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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES C. LYNCH,

Defendant.

Case No. 07-689-GW

Reply in Support of Motion for Written Indication That the Court Would Grant or Entertain a Motion for *McIntosh* Relief; Memorandum of Points and Authorities

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Charlie Lynch ran a legitimate medical marijuana dispensary. He sold only to patients with valid physician recommendations. He worked closely with the Mayor, the City Attorney, and members of the City Council, to ensure compliance with State and local rules. *He called the Drug Enforcement Agency before he opened*. *See* Govt. Ex. F (Sentencing Memorandum) at 13-16.

And yet, the government wants more. It demands compliance with nonbinding guidelines issued *after* Mr. Lynch closed his dispensary. It condemns his efforts to recoup a portion of his capital outlay and cover his operational costs. And it throws up one meritless procedural hurdle after the other, all with the goal of continuing a prosecution Congress has defunded.

Mr. Lynch asks this Court to grant relief.

II. ARGUMENT

A. Mr. Lynch's Motion Is Timely and Procedurally Sound

Mr. Lynch has not moved for habeas relief (28 U.S.C. § 2255) or relief from a civil judgment (Fed. R. Civ. P. 60(b)). He seeks an injunction barring the Department of Justice from spending funds on his case, pursuant to the Ninth Circuit's recent decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). The Court may order this remedy at any time upon notice to the adverse party. *Cf.* Fed. R. Civ. P. 65; Local Crim. R. 57-1. There is no statute of limitations for filing such a motion.

Although the Parties' cross-appeals from Mr. Lynch's conviction and sentence progress slowly, Mr. Lynch moved expeditiously to enforce Section 542. Within weeks of its enactment (as then-Section 538), Mr. Lynch drafted novel briefing on the issue, shared that briefing with the government as a courtesy before filing, and—within twenty-four hours of receiving a response from the government—filed his initial motion for relief in the appeals court. *See* Govt. Ex. K (Def. Opp. to Govt. Mot. To Delay) at 16-17. Proceedings on that motion concluded on June 22, 2015, without

substantive resolution and with direction that Mr. Lynch re-raise his arguments in his third cross-appeal brief. *See* Def. Ex. A (Order); Def. Ex. F (Order). While Mr. Lynch was preparing that brief, the Ninth Circuit issued *McIntosh*, directing criminal defendants challenging their prosecutions under Section 542 to seek relief in district court. *McIntosh*, 833 F.3d at 1179. The Ninth Circuit denied the petition for rehearing in *McIntosh* on November 29, at which point the decision became final;[1] Mr. Lynch moved for relief in this Court less than two weeks later.

Put simply, timeliness and diligence are irrelevant to the Court's decision, but in any event Mr. Lynch moved timely and diligently.

Mr. Lynch's motion is also procedurally sound. The government meanders through the finer points of Federal Rule of Criminal Procedure 37; but it is unclear what the government believes Rule 37 adds to Rule 12.1, the customarily cited authority for indicative rulings that Mr. Lynch addressed in his motion. The government's cited case on indicative rulings, *United States v. Maldonado-Rios*, 790 F.3d 62 (1st Cir. 2015), references only Rule 12.1, with no mention of Rule 37. Indeed, Rule 37 is a recently enacted complement to Rule 12.1 that largely tracks the latter's language and advisory committee notes. *Compare* Fed. R. Crim. P. 37 *with* Fed. R. App. P. 12.1. If the government wishes to highlight the Court's authority to defer ruling on Mr. Lynch's motion, that authority is apparent from Rule 12.1. *See* Fed. R. App. P. 12.1 advisory committee notes (explaining court may "entertain the motion and deny it, defer consideration, state that it would grant the motion . . ., or state that the motion raises a substantial issue"). And as discussed below, the motion is ripe for adjudication.

[1] *See United States v. McIntosh*, CA No. 15-10117, Dkt. No. 95.

B. The Court Should Reject the Government's Request for Delay, and Rule on Mr. Lynch's Motion

The government aims to avoid the Section 542 issue by urging the appeals court and now this Court to table the matter. *See* Govt. Opp. at 5-8; Govt. Ex. J (Govt. Mot. for Leave To File Resp. with Fourth Br. on Cross-Appeal). Such delay presents two problems.

First, if the Court rules in Mr. Lynch's favor, and the Ninth Circuit remands to the district court, that decision could moot the substantive cross-appeals.

Second, if the government's continued spending on this case is unlawful, the Court should not ignore that fact and allow further expenditures on appeal. The concern is not solely unauthorized waste of taxpayer funds—although that interest is weighty. The government's failure to comply with Congress's directive violates the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, and the Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq.*, 1511 *et seq.*, implicating constitutional rights and potential criminal liability for the government.

Moreover, the government's main rationale for deferring a ruling—that the motion presents a purely legal issue, and that Mr. Lynch may not argue otherwise—is disingenuous and false.

When Mr. Lynch initially raised the appropriations rider in the Ninth Circuit pre-*McIntosh*, he argued *any* federal prosecution where the defendant has a colorable claim of State-authorized medical marijuana conduct interferes with a State's implementation of its medical marijuana laws. For that reason, he explained, compliance with State laws is irrelevant. Because no one seriously disputes Mr. Lynch has a colorable claim of authorization, the appropriations rider applies to him. To facilitate a speedy resolution, he urged the Ninth Circuit to review the issue in the first instance. *See* Govt. Ex. K.

The Ninth Circuit rejected that argument in *McIntosh*, and held the rider applies only to defendants whose conduct was fully authorized by State law. Whether a

defendant meets that standard is a mixed question of law and fact that *McIntosh* referred to district courts. *McIntosh*, 833 F.3d at 1179. And so, although Mr. Lynch agrees application of the rider *should* be a purely legal question, under Ninth Circuit law it is not. He has, accordingly, presented his motion to this Court, properly and without undue delay following a final decision in *McIntosh*.[2]

The Parties agree that the Court need not hear additional evidence to decide whether Mr. Lynch's conduct was authorized by State law. *See* Govt. Opp. at 1, 5-8. But the evidentiary record's completeness does not transform the inquiry into a purely legal one. Unless the government concedes Mr. Lynch's compliance as *both* a factual and legal matter—a position the government took in its Second Cross-Appeal Brief, on which the Court may rely—*McIntosh* instructs this Court to resolve the dispute. *McIntosh*, 833 F.3d at 1179.

Rule 37 and *In re Saxman*, 325 F.3d 1168 (9th Cir. 2003), do not suggest otherwise. The former contains a nonexhaustive list of potential motions a criminal defendant might bring under the rule, and unsurprisingly fails to describe *McIntosh* motions specifically. *See* Fed. R. Crim. P. 37 advisory committee notes; *see also* David G. Knibb, Fed. Ct. App. Manual § 15:13 (6th ed. 2016) ("Deliberately, this [indicative ruling] procedure is not limited to specific motions."). Some of the listed motions—like newly discovered evidence motions—necessarily require factual development; others—for example, sentence modification motions—do not.

Saxman simply acknowledges the uncontroversial rule that an appeals court need not remand for "a purely mechanical or computational task," for "the resolution of [a] legal issue [that] is entirely independent of the factual issues," or where the facts "are admitted as true and not in dispute." *Saxman*, 325 F.3d at 1172 (internal quotation

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[2] Mr. Lynch preserves for the record his position that *McIntosh* was wrongly decided on this point because the rider applies more broadly, as discussed above. However, because this Court is bound by *McIntosh*, and because Mr. Lynch wins even under *McIntosh*'s stricter standard, he uses the *McIntosh* test in this brief.

marks and alteration omitted). Again, unless the government concedes—or will be held to its prior concession—that Mr. Lynch complied with State law, this is not such a case.

What is more, the government has it precisely backwards when it claims resolving this motion would "allow defendant to circumvent a ruling on the government's request for reassignment" of the case to a new judge. Govt. Opp. at 8. It is the government who advances its frivolous request for reassignment to countenance continued unlawful spending. If the Ninth Circuit believes this Court unfit to rule on the motion, it surely will say so on the government's inevitable appeal from any unfavorable decision.

C. Section 542 and *McIntosh* Limit DOJ Expenditures, Whether on Direct Appeal or in District Court

Despite the government's protestations, the appropriations rider plainly applies to *all* DOJ expenditures that "prevent" States "from implementing their own" medical marijuana laws. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015). Nothing in that language or the Ninth Circuit's interpretation of it limits its application to pretrial defendants. Just the opposite.

To start, the rider unquestionably applies to defendants whose conduct predates its enactment. *McIntosh*, which ordered Section 542 hearings for precisely such defendants, flatly contradicts the government's suggestion otherwise. *McIntosh*, 833 F.3d at 1167-68 (indicating each defendant indicted between 2012 and 2014).

Furthermore, as *McIntosh* explains, the rider "prohibits DOJ from spending money on *actions* that prevent Medical Marijuana States' giving practical effect to their [medical marijuana] laws." *Id.* at 1176 (emphasis added). Continuing to defend this prosecution on appeal, and pursuing a cross-appeal seeking additional prison time, are plainly "actions" taken by the United States Attorney's Office, an arm of the DOJ.

And these actions, with the intended goal of *punishing* Mr. Lynch, prevent California from giving practical effect to its own medical marijuana laws, as squarely held in *McIntosh*:

> [W]e consider whether a superior authority, which prohibits certain conduct, can prevent a subordinate authority from implementing a rule that officially permits such conduct by punishing individuals who are engaged in the conduct officially permitted by the lower authority. We conclude that it can.

Id. By seeking to punish Mr. Lynch, the government's continued actions prevent implementation of California's medical marijuana laws.

Importantly, the Court barred Mr. Lynch from presenting a State-authorized medical marijuana defense at his trial, and instructed the jury that California medical marijuana laws were irrelevant to the case:

> This case is a federal criminal lawsuit and is governed exclusively by federal law. Under federal law, marijuana is a Schedule I controlled substance and federal law prohibits the possession, distribution, and/or cultivation of marijuana for any purpose. Any state laws that you may be aware of concerning the legality of marijuana in certain circumstances are not controlling in this case. For example, unless I instruct you otherwise, you cannot consider any references to the medical use of marijuana.

Def. Ex. G (Preliminary Instructions) at 5. The Court repeated this instruction at the close of evidence. *See* Def. Ex. H (Jury Instructions) at 2. When the government prosecutes a State-authorized individual in these circumstances, "it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct," in violation of the appropriations rider. *McIntosh*, 833 F.3d at 1177.

And so, this Court need not even decide whether the rider applies to all post-trial defendants—although it surely does. For here, the government seeks a five-fold

increase in punishment by way of a cross-appeal, and does so in a case where California was prevented from giving practical effect to its non-prosecution laws at trial. The government's continued actions to affirm the judgment and enhance the sentence fall squarely within the ambit of the rider.

This conclusion accords with more general Ninth Circuit and Supreme Court precedent holding that a criminal appeal "is an integral part of our system for finally adjudicating [a defendant's] guilt or innocence," *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983) (internal quotation marks and alterations omitted) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)); and with the ordinary meaning of "prosecution" as government action that extends from indictment through final adjudication, *see* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/prosecution (defining "prosecution" as "the act or process of prosecuting; *specifically*: the institution *and continuance of* a criminal suit involving the process of pursuing formal charges against an offender *to final judgment*") (second and third emphases added); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (holding conviction final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally decided").

The Ninth Circuit's decisions in *United States v. Nixon*, 839 F.3d 885 (9th Cir. 2016) (per curiam), and *Olive v. Commissioner*, 792 F.3d 1146 (9th Cir. 2015), do not undermine that authority. *Nixon* holds only that the rider, which prohibits *the DOJ* from spending certain funds, does not bar *a federal judge* from restricting a probationer's marijuana use. *See Nixon*, 839 F.3d at 886-88. And *Olive*, a civil case predating *McIntosh*, merely upholds the government's authority to tax medical marijuana providers because "enforcing . . . a tax . . . does not prevent people from using, distributing, possessing, or cultivating marijuana." *Olive*, 792 F.3d at 1151. These inapposite cases do not narrow the rider's scope.

D. Mr. Lynch's Conduct Was Authorized by California Medical Marijuana Laws

1. Mr. Lynch Is Not Estopped from Arguing His Compliance

The government's bid to estop Mr. Lynch from arguing compliance distorts the record and is meritless. Mr. Lynch consistently has asserted that he ran a State-legal storefront medical marijuana dispensary. In the face of unsettled and ambiguous California rules, he initially relied on California's Compassionate Use Act ("CUA") as authority. After consulting with an expert in the field, he cited the Medical Marijuana Program Act ("MMPA") for additional support. But at all times his position has been clear: California permits storefront medical marijuana dispensaries. *See* Govt. Ex. E (Def. Sentencing Reply) at 10-15; Govt. Ex. G (Elford Decl.); Def. Mot. at 12-13.

When Mr. Lynch agreed that he "did not operate a collective or cooperative" or a "classic collective, as now defined by the Attorney General's opinion," he did not waive any argument that the CCCC was legal under the MMPA during its existence. Govt. Ex. E at 15. In that very paragraph, he described the CCCC as "a storefront dispensary," and explained why storefront dispensaries are lawful. *Id.* His obvious point was that, when he operated the CCCC from 2006 to 2007, he did not take certain steps outlined in the later-issued guidelines, such as incorporating as an agricultural cooperative or, in the alternative, establishing joint ownership with all collective members. *See* Govt. Ex. C (Atty. Gen. Guidelines) at 8. But Mr. Lynch never conceded his storefront dispensary was unlawful for those reasons, because it was not. Nor does he now "claim[] that he ran a cooperative under the MMPA and the Cal. AG's Guidelines." Govt. Opp. at 20. Rather, he maintains his consistent position that "[r]etail medical marijuana dispensaries such as the CCCC are legal under the MMPA, and were at the time Mr. Lynch operated the CCCC." Def. Mot. at 12.

This Court previously held otherwise, as Mr. Lynch acknowledged in his motion. *See id*. But that does not prevent the Court from recognizing, with the benefit of more recent authority—including the post-sentencing cases cited in Joseph Elford's 2012

brief to the appeals court—that the CCCC was a legal dispensary. *See* Def. Ex. B (Amicus Curiae Br. of Americans for Safe Access).

2. The Government Bears the Burden of Proving Noncompliance

Mr. Lynch is not asserting an affirmative defense, moving for a new trial, or bringing a traditional motion to dismiss. He seeks an injunction prohibiting DOJ spending on his case, and in addition asks the Court to dismiss his case to fully effectuate the injunction and the intent of Section 542.

The Supreme Court specifically held that a party asking to enjoin enforcement of the Controlled Substances Act bears the initial burden of presenting a colorable claim for relief, but the burden then shifts to the opposing party to justify its actions. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-30 (2006); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115-16 (9th Cir. 2011). The government's authorities on burden of proof in unrelated contexts are irrelevant.

And the government's description of *People v. Solis*, 217 Cal. App. 4th 51, 57 (2013), as holding "defendant bears burden of showing defense under California marijuana law," is misleading. Govt. Opp. at 17. What *Solis* says at the cited page is: "A defendant invoking the MMP as a defense bears the burden *of producing evidence* in support of that defense," but "need only produce evidence that raises a reasonable doubt whether his or her acts were protected under the MMP." *Solis*, 217 Cal. App. 4th at 57 (emphasis added). The ultimate burden of proof is on "the prosecution." *Id.*; *see People v. Mower*, 28 Cal. 4th 457, 481 (2002) ("[W]e conclude that, as to the facts underlying the defense provided by section 11362.5(d), defendant is required merely to raise a reasonable doubt."); *id.* at 484 (holding "trial court erred by instructing jury that [defendant] was required to prove [his compliance with State medical marijuana law] by a preponderance of the evidence"). Accordingly, even if California medical marijuana affirmative defense cases were germane, they also place the ultimate burden of persuasion on the government.

3. The Government Has Failed To Prove Noncompliance

a. The Attorney General's 2008 Guidelines, Which Postdate Mr. Lynch's Conduct, Are Irrelevant

Much of the government's argument relies on the California Attorney General's 2008 guidelines. *See* Govt. Opp. at 22-24. But this Court must decide whether Mr. Lynch complied with State law in 2006 to 2007, not whether he met a later-articulated standard. *McIntosh* requires compliance, not prescience.

Moreover, the guidelines do not have the force of law. Instead, "the Attorney General's views," as expressed in the guidelines, are "persuasive" but not "bind[ing]" authority. *People v. Hochanadel*, 176 Cal. App. 4th 997, 1011, 1018 (2009); *see People v. Colvin*, 203 Cal. App. 4th 1029, 1040-41 & n.11 (2012). The guidelines themselves recognize as much, demanding only "substantial[] compl[iance]" with their own terms. Govt. Ex. C at 11. Accordingly, a defendant's diversion from the guidelines says little if anything about his conformity with "state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1178.

b. Mr. Lynch Operated the CCCC As a Not-for-Profit

State law did require Mr. Lynch to operate as a not-for-profit, a condition he satisfied. As Mr. Lynch explained in his sworn declaration to this Court:

> I heard a lot of argument at trial about how rich I got by operating the dispensary. That isn't true. *I didn't open the dispensary to make money. I opened it to help people. I never got any of my initial investment back in the dispensary*, which I got from re-financing my house on Rosemary Lane. I still drive the same Murano that I drove before I opened the CCCC. I live in the same house, although I'm getting pretty close to bankruptcy. I've got a bankruptcy lawyer now, and I'm having a lot of trouble making my house payments. I did

> buy myself a new guitar effects pedal during the time I opened the dispensary as well as a brand new X-box system.

Govt. Ex. D (Lynch Decl.) at 6-7 (emphasis added); *see People ex rel. City of Dana Point v. Holistic Health*, 213 Cal. App. 4th 1016, 1027 (2013) (citing similar evidence to support claim of not-for-profit dispensary). Mr. Lynch's compensation for running the CCCC and supplying it with marijuana are consistent with the CCCC's not-for-profit status. *See id.* at 1021 ("Valid nonprofit expenditures expressly include executive compensation."); *People v. Urziceanu*, 132 Cal. App. 4th 747, 785 (2005) (explaining MMPA authorizes "reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana"). So too are Mr. Lynch's attempts to recoup a portion of his initial capital outlay. *See* Govt. Ex. I (Proffer Transcript) at 107-17; *People v. London*, 228 Cal. App. 4th 544, 566 (2014) (noting legality of "reimbursement for . . . out-of-pocket expenses incurred").

And contrary to the government's claim, *see* Govt. Opp. at 23, Mr. Lynch did not set the CCCC's marijuana prices at for-profit levels. Rather, he added a small mark-up over what he paid for the marijuana "to pay for the employees and all the expenses and stuff." Govt. Ex. I at 224; *see id.* at 226. In doing so, he considered what other dispensaries charged, and endeavored to keep prices in line with or lower than those rates. *See id.* at 225-27. Mr. Lynch also "ran a discount program for patients who did not have a lot of money." Govt. Ex. D at 8.

In short, Mr. Lynch operated the CCCC as a not-for-profit. At a minimum, the government has failed to meet its burden to prove otherwise.

c. Mr. Lynch's Limited Marijuana Purchases from Other Dispensaries Were Legal

Mr. Lynch's isolated initial purchases from other marijuana dispensaries are equally unproblematic. *See* Govt. Ex. I at 70-84. For in *Urziceanu*, a 2005 case, the "defendant would sometimes buy marijuana on the black market by the pound to supply the members," but nonetheless had a valid MMPA defense. *Urziceanu*, 132 Cal.

App. 4th at 764; *see id.* at 759. Here, Mr. Lynch and one other employee purchased small quantities of marijuana and clones from other dispensaries "on a couple of occasions" and "like two or three, four, maybe" times "in the beginning" to establish the CCCC's nursery and meet its patients' needs. Govt. Ex. I at 70-76. If regular purchases "on the black market by the pound" comport with the MMPA, a handful of smaller purchases from other medical marijuana dispensaries surely do as well.

Although the Attorney General guidelines later opined that "[c]ollectives and cooperatives should acquire marijuana only from their constituent members," Govt. Ex. C at 10, the guidelines are nonbinding recommendations that postdate Mr. Lynch's conduct, as discussed above. His failure to adhere to them says nothing about his conformity with "State law" in 2006 and 2007. For while *McIntosh*'s compliance requirement excludes defendants with unsubstantiated claims of State authority, it cannot exclude Mr. Lynch—who fully complied with then-available State laws—based on isolated acts later proscribed by nonbinding guidelines.[3]

E. Dismissal Is an Available and Appropriate Remedy

The government never explains how it might comply with an injunction prohibiting all case expenditures, even de minimis ones, absent dismissal of this case. Nor does it dispute *McIntosh*'s express recognition of dismissal as a possible remedy in a Section 542 matter. Instead, the government cites *United States v. Chavez*, No. 2:15-CR-210-KJN, 2016 WL 916324 (E.D. Cal. Mar. 10, 2016), where the judge declined to dismiss federal marijuana charges because of the appropriations rider, and asks this Court to follow suit. But as an unpublished district court decision that predates *McIntosh* and involves a defendant demonstrably not in compliance with State law, *see id.* at *2, *Chavez* is singularly unpersuasive.

[3] To the extent *McIntosh* bars relief on this ground, it reads the appropriations rider too narrowly and was wrongly decided.

The government's claim that *McIntosh* and *Olive* foreclose dismissal fares no better. For even if those cases permit the government to litigate application of the rider—a dubious proposition given the failure of either case to address that issue, and the Ninth Circuit's recent characterization of that question as open, *see Nixon*, 839 F.3d at 887 n.2—they do not authorize *additional* spending in violation of the rider, *once its application is clear*.

Nor do cases allowing courts to examine their own jurisdiction have any bearing on the proper remedy here. Again, even if the government may litigate application of the rider (a point Mr. Lynch does not concede), it may not litigate Mr. Lynch's substantive appeal once enjoined from wasting funds on the case.

III. CONCLUSION

The appropriations rider applies to Mr. Lynch's case, just as Congress intended it to. This Court should issue a written indication that it would grant or entertain Mr. Lynch's motion for injunctive relief, dismissal, or a *McIntosh* hearing.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: January 27, 2017

By */s/ Alexandra W. Yates*
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EXHIBIT F

FILED

JUN 22 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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.	Nos. 10-50219, 10-50264 D.C. No. 2:07-cr-00689-GW-1 Central District of California, Los Angeles ORDER

Before: GOODWIN, CANBY, and NGUYEN, Circuit Judges.

We have considered the amicus briefs filed in support of appellant Lynch's "motion for en banc rehearing."

The "motion for en banc rehearing" is construed as a motion for reconsideration en banc of the April 13, 2015 order. So construed, the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

Appellant Lynch's fourth motion for an extension of time to file the third cross-appeal brief is granted. Additionally, the court sua sponte extends the time to file the optional cross-appeal reply brief. The third cross-appeal brief is due

August 21, 2015, and the optional cross-appeal reply brief is due September 18, 2015.

EXHIBIT G

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. CHARLES C. LYNCH Defendant.	)	No. CR 07-689-GW **PRELIMINARY INSTRUCTIONS**

PRELIMINARY JURY INSTRUCTIONS

1.1 DUTY OF JURY

Ladies and gentlemen: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. These are preliminary instructions. At the end of the trial I will give you more detailed instructions. Those instructions will control your deliberations.

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. These instructions are preliminary and the instructions I will give at the end of the case will control.

1.2 THE CHARGE—PRESUMPTION OF INNOCENCE

This is a criminal case brought by the United States government. The government charges the defendant with five crimes which are in the "indictment". The indictment is simply the description of the charge[s] made by the government against the defendant; it is not evidence of anything.

I will now read to you the indictment in this case.

The defendant has pleaded not guilty to the charges and is presumed innocent unless and until proved guilty beyond a reasonable doubt. A defendant has the right to remain silent and never has to prove innocence or present any evidence.

1.3 WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness;

(2) the exhibits which are received into evidence; and

(3) any facts to which all the lawyers stipulate.

1.4 WHAT IS NOT EVIDENCE

The following things are not evidence, and you must not consider them as evidence in deciding the facts of this case:

1. statements and arguments of the attorneys;

2. questions and objections of the attorneys;

3. testimony that I instruct you to disregard; and

4. anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

1.5 EVIDENCE FOR LIMITED PURPOSE

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

1.6 DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact. Unless I instruct you otherwise, you are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

1.7 RULING ON OBJECTIONS

There are rules of evidence which control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer would have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence which I told you to disregard.

1.8 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;

2. the witness's memory;

3. the witness's manner while testifying;

4. the witness's interest in the outcome of the case and any bias or prejudice;

5. whether other evidence contradicted the witness's testimony;

6. the reasonableness of the witness's testimony in light of all the evidence; and

7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

1.9 CONDUCT OF THE JURY

I will now say a few words about your conduct as jurors.

First, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please let me know about it immediately;

Second, do not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it;

Third, do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials such as dictionaries or encyclopedias, and do not make any investigation about the case on your own;

Fourth, if you need to communicate with me simply give a signed note to the clerk to give to me; and

Fifth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

1.10 NO TRANSCRIPT AVAILABLE TO JURY

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not have a written transcript of the trial. I urge you to pay close attention to the testimony as it is given.

1.11 TAKING NOTES

If you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note taking distract you so that you do not hear other

answers by witnesses. When you leave, your notes should be left in the jury room. No one will read your notes while you are away from the courtroom.

Whether or not you take notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

1.12 OUTLINE OF TRIAL

The next phase of the trial will now begin. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The government will then present evidence and counsel for the defendant may cross-examine. Then, the defendant may present evidence and counsel for the government may cross-examine.

After all of the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

1.13 FEDERAL CRIMINAL CASE

This case is a federal criminal lawsuit and is governed exclusively by federal law. Under federal law, marijuana is a Schedule I controlled substance and federal law prohibits the possession, distribution, and/or cultivation of marijuana for any purpose. Any state laws that you may be aware of concerning the legality of marijuana in certain circumstances are not controlling in this case. For example, unless I instruct you otherwise, you cannot consider any references to the medical use of marijuana.

EXHIBIT H

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	)	No. CR 07-689-GW
	)	
Plaintiff,	)	**JURY INSTRUCTIONS**
	)	
v.	)	
	)	
CHARLES C. LYNCH	)	
	)	
Defendant.	)	
	)	
	)	

INTRODUCTION

INSTRUCTION NO. 1

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A written copy of these instructions has been provided to you which you may take into the jury room.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything that I may have said or done as suggesting what your verdict should be - that is a matter entirely up to you.

INSTRUCTION NO. 2

This case is governed exclusively by federal law. Under federal law, marijuana is a Schedule I controlled substance, and therefore, federal law prohibits the possession, distribution, or growing of marijuana for any purpose. Any state laws that you may be aware of concerning the legality of marijuana in certain circumstances do not override or change the federal law. For example, unless I instruct you otherwise, you should not consider any references to the medical use of marijuana.

The United States Congress did not violate the Tenth Amendment of the United States Constitution when it criminalized the manufacture, distribution or possession of marijuana even in states such as California which have legalized marijuana for certain purposes under state law.

INSTRUCTION NO. 3

The Indictment in this case accuses the defendant Charles C. Lynch of various crimes which are stated in the five different counts of the Indictment. Count One charges Defendant and alleged co-conspirators with a conspiracy: 1) to possess with intent to distribute and to distribute 100 kilograms or more of marijuana; 2) to "manufacture" more than 100 marijuana plants; 3) to possess with intent to distribute and to distribute a mixture or substance containing tetrahydrocannabinol ("THC"); 4) to distribute marijuana to persons under the age of twenty-one, and 5) to maintain a place for manufacturing and distributing marijuana. Counts Two and Three charge Defendant with distributing marijuana to a person under the age of twenty-one. Count Four charges Defendant with possessing with intent to distribute approximately 14 kilograms of marijuana and/or approximately 104 marijuana plants. Count Five charges Defendant with maintaining a place for the manufacturing and distribution of marijuana.

The Indictment in this case is not evidence. Defendant has pled not guilty to all charges. Defendant is presumed to be innocent and does not have to testify or present any evidence to prove his innocence. The Government has the burden of proving every element of the charges beyond a reasonable doubt.

INSTRUCTION NO. 4

You are here only to determine whether the Defendant is guilty or not guilty of the charges in the Indictment. Your determination must be made only from the evidence in the case. The Defendant is not on trial for any conduct or offense not charged in the Indictment. You should consider evidence about the acts, statements, and intentions of others, or evidence about other acts of the Defendant, only as they relate to these charges against the Defendant.

You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 5

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the Defendant is guilty. It is not required that the Government prove Defendant's guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from a lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the Defendant is guilty, it is your duty to find the Defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the Defendant is guilty, it is your duty to find the Defendant guilty.

Proof beyond a reasonable doubt is the standard of proof which the Government must meet as to the issues it must prove in this case.

INSTRUCTION NO. 6

The evidence from which you are to decide what the facts are consists of:

(1) the sworn testimony of any witness;

(2) the exhibits which have been received into evidence; and

(3) any facts to which all the lawyers have stipulated.

INSTRUCTION NO. 7

The parties have stipulated or agreed to certain facts that have been pointed out to you during the trial. You must treat these facts as having been proved.

INSTRUCTION NO. 8

In reaching your verdict you may consider only the testimony and exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, or will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the

lawyers state them, your memory of them controls.

2. Questions and objections by the lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the question, the objection, or the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

INSTRUCTION NO. 9

During the trial, some evidence was admitted for a limited purpose only. When I instructed you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

INSTRUCTION NO. 10

The Defendant has testified. You should treat his testimony just as you would the testimony of any other witness.

INSTRUCTION NO. 11

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

INSTRUCTION NO. 12

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness's testimony;
6. the reasonableness of the witness's testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

If you find that a witness has been willfully false in one material part of his or her testimony, you may reject all of that witness's testimony, unless you find that the witness has testified truthfully in other parts of his or her testimony.

However, discrepancies in one witness's testimony or between one witness's testimony and that of another witness, do not necessarily mean that any witness should be discredited. Innocent misrecollection is not uncommon. Also, two persons witnessing an incident often will see, hear or remember it differently.

The testimony of one witness that is worthy of belief is sufficient to prove any fact. This does not mean that you are free to ignore the testimony of other witnesses merely based on a whim or prejudice, or from a mere desire to favor one side over the other.

INSTRUCTION NO. 13

You have heard testimony from undercover agents who were involved in the Government's investigation in this case. Law enforcement officials are not precluded from engaging in stealth and deception, such as the use of informants and undercover agents, in order to apprehend persons engaged in criminal activities. Undercover agents and informants may properly make use of false names and appearances and may properly assume the roles of members in criminal organizations. The Government may utilize a broad range of schemes and ploys to ferret out criminal activity.

INSTRUCTION NO. 14

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

INSTRUCTION NO. 15

Certain charts and summaries have been received into evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

INSTRUCTION NO. 16

An audio recording of a conversation in the English language has been used and received in evidence during this trial. Each of you were given a transcript of the recording to help you identify speakers and as a guide to help you listen to the tape. However, bear in mind that the audio recording is the evidence, not the transcript. If you heard something different from what appeared in the transcript, what you heard is controlling.

INSTRUCTION NO. 17

You have heard evidence of the defendant's character for law-abidingness. In deciding

this case, you should consider that evidence together with and in the same manner as all the other evidence in the case.

INSTRUCTION NO. 18

The indictment charges that the alleged offense was committed "on or about" a certain date.

Although it is necessary for the Government to prove beyond a reasonable doubt that an offense was committed on a date reasonably near the dates alleged in the indictment, it is not necessary for the Government to prove that the offense was committed precisely on the date charged.

INSTRUCTION NO. 19

You are instructed, as a matter of law, that marijuana, and tetrahydrocannabinol ("THC") are Schedule I controlled substances. Federal law prohibits the possession, distribution, or manufacture of marijuana, marijuana plants, or THC for any purpose. State or local law cannot trump federal law in this area.

COUNT ONE - CONSPIRACY

INSTRUCTION NO. 20

Defendant is charged in Count One of the Indictment with conspiring to (1) possess with intent to distribute marijuana or distribute marijuana, (2) manufacture marijuana plants, (3) possess with intent to distribute or distribute a mixture or substance containing THC, (4) maintain a drug premises, and (5) distribute marijuana to persons under the age of twenty-one, all in violation of Title 21, United States Code, Sections 841(a)(1), 856, and 859. In order for the Defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, beginning on a date unknown and continuing until on or about March 29, 2007, there was an agreement between two or more persons to commit at least one crime as charged in Count One of the Indictment; and

Second, the Defendant was or became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

I shall discuss with you briefly the law relating to each of the elements of conspiracy.

A conspiracy is a kind of criminal partnership – an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was actually committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the Indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan

with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

INSTRUCTION NO. 21

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with other conspirators in the overall scheme, the defendant has, in effect, agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that:

(1) the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy,

(2) the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired, and

(3) the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is no defense that a person's participation in a conspiracy was minor or for a short period of time.

INSTRUCTION NO. 22

Some of the people who may have been involved in these events are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged and prosecuted, or tried together in one proceeding.

Nor is there any requirement that the names of the other conspirators be known. An indictment can charge a defendant with a conspiracy involving people whose names are not known, as long as the Government can prove beyond a reasonable doubt that the defendant conspired with one or more of them. Whether they are named or not does not matter.

INSTRUCTION NO. 23

As noted above, a conspiracy charge requires the Government to prove beyond a reasonable doubt that there was an agreement between two or more persons to commit at least one crime as charged in Count One of the Indictment. The crimes listed in Count One as being an object of the conspiracy agreement are:

1) the possession with intent to distribute marijuana or the distribution of marijuana,
2) the manufacture of marijuana plants,
3) the possession with intent to distribute or the distribution of a mixture or substance containing THC,

4) maintaining a drug premises, and
5) the distribution of marijuana to persons under the age of twenty-one.

The elements of crimes 2 and 3 are stated in the next Instructions. The elements of crimes 1, 4 and 5 are defined later in these Instructions.

INSTRUCTION NO. 24

The crime of "manufacturing" marijuana plants, an object of the conspiracy alleged in Count One, has the following elements:

First, the defendant knowingly "manufactured", produced or propagated plants that were marijuana; and

Second, the defendant "manufactured" the marijuana plants knowing they were marijuana or some other prohibited drug.

As used in these instructions, "manufacturing" marijuana plants means planting, cultivating, growing, or harvesting of marijuana plants.

INSTRUCTION NO. 25

As used throughout these Instructions, an act is done "knowingly" if the defendant is aware of the act and his conduct is not the result of inadvertence, mistake, or accident. The Government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NO. 26

The crime of possession with intent to distribute THC, an object of the conspiracy alleged in Count One, has the following elements:

First, the defendant knowingly possessed THC in a measurable or detectable amount; and

Second, the defendant possessed it with the intent to deliver it to another person.

It does not matter whether the defendant knew that the substance was THC. It is sufficient that the defendant knew that it was some kind of a prohibited drug.

As used throughout these Instructions, to "possess with intent to distribute" means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction. A person has possession of something if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.

More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.

As used throughout these Instructions, for a defendant to "distribute" a controlled substance means that: 1) the defendant knowingly delivered or caused a controlled substance to be delivered to another person, and 2) the defendant knew that the item delivered was a controlled substance or some other prohibited drug.

ALTERNATE BASES OF LIABILITY FOR COUNTS TWO THROUGH FIVE

INSTRUCTION NO. 27

A defendant may be guilty of a crime if he directly commits the acts constituting the crime. In addition, and as described below, he may also be found guilty of a crime if: 1) under certain circumstances, he is part of a conspiracy and the crime is committed by a co-conspirator, or 2) if he "aids and abets" that crime.

INSTRUCTION NO. 28

Each member of the conspiracy is responsible for the actions of the other conspirators performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed the crime.

Therefore, you may find the Defendant guilty of the crimes charged in Counts Two, Three, Four and/or Five of the Indictment if the Government has proved each of the following elements beyond a reasonable doubt:

First, a person committed the crime charged in Counts Two, Three, Four and/or Five of the Indictment;

Second, that person was a member of the conspiracy charged in Count One of the Indictment;

Third, that person committed the crime charged in Counts Two, Three, Four and/or Five of the Indictment, in furtherance of the conspiracy;

Fourth, the Defendant was a member of the same conspiracy at the time the offense charged in Counts Two, Three, Four and/or Five of the Indictment was committed; and

Fifth, the offense fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement.

INSTRUCTION NO. 29

Alternatively, you may find Defendant guilty of a crime charged in Counts Two through Five if you find that he "aided and abetted" the crime. The Defendant may be found guilty of a crime charged in Counts Two, Three, Four, or Five, even if the Defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove the Defendant guilty of aiding and abetting, the Government must prove beyond a reasonable doubt:

First, the crime was committed by someone;

Second, the Defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit the crime; and

Third, the Defendant acted before the crime was completed.

It is not enough that the Defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show that the Defendant aided and abetted in each essential element of the crime.

The evidence must show beyond a reasonable doubt that the Defendant acted with the knowledge and intention of helping that person commit the crime.

The Government is not required to prove precisely which co-conspirator actually committed the crime which Defendant aided and abetted.

COUNTS TWO AND THREE – DISTRIBUTION OF MARIJUANA TO A PERSON UNDER THE AGE OF 21 YEARS

INSTRUCTION NO. 30

Defendant is charged in Counts Two and Three of the Indictment with aiding and abetting in the distribution of marijuana to Justin St. John, a person under the age of twenty-one years at the time, in violation of Section 841(a)(1) and 859 of Title 21 of the United States Code.

In order for Defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, the Defendant knowingly delivered marijuana to an underage person;

Second, the Defendant knew that it was marijuana or some other prohibited drug;

Third, the Defendant himself was at least eighteen years of age; and

Fourth, the underage person was under twenty-one years of age at the time of the distribution of the marijuana to him.

The Government does not have to prove that the person who distributed the marijuana to the underage person knew that the underage person was under twenty-one years of age.

COUNT FOUR – POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

INSTRUCTION NO. 31

The Defendant is charged in Count Four of the Indictment with possession of marijuana and/or marijuana plants with intent to distribute in violation of Section 841(a)(1) of Title 21 of the United States Code. In order for the Defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, the Defendant knowingly possessed marijuana in a measurable or detectable amount and/or marijuana plants; and

Second, the defendant possessed it (or them) with the intent to deliver it (or them) to another person or persons.

It does not matter whether the Defendant knew that the substance was a specific controlled substance. It is sufficient that the Defendant knew that it was some kind of a prohibited drug.

COUNT FIVE – MAINTAINING A DRUG PREMISE

INSTRUCTION NO. 32

The Defendant is charged in Count Five of the Indictment with maintaining a place for the purpose of manufacturing or distributing marijuana in violation of Section 856(a)(1) of Title 21 of the United States Code. In order for the Defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, Defendant knowingly opened, leased, rented, used, or maintained the premises

located at 780 Monterey Avenue, Suite B, Morro Bay, California; and

Second, the Defendant did so for the purpose of manufacturing or distributing marijuana.

"Maintaining" a place means that, over a period of time, the Defendant directed the activities of and the people in the place.

The Government is not required to prove that the drug activity was the primary purpose of Defendant's opening, leasing, renting, using, or maintaining a place, but instead must prove that drug activity was a significant reason why Defendant opened, leased, rented, used, or maintained the place.

QUANTITY OF DRUGS

INSTRUCTION NO. 33

The Government is not required to prove that the amount or quantity of marijuana or marijuana plants was as charged in Counts One, Two, Three, or Four of the Indictment. The Government need only prove beyond a reasonable doubt that there was a measurable or detectable amount of the controlled substance charged in a particular count.

However, if you do return a verdict of guilty against Defendant as to any of these Counts, then you must answer an additional question regarding the quantity of the controlled substance or substances involved in that particular count.

For the purposes of that additional question, you will not be required to find that the amount or quantity of the controlled substance was precisely as charged in the Indictment. You will, however, be required to complete a special verdict form specifying whether the Government has proven beyond a reasonable doubt that the amount of the controlled substance involved in the Defendant's commission of the offense exceeded a specified quantity.

You may determine your answer based on:

(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the Defendant; and

(B) all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

If you return a verdict of guilty on Counts One, Two, Three, or Four of the Indictment, you may base your answer on (A) and (B) above, plus any additional amounts for which you unanimously conclude that the conspiracy is responsible. In making this determination, you may consider, for example, the price generally obtained for the controlled substances, financial or other records, and similar transactions in controlled substances by the Defendant. In determining the drug quantity, you must consider any margin of error in favor of Defendant.

Your decision on whether a drug quantity range has been proven must be unanimous.

You need not find that Defendant knew the type or amount of the controlled substance.

If you find Defendant guilty as to either Count One and/or Four and if you further find that he possessed (or conspired to possess) with intent to distribute marijuana plants, you will be asked to fill out a special verdict form as to the number of marijuana plants that he possessed (or conspired to possess). You heard testimony that suspected marijuana plants which were taken by the Government from the Defendant's business on March 29, 2007 were destroyed or

deteriorated before the Defendant or his counsel were able to inspect or count the plants. As to that matter, if you find that the Government allowed some or all of the marijuana plants to be destroyed, lost, or deteriorated such that an accurate count could not be verified by the Defendant, you may draw an adverse inference that the number of plants was less than the Government claims it to be, and conclude that the destruction/deterioration raises an inability to determine with sufficient certainty the total number of marijuana plants located at the Central Coast Compassionate Caregivers store on March 29, 2007.

Marijuana plants have three characteristic structures, readily apparent to the unaided layperson's eye: roots, stems, and leaves. Until a cutting develops roots of its own, it is not a plant itself but a mere piece of some other plant.

DEFENSE – ENTRAPMENT BY ESTOPPEL

INSTRUCTION NO. 34

Defendant has raised an "entrapment by estoppel" defense in this case. Entrapment by estoppel is the unintentional entrapment by a governmental official who mistakenly misleads a person into a violation of the law. In this case, that defense is not available as to the crime of the distribution of marijuana to persons under the age of 21 years which is the crime charged in Counts Two and Three and as one of the objects of the conspiracy charged in Count One.

The Defendant bears the burden of proving this defense by a preponderance of the evidence. To prove something by a preponderance of the evidence is to prove that it is more likely true than not true. This is a lesser standard than proof beyond a reasonable doubt.

In order to find the Defendant "not guilty" of Counts Four or Five of the Indictment or to find him not responsible of a crime charged as an object of the conspiracy alleged in Count One based upon that defense of entrapment by estoppel, the Defendant must prove the following five elements by a preponderance of the evidence as to that Count or crime:

1) an authorized federal government official who was empowered to render the claimed erroneous advice,
2) was made aware of all the relevant historical facts, and
3) affirmatively told the Defendant that the proscribed conduct was permissible;
4) the defendant relied on that incorrect information, and
5) Defendant's reliance was reasonable.

As to the first element, in this case, the entrapment by estoppel defense would only apply to the statements made by United States government officials. It does not apply to statements made by state or local officials or by private parties. As to the third element, the advice or permission received from the federal official must be more than a vague or even contradictory statement. As to the fifth element, defendant's reliance is reasonable if a person sincerely desirous of obeying the federal law would have accepted the information as true, and would not have been put on notice to make further inquiries.

Unless you find that Defendant has met his burden of proving each element of the defense of entrapment by estoppel as to a particular Count, mere ignorance of the law or a good faith belief in the legality of one's conduct is no excuse to the crimes charged in the Indictment. The Government is not required to prove that the Defendant knew his conduct was unlawful.

CONCLUDING INSTRUCTIONS

INSTRUCTION NO. 35

I have told you to disregard a number of statements and arguments advanced by the lawyers which are contrary to the law. You must not consider such statements and arguments. You must consider the law only as I instruct you and not substitute your personal views for your duty to follow the law as applied to the evidence in this case.

INSTRUCTION NO. 36

When you begin your deliberations, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict on each Count, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

INSTRUCTION NO. 37

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be — that is entirely for you to decide.

INSTRUCTION NO. 38

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by the notes.

If you have a disagreement on what the testimony of a particular witness was on a subject or question, you may request that the court reporter read back the relevant portion of that witness's testimony. However, you should only make such a request after trying your best to resolve that issue amongst yourselves. It will take time for the reporter to locate and transcribe the testimony and then the attorneys and I will have to review it as well. If you decide to make a "read-back" request, please designate: 1) the name of the witness, 2) the question or topic as specifically as possible, 3) whether the witness was being questioned by the Government's or Defendant's counsel, and 4) if the topic was raised in the beginning, middle or end of the witness's testimony and/or whether the questions were on the direct or the cross examination.

During a read-back by the reporter, you are not to deliberate in his presence. You are not to ask him any questions or request that he read other portions of the transcript which you have not previously requested from the Court.

INSTRUCTION NO. 39

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the Government has proved its case against the Defendant beyond a reasonable doubt.

INSTRUCTION NO. 40

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it and advise the Court that you are ready to return to the courtroom.

INSTRUCTION NO. 41

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff or court clerk, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing, or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone — including me — how the jury stands, numerically or otherwise, on the question of the guilt of the Defendant, until after you have reached a unanimous verdict or have been discharged.

Responses/Replies/Other Motion Related Documents

2:07-cr-00689-GW USA v. Lynch et al **CASE CLOSED on 04/30/2010**

APPEAL,CLOSED

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

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Case Name: USA v. Lynch et al
Case Number: 2:07-cr-00689-GW
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Docket Text:
REPLY In Support of NOTICE OF MOTION AND MOTION for Ruling *Indicating That The Court Would Grant Or Entertain A Motion For McIntosh Relief; Memorandum Of Points And Authorities*[453] filed by Defendant Charles C. Lynch. (Attachments: # (1) Exhibit F, G, & H)(Yates, Alexandra)

2:07-cr-00689-GW-1 Notice has been electronically mailed to:

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