should not apply here? In other words, does the court have the authority to do that." (ER 3183). It asked, "can the court get around the mandatory minimum in a medical marijuana conviction situation?" (Id.).

In defendant's Presentence Investigation Report, the Probation Office applied § 3B1.1(a)'s four-level aggravating-role enhancement because defendant was an organizer and leader of criminal activity involving five or more participants. (PSR ¶ 55). It explained that defendant employed and oversaw ten employees, who helped defendant run the CCCC. (Id.). It referenced defendant's leadership as an owner/operator of the CCCC who controlled its bank accounts, day-to-day business, and

money, and entered into its lease. (Id.). It also noted that Counts Two and Three carried a one-year mandatory-minimum sentence, and Count One carried a five-year mandatory minimum. (PSR ¶¶ 3, 39, 142).

At a January 2009 hearing denying defendant's third new trial motion, the court continued sentencing over the government's request for a "tighter" schedule. (ER 3297-3316). It said it had "no problem sentencing the particular defendant except for the issue of the mandatory minimum. If the mandatory minimum binds me, there is not much I can do. If the mandatory minimum does not bind me, then I can do other things." (ER 3307-08). In response to defendant's plan to call various witnesses at sentencing, and before any parties had filed sentencing papers, the court said that "[t]he issue is the legal issue, which is the mandatory minimum" and that equitable factors were "irrelevant" unless it had discretion. (ER 3313). The court twice added that it knew exactly how it would exercise its discretion "if I have it." (ER 3313-14).

The parties filed extensive sentencing briefs. Regarding § 3B1.1, defendant admitted that the PSR's recitation of facts supporting its application was correct. (GER 590-91 (citing PSR)). It argued the enhancement should not apply because it would lead to an "anomalous, unjust, and absurd result," raised

several theories opposing the mandatory minimum, but did not attack the facts behind the PSR's conclusion. (GER 591-99).

The government asserted the court had no discretion but to apply the one and five-year mandatory minimums. (GER 450-62). It filed a separate pleading on the safety valve. (GER 418-49). It noted that, by its express terms, 18 U.S.C § 3553(f) did not apply to § 859 convictions, and thus to Counts Two and Three's one-year minimums. (GER 428-30). The government said there were overwhelming facts supporting the PSR's conclusion that defendant was an organizer/leader under § 3B1.1(a). (GER 433-36). In addition to those in the PSR, the government referenced additional facts, supported by record citations to trial exhibits, trial testimony, and defendant's declarations. (See GER 435-37 (cataloguing evidence)). These included defendant's hiring and firing of employees and managing their payroll as the CCCC's owner atop its management; his leadership and initiative in organizing and setting up the operation and interacting with public officials; and his management and control of the store's records, safes, money, and financial accounts. (ER 1416-18, 1430-33, 2355-57, 2508-11, 2528, 2585-86, 2728, GER 324-29, 403-10, 730-34; GX 45-51, 89, 176, 180-181; GER 406-07, 764-77, 783-88, 919-20, 937-39). The government also referenced defendant's name and signature on all customer forms and agreements, and his personal involvement in approving or paying for the vast

majority of CCCC marijuana transactions. (GER 250-51, 289-97; GX 101, 106, 108, 109-11, 166, 183, 184; GER 804-05, 811-12, 814-20, 821-24, 909-917, 947-958).

The government thus asserted that under 18 U.S.C. § 3553(f)(4), the § 3B1.1 enhancement barred defendant from satisfying the safety valve. It opposed defendant's other arguments and said it would be clear error for the court not apply the role enhancement and Count One's five-year mandatory-minimum. (GER 437-43). The government calculated defendant's guideline range as 135-168 months. (GER 469-73). Nonetheless, it requested only Count One's five-year mandatory sentence. (GER 481).

The court held a sentencing hearing on March 23, 2009. (CR 268; ER 3333-73). Although the government sought only the mandatory minimum, the court again delayed sentencing, over government objection, purportedly to obtain new information pertinent to § 3553(a)'s discretionary sentencing factors. The court said it had seen statements in the media by the Attorney General concerning marijuana and ordered the government to provide information from someone in Washington, D.C., regarding whether these statements changed government policy on marijuana stores. (ER 3335-48). The government asked the court to rule on the applicability of the mandatory minimums. The court refused without first receiving the government's response to its

new inquiry, stating that its sentencing decisions and the § 3553(a) factors were "a gestalt-type of thing." (ER 3360).

On March 27, 2009, the court conducted a telephonic status conference clarifying its request to the government, and overruling the government's arguments that it would unnecessarily delay proceedings. (CR 272; ER 3377-99). On April 17, 2009, the government filed a letter from Washington D.C. to the USAO stating defendant's prosecution complied with all Departmental policies and statements of the Attorney General, and directing the USAO to proceed with its sentencing position. (CR 276; GER 613-15).

The court held a third sentencing hearing on April 23, 2009. (CR 282; ER 3402-3510). It said the government's letter "takes care of that particular issue," but said nothing about its impact on sentencing. (ER 3432).

The court commented on various issues concerning mandatory-minimum sentences, and said that it did not wish to apply them:

> As to the safety valve, the safety valve would only work as to Count 1. The safety valve would not work as to Counts 2 and 3. So at this point the Court would have to conclude that the Court would be bound by the mandatory minimum in Counts 2 and 3. I can't see at this point any way out of it. And, frankly, to be blunt, I will indicate that -- that my preference would be that if I could find a way out, I would.
>
> . . . .
>
> Because, frankly, I don't think that this particular case is one which merits a mandatory minimum. But

> again, I'm not the legislature, and the legislature has clearly spoken on this issue.

(ER 3444).

The court said "no judge on the Ninth Circuit" would allow defendant to be relieved from application of the mandatory sentences for Counts Two and Three. (Id.). However, the court said it still had questions about whether it could find the safety valve applicable to Count One's five-year sentence by finding § 3B1.1 inapplicable. (ER 3444-45). It read out Application Note 4, which discussed the differences between defendants receiving a four-level or three-level enhancement, but which the court appeared to believe could be used to determine whether § 3B1.1 applied at all. It asked whether it could avoid applying § 3B1.1 if defendant reasonably believed his conduct lawful, and ordered briefing on the issues. (ER 3436-37). It said it looked for a case allowing it to avoid the mandatory minimums, but had not found one. It invited defense counsel to find a case. (ER 3483). The court also asked for briefing on whether it could impose the one-year mandatory sentences without imprisonment. (ER 3499-3500, 3503-10). It said it would draft a tentative decision before the next hearing. (ER 3504).

The court made clear it was trying to avoid application of the five-year mandatory-minimum sentence:

> I mean, I've pretty much kind of laid my hand out here
>
> . . . .
>
> The five-year issue -- I mean, let me put it this way. The only way I can see around the five-year issue is if I make a determination that he is not a leader, supervisor, manager. And the only way I can conceive of doing that is the way I discuss here. Unless . . . the defense come up with something new, I really can't conceive of another way to do it, other than what I've discussed.

(ER 3505).

As required, the parties filed additional briefs. The government asserted that § 3B1.1 unambiguously provided a role enhancement regardless of the defendant's scienter, only imprisonment satisfied the mandatory sentences, and again urged the court to apply the legally-required sentences. (CR 286; GER 616-36). The court did not issue a tentative decision, but held a fourth sentencing hearing on June 11, 2009. (CR 324; ER 3572-3663). It reviewed the charges of conviction, and guideline calculations of the probation office and parties. (ER 3603-08). It discussed marijuana prosecutions in other cases and, after argument, denied defendant's attempts to seek relief from the mandatory-minimum sentences other than through the safety valve. (ER 3609-20).

The court ruled, however, that it would find "the safety valve applicable in this situation. Therefore, I will not find that the five-year mandatory minimum is applicable in this

situation." It said it would sentence defendant to a year-and-a-day's concurrent imprisonment on Counts One, Two, and Three with four years' supervised release. (ER 3639-40, 3656-57). Defendant would receive a time-served sentence for Counts Four and Five, with three years' supervised release on Count Four. (ER 3658-61). The court stated its intent to "put it in writing so there is no confusion as to why I['m] doing that. I will put that in writing hopefully that will be out within a week." (ER 3639). Over government objection, the court declined to explain its § 3553(a) analysis or its sentence until its subsequent written decision. (ER 3639-41, 3643-45, 3653-55, 3657-58).

Five months later, the court had not issued its promised ruling. The government filed a request for a ruling and a judgment and commitment order. (CR 313). The court did not respond. Over four months later, in February 2009, the government filed a second request, noting it had been over a year-and-a-half since defendant's conviction. (CR 315). Approximately three months later, in April 2010, the court held two hearings where it circulated, and filed a 41-page explanation of its rulings from its June 11, 2009 hearing, but allowed no argument, made only technical corrections, or discussed other matters. (CR 320, 325, 327; ER 391-431, 3665-89).

The sentencing memorandum described California and federal marijuana law and the court's characterization of defendant's activities at the CCCC. (ER 393-409). The court rejected defendant's other arguments for relief from the mandatory-minimum sentences and held that the safety valve did not apply to Counts Two and Three's one-year mandatory sentences. (ER 417-20). It found it did not have to apply § 3B1.1(a)'s aggravating role enhancement to defendant as an organizer/leader or any of § 3B1.1's lesser enhancements. (ER 422-34). Referencing the application notes and commentary, it held it need not apply the provision when the organizer/leader of a crime "did and does not present a danger to the public . . . and is not likely to recidivate." (ER 422). It recited several facts it believed demonstrated defendant was not a risk to the public and found § 3B1.1 inapplicable. (ER 423-25). As the parties agreed defendant had satisfied its other criteria, the court concluded that defendant qualified for the safety valve for Count One. (ER 426). After applying the 18 U.S.C. § 3553(a) factors, the court sentenced defendant to a year-and-a-day's imprisonment on Counts One through Three, and "time served" on Counts Four and Five. (Id.).

2. Standard of Review

The district court's interpretations of the guidelines are reviewed de novo. United States v. Yi, 704 F.3d 800, 805 (9th Cir. 2013).

3. Applicable Law on Mandatory Minimum Sentences and the Safety Valve

"It is axiomatic that a statutory minimum sentence is mandatory. . . . Where 'no exception to the statutory minimum applies . . . , the court lack[s] the authority to refuse to impose the . . . mandatory minimum.'" United States v. Sykes, 658 F.3d 1140, 1146 (9th Cir. 2011).

There are only two well-established exceptions where a court may impose a sentence below a statutory mandatory minimum. First, following a motion by the government for defendant's "substantial assistance," which is inapplicable here. Melendez v. United States, 518 U.S. 120, 128 (1996). Second, for defendants who qualify for § 3553(f)'s safety-valve provision. Section 3553(f) has five independent criteria for authorizing a sentence below an otherwise-applicable mandatory minimum. 18 U.S.C. § 3553(f)(1)-(5). The one disputed criterion here is paragraph (f)(4):

> [T]he defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in [21 U.S.C. § 848].

As defendant was not charged with engaging in continuing criminal enterprise, the safety valve's applicability depended on whether he qualified as "an organizer, leader, manager, or supervisor under the sentencing guidelines." For safety-valve purposes, this "means a defendant who receives an adjustment for an aggravating role under § 3B1.1."[13] USSG § 5C1.2, comment. (n.5).

Section 3B1.1 includes three different degrees of offense-level enhancements depending on the number of participants involved in the offense, and defendant's level of responsibility. The highest enhancement is subsection 3B1.1(a), which provides, "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase 4 levels." Subsection 3B1.1(b) provides a three-level enhancement for being a "manger or supervisor (but not an organizer or leader)" of criminal activity involving five or more participants, and subsection 3B1.1(c) provides a two-level enhancement for being a "manager or supervisor" of fewer than five participants. While a defendant may be subject to no more than one of these three § 3B1.1 enhancements, any precludes safety-valve eligibility,

[13] Booker does not impact the safety-valve determination, nor make discretionary § 3553(f)'s requirements referencing the guidelines. United States v. Holguin, 436 F.3d 111, 116-17 (9th Cir. 2006).

and statutory relief from a mandatory-minimum sentence. USSG § 5C1.2, comment. (n.5); United States v. Ceron, 286 Fed. Appx. 974 (9th Cir. 2008).

4. The Court's Erroneous Interpretation of USSG § 3B1.1

The application notes to § 3B1.1 provide definitions for issues like who is a "participant" in a crime, and what distinguishes mere "management or supervision" from "leadership and organization." USSG § 3B1.1, comment. (nn.1 & 4). However, the court did not dispute the overwhelming evidence that defendant was an organizer or leader of a crime involving over five participants. It acknowledged that § 3B1.1(a)'s factual predicates were met, finding that "Lynch did put together [the marijuana store's] operations which had about ten employees." (ER 425). It referenced several facts demonstrating defendant's organizer/leader role, such as his obtaining licenses for the business, "regulating the conduct of CCCC's employees," requiring workers and customers to sign various agreements and forms, and keeping detailed records. (ER 425-26).

Instead, the court relied on Application Note Two to create an exception to the direct relationship in § 3B1.1's text between the factual predicates of defendant's role and the number of criminal participants on the one hand, and application of the enhancement on the other. (ER 422).

Note Two provides:

> To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

USSG § 3B1.1, comment. (n.2) (emphasis added).

Quoting only from the first sentence and relying on the emphasized phrase, the court concluded, "[c]onsequently, merely being an organizer/leader over another participant simply qualifies a defendant for an adjustment; it does not require it." (ER 422).

After creating this dichotomy between qualification and application, the court looked to two sources to determine which defendants "qualified," but did not need to receive an enhancement. First, it referenced general statements in case law that the safety valve was designed to assure that mandatory-minimums were targeted "towards relatively more serious conduct." (Id.). Second, it cited a small portion of the "Background" paragraph of § 3B1.1's commentary, which provides, in part:

> Background: This section provides a range of adjustments to increase the offense level based on the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility.

> However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

USSG § 3B1.1, comment. (backg'd). The court summarized the commentary as saying the "reason why USSG § 3B1.1" provides for an adjustment for organizers, leaders, managers, and supervisors "is the belief that 'such persons present greater danger to the public and/or are more likely to recidivate.'" (ER 442 (quoting § 3B1.1, comment. (backg'd))). Accordingly, the formulated its new exception to § 3B1.1, as follows:

> [W]hen the evidence clearly shows that the defendant in question did and does not present a greater danger to the public (and in fact has greatly reduced the criminality of the involved conduct) and is not likely to recidivate, that individual should not be considered as falling within USSG § 3B1.1 for purposes of an upward adjustment.

(Id.).

5. The Court Violated Clear Guideline-Interpretation Rules by Ignoring USSG § 3B1.1's Text and Mandatory Nature

The court failed to follow § 3B1.1's plain meaning, and refused to recognize that it was required to apply that meaning once it found § 3B1.1's factual predicates satisfied. In construing the guidelines, a court must apply conventional statutory-construction principles. United States v. Soberanes, 318 F.3d 959, 963 n.4 (9th Cir. 2003). If the plain text of the

guidelines addresses an issue, it controls, and the analysis ends. United States v. Valenzuela, 495 F.3d 1127, 1133 (9th Cir. 2007).

Background notes are authoritative only to the extent that this commentary is consistent with the guideline's text itself. See Stinson v. United States, 508 U.S. 36, 43 (1993). It is improper for courts to create exceptions to § 3B1.1 not found in its text. As the Eighth Circuit explained in a case where the government argued for § 3B1.1(c)'s two-level enhancement, but the court found that a four-level enhancement was warranted:

> We cannot circumvent the plain meaning of the guideline and impose a flexibility that is not contemplated by its terms. Rigidity within the sentencing guidelines is an issue for the sentencing commission and Congress to resolve, not for the courts to ignore.

United States v. Smith, 49 F.3d 362, 367 (8th Cir. 1995).

Section 3B1.1's text requires application of the four-level enhancement where the defendant was an organizer or leader of criminal activity involving over five participants. USSG § 3B1.1(a). The court found these facts met, but improperly sought to give itself flexibility to avoid imposing the enhancement.

Section 3B1.1 provides clear instruction that if the factual predicates of the defendant's role and the number of participants are met, then the court is commanded to "increase"

the offense level. See USSG § 3B1.1. Application of such "if/then" enhancements is mandatory, and "equitable principles do not apply." United States v. Savin, 349 F.3d 27, 30 n.10 (2d Cir. 2003); see also United States v. Williamson, 154 F.3d 504, 505 (3d Cir. 1998) (construing USSG § 3C1.1, an "if A, then B" guideline). This rule has been directly applied in § 3B1.1 cases. United States v. Jimenez, 68 F.3d 49, 51-52 (2d Cir. 1995); United States v. Feinman, 930 F.2d 495, 500 (6th Cir. 1991). It has also been frequently applied in cases involving § 3C1.1's obstruction of justice enhancement, which is similarly structured. See, e.g., United States v. Barajas, 360 F.3d 1037, 1043 (9th Cir. 2004) (enhancement mandatory once factual predicates met); United States v. Ancheta, 38 F.3d 1114, 1118 (9th Cir. 1994) (enhancement is "mandatory, not discretionary").

That the guideline provision at issue had an impact on application of the safety valve does not change the analysis. This Court has clearly stated that courts may not use policy or equitable concerns to "create an exception to one of the five [safety valve] criteria established by Congress and the President by judicial fiat." United States v. Yepez, 704 F.3d 1087, 1091 (9th Cir. 2012) (en banc); United States v. Valencia-Andrade, 72 F.3d 770, 774 (9th Cir. 1995).

Even in cases with sympathetic defendants, this Court has urged courts "to resist the temptation to extend the reach of a

statute beyond the express intention of Congress, to avoid a harsh result" because courts "have no constitutional authority to adopt a new exception to the mandatory minimum penalty requirements of 21 U.S.C. §§ 841, 844, and 846." Valencia-Andrade, 72 F.3d at 774; see United States v. Hernandez-Castro, 473 F.3d 1004, 1008 (9th Cir. 2007) (reaffirming Valencia-Andrade after Booker)).

6. The Court Misread the Guideline's Commentary

Even if it were proper for the court to craft a policy exception to the text of § 3B1.1 from guideline commentary and notes, the sources relied on by the court did not support its new rule, but the plain meaning of its text requiring its application to defendant.

Contrary to the court's analysis, Application Note Two does not distinguish between classes of organizer/leaders who "qualify" factually and receive the enhancement and a different group (including defendant) that do not receive it. Note Two distinguishes between organizers/leaders of human participants, all of whom are covered by § 3B1.1's clear text, and those defendants who do not supervise people, but manage "property, assets, or activities of a criminal organization." USSG § 3B1.1, comment. (n.2). This latter group who lead, organize, supervise, or manage no human participants are not covered by § 3B1.1, but might be eligible for an upward departure under the

guidelines generally. Id. Nothing in Note Two supports the court's view that organizer/leaders of other criminal participants could avoid receiving a role enhancement based on other factors.

The court also misread the background commentary. Consistent with § 3B1.1's text, its background commentary points out that § 3B1.1 "provides a range of adjustments to increase the offense level based on the size of a criminal organization . . . and the degree to which the defendant was responsible for committing the offense." This refers to the offense-level adjustment increasing from two to four depending on the organization's size and the responsibility of the defendant.

The court relied heavily on the sentence noting that "it is also likely" that supervisors and managers "tend to profit more" and present a "greater danger to the public" or likelihood of recidivism. But in selectively over-relying on this sentence, the court ignored the word "likely" and the absence of any statement that § 3B1.1 does not apply in the absence of facts showing greater profit or public danger. See United States v. Calvert, 511 F.3d 1237, 1244 (9th Cir. 2008) (background commentary noting that conduct "frequently" involves an effort to obstruct ongoing proceeding "necessarily means that it does not 'always' have to be tied to such a proceeding"). The court also ignored the context provided by the very next sentence,

which states the "Commission's intent" that "this adjustment should increase with both the size of the organization and the degree of responsibility." (Id.). This formulation directly follows the factors set forth in § 3B1.1's text without reference to public danger or recidivism.

7. The Court Committed Additional Errors in Its Safety-Valve Analysis

The court made further errors in its safety-valve determination. At the start of its analysis, the court referenced Koon v. United States, 518 U.S. 81 (1996). (ER 422). Although not expressly relying on Koon's reasoning, the court suggested Koon might permit it to find that defendant's medical marijuana activities presented an "atypical" case "outside the heartland" that would "justify a departure from the ordinary/conventional view of what characteristics/activities are used to define the status of being an 'organizer, leader, manager or supervisor.'" (Id.).

This discussion is at best a non-sequitur. Departures under the guidelines do not concern a court's ability to ignore application of a guideline provision, as the court implied. Rather, a departure is an adjustment to a sentencing range (or criminal history score) once the guideline provisions have already been appropriately applied and calculated. See generally USSG 1B1.1, comment (n.1)(E) (defining "departure");

18 U.S.C. § 3553(b)(1); Koon, 518 U.S. 92-94. Koon, by contrast, addressed the standards of review governing guideline departures, and liberalized the deference that appellate courts gave to a court's departure decision. See Koon, 518 U.S. at 81, 85, 96-100. It did not, as the district court seemed to think, convert departures into a mechanism for avoiding application of individual guideline provisions. Even where departures are used correctly under the guidelines, this Circuit has held that departures may not be used to distort the requirements of the safety valve. See Hernandez-Castro, 473 F.3d at 1008; Valencia-Andrade, 72 F.3d at 774.

Although the court's fundamental misunderstanding of Koon and structure of the guidelines was not clearly a part of its § 3B1.1 ruling, it highlights the breadth of its error, and its strenuous effort to justify its desired result.[14]

J. BECAUSE OF THE COURT'S STRONGLY HELD VIEW AND UNUSUAL EFFORTS TO AVOID THE REQUIRED SENTENCE, THIS COURT SHOULD ORDER REASSIGNMENT

Should this Court reverse the district court's ruling on § 3B1.1 and application of the five-year mandatory-minimum, one might expect quick resolution on remand with imposition of the

[14] The court also made clear factual errors. For example, it said there was no evidence that the marijuana employee Doherty distributed came from the CCCC when his bag containing the plants had a CCCC receipt on it. (ER 408 n.16, 1741). Because the court's ruling is reversible as a matter of law, the government need not catalogue these mistakes.

five-year sentence. However, the court's prior actions suggest otherwise. The court made many blunt statements opposing the five-year mandatory minimum. It engaged in highly unusual and protracted efforts to search for any legal rationale to avoid the sentence, and showed a willingness -- often without explanation -- to significantly delay proceedings. These factors raise a strong inference that the court will seek to frustrate or delay the consequences of a successful government appeal. Accordingly, following a successful government appeal, the government seeks reassignment to a new judge.

The authority to reassign stems from 28 U.S.C. § 2106 and, unlike a disqualification motion, a reassignment request need not be raised in district court. United States v. Sears, Roebuck & Co., 785 F.2d 777, 780-81 (9th Cir. 1986). Reassignment is appropriate under "unusual circumstances" when:

> (1) the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected,
>
> (2) reassignment is advisable to preserve the appearance of justice, and
>
> (3) reassignment would not entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Jacobs, 855 F.2d 652, 656 (9th Cir. 1988).

It is easy to conclude that the district court would have great difficulty putting out of its mind its previously

expressed views opposing the mandatory-minimum. The court stated its firm views directly and repeatedly. Twice at the April 23, 2009, sentencing hearing, it expressed its opposition to applying the mandatory minimum and also said that it was actively attempting to "find a way out," inviting the defense to help. (ER 3444, 3505). Immediately after the verdicts, it said it was looking for a way to "get around" the mandatory minimum. (ER 3183). Just as problematic was the court twice saying on January 5, 2009, before either party had filed a sentencing position, that it knew the result it wanted to reach. (ER 3313-14 ("I know what I'm going to do . . . if I have discretion.")). The court formed a hardened opinion early on and had little concern for the adversarial process or required sentencing procedures. The extraordinary lengths the court went -- a total of four sentencing hearings, multiple briefing rounds, a request for comment from Washington D.C., and a final delay of approximately 11 months before issuing its opinion -- reflect substantial commitment to reaching its flawed conclusion.

Taken as a whole, the past proceedings demonstrate why reassignment is necessary to preserve the appearance of justice. Most significant are fairness and delay. The court continually sacrificed the efficient administration of justice to search for a rationale or event to reach its desired result. The court took the highly unusual step of requiring trial counsel to

confirm the government's sentencing position with officials in Washington, then essentially ignored the response. (ER 402 n.7). The court delayed issuance of its written sentencing memorandum for eleven months after announcing it had reached its conclusion saying it would provide its rationale "within a week."

These acts should also be viewed in light of the court's delay of proceedings on multiple occasions to ask for briefing on theories to avoid the mandatory-minimum, but ultimately ruling on grounds never raised previously and without giving the government any opportunity to respond. Viewed as a whole, the court's conduct reflects a willingness to use extraordinary means and to tolerate or foster extreme delay to avoid the legally-required sentence. It is unfortunately reasonable to assume that the court will pursue a similar course even in the more restrictive context of remand from a successful appeal.

Finally, a new judge would not be overly-burdened on remand. As the government will be seeking only the applicable mandatory-minimum sentence on Count One, the judge need only properly apply that legally required sentence.

K. DEFENDANT'S CHALLENGES TO HIS YEAR-AND-A-DAY SENTENCE ARE INCONSEQUENTIAL IN LIGHT OF THE APPLICABLE MANDATORY MINIMUM, AND MERITLESS IN ANY EVENT

Defendant raises two brief challenges to his sentence on Counts One through Three. Because those sentences were below

the five-year sentence required for Count One, these arguments are inconsequential and in any event mistaken.[15]

1. Defendant Was Not Entitled to Time Served on Count One

For the first time on appeal, defendant argues that the court erred by imposing a year-and-a-day sentence on Count One. (AOB 78). Although the issue was never raised below, he suggests that the court imposed this sentence because it mistakenly thought it was required because one of objects of that count was to violate 21 U.S.C § 859, which carries a one-year minimum. Defendant correctly notes that there was no jury finding to support a mandatory one-year sentence under § 859 for Count One. However, as set forth above, the court should have imposed the applicable five-year mandatory sentence on Count One, thus mooting defendant's argument. In any event, it is unclear whether the court would have sentenced defendant to less than a year on Count One, given that his sales to under-21 minors included the two individual transactions that led to the year-and-a-day sentences on Counts Two and Three, in addition to many additional transactions with minors proven at trial. On

[15] The court correctly held the safety valve does not apply to convictions under 21 U.S.C. § 859 and the one-year minimums in Counts Two and Three. (ER 420); see United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir. 2000). Without analysis, defendant seeks to preserve an argument that Kakatin was wrongly decided. (AOB 80). As the government explained below, Kakatin is correct and need not be reexamined. (GER 428-31).

multiple separate occasions, the court expressed its intent to impose a one-year sentence on Count One, and did not reference the mandatory minimum in so doing. (ER 429, 3656-59, 3682-84). There was no plain error.

2. 21 U.S.C. § 859's One-Year Mandatory Minimum Applies to Counts Two and Three Notwithstanding Count One's Longer Mandatory Minimum

Defendant suggests that § 859's language can be read to preclude application of any mandatory sentence to him. (AOB 79-80). In district court, defendant relied on United States v. Williams, 558 F.3d 166 (2d Cir. 2009), which interpreted 18 U.S.C. § 924(c), to argue that § 859(a)'s second sentence, the so-called "except clause," prevented the one-year mandatory minimum's application to him because there was a higher mandatory minimum potentially applicable for Count One, even though the court might not impose that minimum. (ER 3512-26). The government opposed the argument (GER 650-59), and the court rejected it, finding it an "unnatural reading of the statute." (ER 3613-22, 3637). The Supreme Court rejected the Second Circuit's reasoning in Abbott v. United States, 131 S. Ct. 18 (2010). See United States v. Tejada, 631 F.3d 614, 617-19 (2d Cir. 2011).

In its briefing below the government showed that even before Abbott overruled Williams, defendant's arguments for construing § 859 to avoid application of any mandatory sentence

merely because there is a mandatory minimum available for Count One was even weaker than in Williams' § 924(c) context. (GER 652-58). As explained in detail the government's brief, defendant's focus on § 859's "except clause," ignores the rest of the statue. The plain meaning of "except to the extent a greater minimum sentence is otherwise provided by section 841(b)" is to reference mandatory penalties for charged conduct underlying a specific § 859 charge, not conduct separate and apart from the § 859 violation. Defendant's reading radically suggests that the "except clause" can vitiate a mandatory minimum whenever there is a higher mandatory minimum for another charge, which would put him in a better place than a person not charged with a drug conspiracy. (Id.). No court has adopted defendant's argument; it should fail.

IV

CONCLUSION

For these reasons, defendant's convictions should be affirmed and below-mandatory-minimum sentence reversed.

Dated: March 14, 2015

Respectfully submitted,

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ROBERT E. DUGDALE
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STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6, that the following appeal involves an issue "closely related" within the meaning of Ninth Circuit Rule 28-2.6(c): United States v. Jason Washington, No. 13-30143 (opening brief filed October 30, 2013).

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 10-50219, 10-502

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ DAVID KOWAL

("s/" plus typed name is acceptable for electronically-filed documents)

Date: March 14, 2014

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

9th Circuit Case Number(s) 10-50219, 10-50264

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****

CERTIFICATE OF SERVICE
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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) March 14, 2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ David Kowal

****

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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Signature (use "s/" format)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant

v.

CHARLES C. LYNCH,

Defendant-Appellant/
Cross-Appellee

C.A. No. 10-50219, 10-50264
D.C. No. CR 07-689-GW
(Cent. Dist. Calif.)

GOVERNMENT'S MOTION FOR LEAVE TO FILE OVERSIZED BRIEF; DECLARATION OF DAVID KOWAL

Plaintiff-Appellee United States of America, by and through its counsel of record, pursuant to Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 32-3, respectfully moves this Court for leave to file it answering brief exceeding the word count limitations set forth by the Appellate Commissioner's December 31, 2013, order.

This motion is based upon the files and records of this case

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and the attached declaration of Assistant U.S. Attorney David Kowal.

DATED: March 14, 2014

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

/S/ David Kowal
DAVID KOWAL
Assistant United States Attorneys

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

DECLARATION OF DAVID KOWAL

I, David Kowal, hereby declare and state as follows:

1. I am Assistant United States Attorneys in the Central District of California and was responsible for preparing the government's answering brief and brief on cross-appeal ("answering brief") in United States v. Lynch, CA No. 10-50219, 10-50264, which I co-prosecuted in the district court.

2. On November 1, 2013, the government moved for leave to file an answering brief of 42,341 words (the "original" brief). On December 31, 2013, the Appellate Commissioner ordered the government to reduce the size of its answering brief to 28,000 words. The government seeks to file an answering brief exceeding the 28,000-word-count limitation set by the Appellate Commissioner's Order. Specifically, the government seeks leave to file an answering brief that is 32,951 words, 3,951 above the Appellate Commissioner's order. Allowing the government to file its 32,951-word answering brief would be appropriate for the following reasons:

a. The government has substantially reduced its answering brief in response to the Appellate Commissioner's order. Specifically, we have cut 10,621 words from the original brief, and reduced the total page length by 41 pages (from 190 pages to 149) -- a reduction of almost 25% percent. I note that in the government's

November 1, 2013, motion to file an oversized brief, I said the government's original brief was 42,341. However, I have since learned that I mistakenly did an incorrect word count using our word processing software, and the government's original brief was in fact 43,572 words. (This was my first appellate brief using our office's new Microsoft Word software, and I did not know that I had to check a specific box for the software's word count to include footnotes. My November 1, 2013, word count in the default setting did not include footnotes, causing the under-count of over 1,000 words). Even using the mistaken original word count as a starting point, we have cut 9,390 words.

b. My office has expended substantial time and commitment to reduce the size of the answering brief. The Chief of our office's Criminal Appeals Section, Jean Claude André, has personally worked on the revisions of this brief with me for over a month, working through dozens of drafts to reduce the brief's length. Among other things, we removed and reduced to a short footnote one entire argument section which we thought meritorious and raised an unresolved issue in this Circuit (concerning application of Federal Rule of Procedure 12.3), purely to reduce the word count. We have made similar difficult reductions to subsections of the brief, including cutting many case citations and descriptions of the factual record that would have likely been useful

to better understand the case and our arguments. I recognize that attorneys are often overly fond of their arguments and fail to recognize the virtue and necessity of shorter briefs. However, many drafts ago, both Mr. André and I believed that we were no longer cutting anything that could be described as fat, but were harming the effectiveness and clarity of our presentation and risking adverse substantive consequences for the case.

c. As noted in our original motion, the nature of the case, proceedings in the district court, and size of the record supports the proposed answering brief. This case involves an appeal from convictions after a 10-day jury narcotics trial with extensive pre-trial and post-trial litigation such as pre-trial motions, four new trial motions, six sentencing hearings, voluminous sentencing briefs, and numerous rulings by the district court over the entire course of proceedings that covered over two years. Defendant filed 16 volumes of excerpts of record. The government has filed four of its own volumes of excerpts. The issues raised in defendant's opening brief and the answering brief cover the great majority of this procedural and factual history.

d. The need for an oversized amended answering brief is also supported by defendant's opening brief. Defendant filed an oversized opening brief, consisting of approximately 20,400 words. Two amicus briefs were filed on defendant's behalf. Each argument

section in defendant's brief often raised numerous discrete issues that the government had to address in its answering brief. For example, defendant raised evidentiary challenges to 10 different categories of evidence that the government had to respond to in its answering brief, and often each category included more than one witnesses or exhibit. Defendant also raised five different challenges to jury instructions relevant to its affirmative defense (AOB 46-57), as well as two other more general challenges to instructions by the district court containing several sub-arguments. (AOB 57-68). These issues were raised in addition to three further sentencing issues, and a challenge to the district court's denial of a new trial motion. (AOB 40-42, 78-80).

e. An oversized brief much longer than the opening brief is also warranted. Defendant's opening brief raised many issues while providing little procedural background for them, often requiring a more lengthy response from the government. For example, in one section of defendant's brief covering approximately two pages, defendant uses bullet points and short descriptions to raise evidentiary challenges to six separate items of evidence or events at trial. (AOB 36-38). While the government's answering brief sought to group similar evidentiary items and issues together for efficiency, an intelligible response required description of each challenged item of evidence, how it arose at trial, and how it was

ruled on below, as well as answering defendant's argument.

f. Similarly, in only three pages of his opening brief defendant has challenged the district court's denial of his fourth new-trial motion, which made allegations that the government violated its constitutional obligations under Brady by suppressing evidence useful to the defense. (AOB 40-43). In approximately three pages defendant raised this issue which is subject to de novo review on appeal, and which the government needed over 21-pages of briefing and over 60 pages of supporting exhibits to respond to in the district court. Hence, the government's response to the issue, much of which is a description of the factual and procedural background, is longer than the opening brief's.

7. Finally, as noted, much of the government's task in the answering brief was to set forth clearly the factual and procedural background accompanying the issues the Court needs to address. Thus, a relatively large percent of the proposed answering brief is not argument or legal analysis, but a recitation of that factual and procedural background.

8. Mr. André has informed me that today he contacted Deputy Federal Public Defender Alexandra Yates, and informed her of this request for leave to file an oversized brief. She responded that

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her office takes no position on the issue

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: March 14, 2014

/s/ David Kowal
David Kowal
Assistant U.S. Attorney

9th Circuit Case Number(s) 10-50219, 10-50264

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) March 14, 2014 .

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Signature (use "s/" format) /s/ David Kowal

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