IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES C. LYNCH, Defendant-Appellant.	C.A. No. 10-50219 D.C. No. CR 07-689-GW (Central Dist. Cal.) **GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR REMAND UNDER FED. R. APP. P 12.1**
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CHARLES C. LYNCH, Defendant-Appellee.	C.A. No. 10-50264 D.C. No. CR 07-689-GW (Central Dist. Cal.)

Plaintiff-Appellee/Cross-Appellant United States of America, by and through its counsel of record, hereby submits this opposition to Defendant-Appellant/Cross-Appellee Charles C. Lynch's ("defendant") Motion for Remand pursuant to Federal Rule of Appellate Procedure 12.1, filed on March 3, 2017.

The response is based on the attached memorandum of points and authorities, and the briefs and excerpts of record already filed in this matter.

Defendant is not in custody.

DATED: March 23, 2017

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant's present Motion is purportedly a notice of an indicative ruling by the district court under Fed. R. App. P. 12.1 seeking a remand of the pending appeal. What it is, in fact, is the latest in a series of attempts by defendant to pursue every procedural avenue, no matter how unfounded or contrary to law, to delay completion on the appeal and cross-appeal in this matter which has been pending since 2010, including three years' delay waiting for defendant to file his pending third brief on cross-appeal. The Motion is deeply flawed both procedurally and substantively. It seeks remand or piecemeal adjudication of a defense theory independent of resolution of this long-pending matter, in the face of the district court's refusal to entertain defendant's indicative motion, the applicable rules of procedure, multiple lines of black letter precedent, and a complete lack of substantive merit. It should be rejected, and this Court should eschew any further extension for defendant in the briefing schedule of this long-delayed matter.

I. *PROCEDURAL BACKGROUND*

A. Conviction, Sentence, and Rulings Regarding State Law

On August 5, 2008, a jury convicted defendant of five marijuana-related Title 21 narcotics charges arising from his ownership and operation of a marijuana business, the Central Coast Compassionate Caregivers ("CCCC").

(CR 169, 175.)[1] After post-trial motions, the court held four sentencing hearings between March 23 and June 11, 2009, during which it heard testimony from multiple defense witnesses. (CR 361-64.) The parties also submitted extensive sentencing briefs. (*See* Mot., Ex. A at 2-3.)

In its sentencing position, the government argued that in addition to violating federal law, defendant's conduct had violated California medical marijuana law, as reflected in the two applicable state statutes, the Compassionate Use Act ("CUA") and the Medical Marijuana Program Act (MMPA). (GER 12-13.) The government asserted that defendant violated state law because he did not qualify as a "primary caregiver," as he had always represented, and because he had not operated a marijuana collective or cooperative under the limited immunities provided under the MMPA. (*Id.*) In reply, defendant acknowledged that the government was "correct" that he did not operate a collective or cooperative, and "he made no attempt" to operate a collective under state marijuana law. (GER 545.)

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[1] "CR" refers to the clerk's record in the district court, CTA refers to the clerk's record in this Court, and both are followed by the docket number. "RT" refers to the reporter's transcripts of proceedings and is followed by the applicable date and page references. "ER" refers to the Excerpts of Record, "GER" refers to the Government's Excerpts of Record (CTA 75), and "GAB" refers to the Government's Answer Brief (CTA 79), the second brief on cross-appeal, all filed in this matter and followed by the applicable page references.

More than a year after the final sentencing hearing, and after two written requests from the government for a ruling and judgment (CR 313, 315), in April 2010, the district issued a 41-page sentencing memorandum and a judgement and commitment order, sentencing defendant to one year in prison. (Mot., Ex. A.) In course of making many favorable rulings for defendant (including refusing to apply the five-year mandatory minimum sentence sought by the government), the district court said that it agreed with the government that the "*CCCC was not operated in conformity with California state law*." (*Id.* at 33, n. 5 (emphasis added).)

B. Appellate Proceedings and the Appropriations Rider

Defendant's criminal judgment and commitment order was issued on April 30, 2010, and defendant filed a notice of appeal soon thereafter. (CR 328, 330; CTA 1.) The government cross-appealed. (CR 336, CTA 7.) Defendant filed his first brief on cross-appeal in July 2012. (CTA 38.) On defendant's behalf, an amicus brief was filed by Joseph Elford on state marijuana law soon thereafter. (CTA 42.) After this Court denied on December 31, 2013 the government's first request to file an oversized second brief on cross-appeal, the government successfully filed its brief on March 14, 2014. (CTA 76, 79.) In its brief, the government asked this Court to reverse the district court's decision to refuse to apply the five-year mandatory

minimum sentence, and to reassign this case on remand due to the district court's strongly held views on the result it wished to reach at sentencing and its extreme delay in resolving the matter. (*See* GAB at 122-145.)

Defendant's final brief, the third brief on cross-appeal, was initially due May 11, 2014. On November 5, 2014, this Court granted defendant's second extension to March 12, 2015. (CTA 89.) On December 16, 2014 -- long after defendant had been convicted and sentenced, and nine months after the government had filed its second brief on cross-appeal -- the President signed into law a budget bill, which became the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130. Section 538 of that act prohibited the use of federal funds to "prevent [California] from implementing [its] own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id*. § 538, 128 Stat. 2217 (the "appropriations rider"). On December 18, 2015, the appropriations rider was reenacted as Section 542 of the Consolidated Appropriations Act of 2016. Pub. L. No. 114-113, 129 Stat. 2242, 2332-33, § 542. ("§ 542," or the "appropriations rider"). On December 10, 2016, the appropriations rider was included as part of the Continuing Appropriations Act of Fiscal Year 2017 which extended the December 18, 2015 law through April 28, 2017. Pub. L. No 114-254.

Approximately two months after the appropriations rider was passed, on January 31, 2014, defendant sent a letter to the government stating his intention to file a civil motion for injunctive relief to enforce the appropriations rider with respect to his case. (*See* CTA 96 at 1, CTA 97 at 1, n.1.) But he did not. Instead, on February 24, 2015, defendant filed in this Court a motion -- later designated "urgent" -- for an order based on the appropriations rider that the government cease spending funds on this case. Alternatively, defendant asked that the issue be remanded to the district court. (CTA 91, 95.) In reply, the government asked to be allowed to respond to defendant's motion on the appropriations rider as part of its final brief on cross-appeal so that the issues could be decided by the panel hearing the entire appeal. (CTA 94, 97.)

On April 13, 2015, a motions panel of this Court denied defendant's urgent motion without prejudice to defendant renewing his arguments about the appropriations rider in his third brief on cross-appeal. (CTA 100.) The panel also denied defendant's alternative request for remand, without prejudice to defendant seeking an indicative ruling in the district court pursuant to Fed. R. App. P. 12.1. (*Id.*) The Court granted defendant until June 12, 2015 to file the third brief on cross-appeal. Filing multiple briefs and exhibits, defendant sought reconsideration or rehearing *en banc* on his motion, which this Court denied on June 22, 2015. (CTA 101-12.) The Court *sua sponte*

granted defendant a fourth extension to file the third brief, until August 21, 2015. (CTA 112.)

Defendant then obtained eight more extensions to file his final brief. Recognizing defendant's delay, the Court has three times ordered that further extensions would be "disfavored" and twice more "strongly disfavored." (CTA 114, 119, 121, 123, 125, 127, 129, 133.) Most recently, even though defendant told this Court that he would likely be filing the present Motion, the Appellate Commissioner cut in half the time requested by defendant in his twelfth extension request, so that defendant's final cross-appeal brief is now due April 1, 2017. (CTA 133.)

On December 12, 2017, twenty months after this Court had denied defendant's "urgent" motion under the appropriations rider and referenced the indicative motion procedure provided by Fed. R. App. P. 12.1, and weeks before another filing deadline was to expire, defendant filed a motion in the district court seeking an indicative ruling under the appropriations rider. (Mot., Ex. B.) The government opposed the motion arguing, among other things, that the motion was untimely, that the issues in it should be raised in defendant's third brief on cross-appeal, as referenced in the motion panel's April 13, 2015 order, and that the rider did not apply to this case. (CR 458; Mot., Ex. C.)

On February 6, 2017, the district court held a hearing on the indicative motion, and refused to grant or entertain it. (*See* Mot., Ex. E (hearing transcript).) Instead, it chose to defer ruling on the motion under Fed. R. Crim. P. 37(a)(1) until this Court ruled on any issues on the rider, and repeatedly said that the case would proceed more quickly and efficiently if this Court addressed defendant's contentions under the rider as part of the briefing on the pending appeal. (*Id*. at 29-32, 43, 47-48.) In its subsequent minute order, the court indicated that it had *denied* defendant's motion. (CR 466.)

II. *SUMMARY OF ARGUMENT*

Defendant's Motion seeking immediate relief under the appropriations rider flies in the face of clear statutory and case law, and should be denied on procedural grounds for multiple reason. Defendant's purported request for a remand under Fed. R. Crim. P. 37 and Fed. R. App. P. 12.1 finds no support in those rules because, in responding to defendant's indicative motion, the district court did not state that it would grant the motion or that the motion presented substantial issues suitable for immediate remand, as required, but rather deferred consideration pending completion of this appeal. Defendant's effort to conjure certification of a "substantial issue" misrepresents the record in which the court repeatedly stated that any issues regarding the rider should be determined by this Court. This Court has repeatedly and summarily

rejected remand requests like this one where a district court refused to grant or entertain a post-judgment indicative motion. Defendant's request for remand is also contrary to the indicative motion rules and precedent because defendant seeks no factual development on remand, remand would unfairly circumvent the government's request on cross-appeal for reassignment on remand to a new judge, and because defendant's motion is untimely.

Defendant's related request that this Court engage in piecemeal adjudication of issues under the appropriations rider, separate and apart from those already pending on appeal, is similarly in conflict with controlling law. Decades of precedent weigh against the piecemeal adjudication of appellate issues that defendant seeks. Instead, any issues regarding the appropriations rider should be briefed and considered by the panel hearing the merits of the entire appeal because resolution of issues under the rider are closely tied to several issues in the main appeal.

If this Court does reach the merits of defendant's claims under the appropriations rider at this stage, it should reject them. In *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), and later in *United States v. Nixon*, 839 F.3d 885 (9th Cir. 2016), this Court interpreted the rider narrowly. That narrow interpretation, and binding rules of statutory interpretation, dictate that the rider does not apply retroactively to cases like this where the defendant's

sentence and judgment occurred before the rider's enactment. First, the rider contains no retroactivity clause, so its scope is governed by the long-standing rule against retroactive application of new statutes, as reinforced by *McIntosh* and *Nixon*. Second, the general statutory savings clause, 1 U.S.C § 109, as broadly interpreted by this Court and the Supreme Court to cover legislative enactments that reduce criminal liability, provides another strong rule against the rider's retroactivity, especially where a defendant is seeking dismissal of his underlying conviction after judgment. Third, the remedy of a dismissal is unavailable given the rider's limitation to DOJ spending, and *Nixon*'s holding that it does not impact the power of courts. Finally, the record, including undisputed facts, the district court's findings, and defendant's admissions conclusively demonstrate that that defendant did not strictly and fully comply with all California marijuana laws, as *McIntosh* requires.

III. *ARGUMENT*

A. Remand Is Improper Because The Requirements Of Fed. R. App. P. 12.1 Are Not Met

1. *The district court's refusal to entertain defendant's motion bars remand or relief on his motion*

Fed. R. App. P. 12.1, passed in 2009 in conjunction with Fed. R. Civ. P. 62.1, codifies prior procedure in this Court and others for handling a request in the district court for a post-judgment ruling, often motions under Fed. R. Civ.

P. 60(b), where the district court had been deprived of jurisdiction by a pending appeal.[2] *See Johnson v. Keybank Nat'l. Assoc.* (*In re Checking Account Overdraft Litigation*), 754 F.3d 1290, 1297 (11th Cir. 2014) (rule codifies prior practice); 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2873, at 599-604 (3d ed. 2012) (same); *see also Scott v. Younger*, 739 F.2d 1463, 1466 (9th Cir. 1984) (describing pre-rule law and procedure in Ninth Circuit). Fed. R. Crim. P. 37 was added in 2012 for criminal post-judgment indicative motions, and also works in conjunction with Fed. R. App. 12.1.[3]

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[2] Fed. R. App. P. 12.1 provides:

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue.

(b) Remand After and Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court as decided the motion on remand.

[3] Fed. R. Crim. P. 37 provides:

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

A district court confronted with a post-judgment indicative motion has three choices: (1) defer consideration of the motion, (2) deny the motion, or (3) state that it would grant the motion upon remand or that the motion raises a substantial issue. Fed. R. Crim. P. 37(a). Even if the court choses the third option, and notice is given to the court of appeals under Fed. R. App. P. 12.1, remand by the Court of Appeals is discretionary. *See* United *States v. Maldonado-Rios*, 790 F.3d 62, 64-65 (1st Cir. 2015); Fed. R. App. P. 12.1, Adv. Comm. Notes ("Remand is in the court of appeals' discretion.").

Here, the district court clearly did not chose the third option under Fed. R. Crim. P. 37(a)(3), to state that it would grant defendant's motion or that it was certifying that on remand the motion would raise a substantial question. Rather, at the end of the hearing, the district court made clear that it was "deferring the motion" within the meaning of the first option under Rule 37(a):

> So *I will deny the motion without prejudice for, in essence, I will be saying that I am deferring the ruling on the motion* because I think there was a legal questions that I think is properly addressed by the circuit court and that it should address which would asset me in deciding what I . . . would do next."

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

(Mot, Ex. E at 47-48 (emphasis added).)

The district court's minute order reinforces the point that it was not granting or certifying a substantial question to this Court under Rule 37(a)'s third option. The court described defendant's motion as "For Written Indication That The Court *Would Grant Or Entertain* A Motion for *McIntosh* Relief" (CR 466; (first emphasis added).) It nonetheless chose not to "grant or entertain" the motion, but to deny it:

> After considering the motion and opposing papers, the relevant materials in the case file, and the arguments of counsel, the Court *denies the motion without prejudice* for the reasons stated on the record.

(*Id.* (emphasis added).)

Thus, the district court's chose to adopt the first option under Fed. R. Crim. P. 37(a) -- deferring consideration of the indicative motion, or, at most, chose the second option of denying the motion. At no time, did the district court state that it would either grant defendant's motion or that it intended to certify to this Court that the motion presented a substantial issue suitable for remand within the meaning of Rule 37(a) and Fed. R. App. P. 12.1.

Defendant tries to conjure up such certification by noting that the district twice used the word "substantial issue" during the hearing. (Mot. at 9.) However, defendant leaves out the context of these statements. On both

occasions, the district court was not referencing the merits of defendant's motion, or the procedures for indicative motions, but rather the government's counter-argument that even if the appropriations rider applied to this case, the rider could not undue a prior conviction. The court said that any ruling in defendant's favor on remand would present *the government* with a substantial issue on a subsequent appeal. (Mot., Ex. E at 29 (if court barred government from spending money and decided whether that could result in dismissal "the government has a right to appeal that issue because it is a substantial issue"), 31 ("if I order the government not to spend any more money on this matter, the government is going to appeal my order. And they would have a right to do so . . . I think there is a substantial issue as to what the effect of my order would be.").) Thus, rather than saying that there were substantial issue for the district court to decide warranting remand under Fed. R. App. P 12.1, the district court used "substantial issue" in these instances to say the exact opposite -- that there was substantial issues for this Court to decide before any remand would be potentially appropriate.

Notably, after both uses of the phase relied on by defendant, the district court immediately made clear that the better procedure in this case was for this Court *not* to remand the matter, but to decide any issues under the appropriations rider in the first instance, as remand would delay resolution of

the case. (*Id.* at 29 ("It just seems to me it is faster to just let the thing go in the circuit court which now has the issue because they can decide."), 31-32 ("it is going to be in front of the circuit court anyway. And so, I think . . . it would be faster to let the proceedings go forward in front of the Ninth Circuit . . . in other words, it is not going to be faster for the defendant to go the rout that [defendant] want[s]. It is going to be faster for [defendant] to . . . get to the appellate court and have the appellate court deal with this fundamental issue."); *see also id.* at 30 ("in the long run, it will take more time and effort . . . if I entertain this hearing").)

Nor was the district court confused about the meaning of "substantial issue" in the context of Fed. R. App. P 12.1. It specifically referenced the phrase in connection with that rule, using the phrase "substantial issue" on another occasion not referenced by defendant in his remand Motion. In discussing "[Fed. R. App. P] 12.1," the district court said that that the substantial issue did not have to be factual, but rather an instance where "the district court feels there is a substantial issue that could be developed better for the . . . circuit court, to rule on." (*Id.* at 14-15.) By contrast, the district court clearly expressed its belief that a district court ruling on defendant's indicative motion would not help this Court decide or narrow the issues for appeal. Rather, it agreed with the government that the issues raised by defendant in his

indicative motion should be presented to this Court. (*Id.* at 42 (noting there were clear legal issues "the Ninth Circuit has to resolve first. It should resolve them."), 43-44 (rejecting defendant's argument that the appropriations rider issues be remanded while court of appeals considered other issues on appeal because court was "not going to make the appeal more complicated than it already is" and holding it was not "obligated [to do so]" "under either [Rule] 37 or [Rule] 121.")

The decision by the district court not to indicate that it would grant defendant's motion or certify a substantial issue for remand under the third option of Fed. R. Crim. P. 37(a) is fatal to defendant's present Motion. The plain text of the Fed. R. Crim. P. 37 and Fed. R. App. P. 12.1 provide no mechanism for remand if the district court choses either of the first two options, as it did here, by deferring or denying the indicative motion. They provide discretionary remand by the Court of Appeals only "[i]f the district court states that it would grant the motion or the motion raises a substantial issue." Fed. R. App. P. 12.1(b). There is no mechanism for even discretionary remand where the district court either defers consideration of the motion or denies it. *See* Fed. R. App. P. 12.1(b); Fed. R. Crim. P. 37(a) & (b).

Defendant's request for remand is not only contradicted by the statutory text, but also this Court's case law on post-judgment and indicative rulings

prior to adoption of Fed. R. App. P. 12.1. This Court has repeatedly held that when a district court defers or refuses to grant an indicative motion, that ruling is unreviewable. *Miller v. Marriot Int'l, Inc.*, 300 F.3d 1061, (9th Cir. 2002); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 930 (9th Cir. 2000) (district court's order "declining to entertain or grant" a post-judgment motion based on new evidence "not reviewable on appeal"); *Gould v. Mutual Life Ins. Co.*, 769 F.2d 769, 772 (9th Cir. 1986); *Scott*, 739 F.2d at 1466 (("if the district court's order is construed as a denial of Scott's request to 'entertain' the motion . . . that denial is interlocutory in nature and not appealable"); *Los Angeles Mem. Coliseum Com'n v. National Football League*, 726 F.2d 1381, 1386 n.2 (9th Cir. 1984); *Canadian Ingersoll-Rand Co. v. Peterson Products*, 350 F.2d 18, 26-27 (9th Cir. 1065) (same, and holding rule applies to both civil and criminal cases).

Accordingly, this Court has typically refused to even consider motions that the district court refused to entertain or grant. *E.g.*, *Defenders of Wildlife*, 204 F.3d at 930; *Scott*, 739 F.2d at 1466. On occasion, this Court has construed appeals from refusals to grant or entertain an indicative motion as a motion for remand, but has uniformly and summarily rejected such remand requests. *See Crateo, Inc. v. Intermark, Inc.,* 536 F.2d 862 (9th Cir. 1976); *Canadian Ingersoll-Rand Co.*, 350 F.2d at 27 n. 16; *see also Davis v. Yageo Corp.*, 481 F.3d 611, 685 (9th Cir. 2007) (declining motion for remand after district

court refused to entertain post-judgment motion); *United States v. Frame*, 454 F.2d 1136, 1138 (9th Cir. 1972) (holding that for new trial motions filed after appeal "this court will remand in the event the trial court evidences a willingness to grant the motion, *and not otherwise*.") (emphasis added, citation omitted). Defendant has not cited, nor is the government aware of, any case where this Court remanded a pending appeal to the district court where the district court had denied or refused to entertain an indicative motion on the same issue. Thus, there is no procedure or precedent for remanding here.

2. *Remand is also inappropriate because defendant seeks no factual development below*

Remand for a decision on the appropriations rider issues is also contrary to the indicative motion rules and this Court's precedents because defendant has consistently asserted that no further factual development is needed on the appropriations rider issue. The advisory committee notes to Rule 37 explain that the remand provisions on an indicative ruling in a criminal case "will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) . . . , reduced sentence motions under Criminal Rule 35(b), and motions" to reduce a sentence based on retroactive change to the guideline range under 18 U.S.C. § 3582(c). Fed. R. Crim. P. 37, Adv. Comm. Notes. Each of these types of motion depend on the development of new

factual information or a discretionary determinations by the district court that was not part of the existing record on appeal.

This Court has also held that if a matter for remand to the district court concerns primarily a question of law and the primary factual issues are not in dispute, then "policies of judicial efficiency and finality weigh in favor of [the Circuit] resolving the question." *United States v. Saxman*, 325 F.3d 1168, 1172 (9th Cir. 2003); *see also Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1070, 1076 n.7 (9th Cir. 2003) (remand unnecessary where record permits only one resolution of the factual issue); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1162 (9th Cir. 2001) (remand not required where it would serve "no practical purpose"); *DeMarah v. United States*, 62 F.3d 1248, 1250 (9th Cir. 1995) (no remand where issue requires no further factual development).

In this matter, defendant has repeatedly disclaimed any need for further factual development on remand. In his indicative motion in the district court, defendant expressly rejected the need to add to the evidentiary record which he claimed was "already well developed." (Def. Mot, Ex. B at 6, 16.) In his present Motion, he primarily seeks to have issues decided without remand based on the current record (Mot. at 25-27.) Although he also makes bare references in his Motion to remand (Mot. at 1, 12, 27), he fails to specify which factual issues the district court needs to decide. Thus, defendant's request for

remand to the district court not only lacks support in the governing indicative motion rules, but also is contrary to this Court's remand procedures.[4]

3. *Remand would unfairly circumvent the government's long-pending request for reassignment*

Remand would also be improper and unfair because the government has requested in its long-ago-filed second brief on cross-appeal, that this Court re-assign this case to a new judge on remand due to the district court's actions and statements indicating strongly held views about the result it wished to reach at sentencing. (GAB at 142-45.) No remand to the district court under Rule 12.1 or otherwise is appropriate until this Court rules on this threshold procedural issues. Particularly where defendant can present the issues in his Motion in his third brief on cross-appeal, the indicative motion procedures should not allow defendant to circumvent a ruling on the government's request for reassignment.

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[4] As developed in the final section, below, should this Court address defendant's state-law compliance under the appropriations rider, this Court can conclusively determine that defendant did not comply with California marijuana law based on the existing record. Yet contrary to defendant's claim, (Mot. at 25), on remand the government could provide additional proof of defendant's multiple violations of state marijuana law.

4. *Defendant's motion is untimely*

Alternatively, while the district court did not adopt the government's argument that defendant's Rule 37 motion was untimely (*see* Mot., Ex. E at 11-12), this Court may reject defendant's current Motion on that alternative basis. As indicated in the text of the rule, "[b]efore a district court may exercise jurisdiction under Fed R. Crim. P. 37 . . . the motion for relief must be timely." *United States v. Amado*, 841 F.3d 867, 871 (10th Cir. 2016); Fed R. Crim. P. 37(a); *see also* Fed. R. App. P. 12.1 (rule applies "[i]f a timely motion is made in the district court"). In considering which time limit applies for the purpose of determining timeliness under Fed. R. Crim. P. 37, "[t]he substance of the motion, not its form or label, controls it's disposition." *Amado*, 841 F.3d at 871 (holding that defendant's second motion for a sentencing reduction under § 3582(c)(2) should be construed as a motion to reconsider so that 14-day timeline for such motions applies).

Here, defendant did not specify the rule of procedure under which he sought his remedy of dismissal of his action in his indicative motion. The analysis is made more difficult by the fact that the actual, proper procedure for defendant is incompatible with the motion -- requesting relief as part of his pending direct appeal. Because the substance of defendant's motion is to seek relief from a prior federal criminal conviction and sentence based on new law,

the best source for the timing rule is a post-conviction motion under 28 U.S.C. § 2255. Section 2255 is the quintessential vehicle to challenge the validity of a federal conviction or sentence after judgment in the district court. *E.g.*, *Porter v. Adams*, 244 F.3d 1006, 1006 (9th Cir. 2001). Indeed, defendant himself cites § 2255 as the basis for the purported power of a district court to dismiss an action under the appropriations rider. (*See* Mot. at 24 n.5.)

The applicable time period for defendant's motion was, therefore, the one-year period for a § 2255 motion under 28 U.S.C. § 2255(f). Where, as here, a claim only became viable with the announcement of new law, the one-year period would accrue at the time of the passage of the appropriations rider on December 16, 2014. *Cf. Dodd v. United States*, 125 S. Ct. 2478, 2482 (2005) (time for filing § 2255 motion based on new right starts on date of decision announcing the right). Defendant was obviously aware of the appropriations rider one month later in January, 2015 when he threatened to enjoin the government under the rider, or when the following month he filed his urgent motion in this Court. Defendant would have also been fully aware of his ability to file his motion on April 13, 2015 when this Court denied defendant's urgent motion and specifically referenced the filing of an indicative motion in the district court. Nonetheless, defendant did not file his indicative motion in

the district court until well more than a year after the Ninth Circuit denied defendant's subsequent request for *en banc* review on June 22, 2015.

Nor should this Court accept the contention that defendant was entitled to wait to file his motion until this Court had issued what he considers a more favorable ruling in *McIntosh*. Defendant's Motion is based on the appropriations rider which he was clearly fully aware of soon after it was passed and he initiated litigation on it in this Court. *McIntosh* was the second published opinion in this Circuit based on the rider. *Olive v. Commissioner*, 792 F.3d 1146, 1149 (9th Cir. 2015), discussed further below, was decided over a year before *McIntosh*. A party should not be allowed to sit on potential claims based on a new statute indefinitely until it perceives a favorable development in case law, especially where, as here, defendant's delay prolongs an already unnecessarily protracted appeal. A contrary rule would invite a new appellate motion with every published decision. Defendant's indicative motion should be rejected for this additional reason.

B. Defendant's Request for Piecemeal Adjudication Of This Appeal Should be Rejected

In addition to seeking remand, defendant asks this Court -- presumably a motions panel -- to "resolve" several "preliminary legal questions identified by the district court" about the appropriations rider, and to do so separate and apart from consideration by the merits panel of the main issues already raised

(and waiting for defendant's final brief). (Mot. at 12-14, 21.) In short, defendant seeks a separate appeal on one defense theory, including truncated appellate consideration and potential remand to the district court, while continuing to delay progress on the main appeal that has been pending in this Court for approximately seven years. This request should be rejected for multiple reasons. Any consideration of the appropriations rider should be after briefing and oral argument by the panel assigned to hear this entire appeal.

First, there is no precedent or rule that would support defendant's suggested piecemeal adjudication of appellate issues. Defendant cites no circuit or federal rule. Fed. R. App. P. 12.1, on which his motion is purportedly based, provides for a court of appeals to remand a matter in limited circumstances (not actually found here, as previously explained) in response to notice of an indicative ruling by the district court. There is no provision for making preliminary legal rulings prior to remand in order to cure defects in the moving party's indicative motion or to overcome a district court's reluctance to entertain the motion. *See* Fed. R. App. P. 12.1(b).

Crafting such a byzantine procedure from whole cloth, as defendant requests, would violate the long-standing federal policy against piecemeal litigation of appellate issues. The Supreme Court has many times noted the strong Congressional policy against piecemeal appeals. *E.g.*, *United States v.*

Hollywood Motor Car Co., Inc., 458 U.S. 263, 265 (1982); *Baltimore Contractors Inc. v. Bodinger*, 348 U.S. 176, 251 (1955); *see Monti v. Department of Indus. Relations*, 582 F.2d 1226, 1228 (9th Cir. 1978). That policy is both deeply rooted in and fundamental to the federal judicial system. *Baltimore Contractors, Inc.*, 348 U.S. at 178 (Congressional policy from "very foundation of our judicial system" is "to have the whole case and every matter in controversy in it decided in a single appeal"). Exceptions to this policy against piecemeal appeals must be expressed clearly in statutes, and may not be "enlarge[d] or extend[ed]" by courts. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 481 (1978). Moreover, in order to preserve the policy "against piecemeal appeals in criminal cases" the Supreme Court has rejected the "superficial plausibility to the contention that any claim . . . that would be dispositive of the entire case if decided favorably to a criminal defendant, should be decided as quickly as possible in the course of the litigation." *Hollywood Motor Car*, 458 U.S. at 270; *see also id*. at 265 (the "insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.") (quoting *DiBella v. United States*, 369 U.S. 121, 124 (1962) (citation omitted)). Thus, even if defendant were correct that a favorable ruling on the appropriations rider issue could potentially "moot the substantive case" (Mot.

at 12), that disputed contention would provide no basis to separate the rider issue from consideration of the remaining issues on appeal.

Second, as the government argued to this Court prior to it denying defendant's earlier motion for separate adjudication of the appropriation rider, it is both more fair and efficient to have the merits panel consider all the issues in this appeal in the normal course after full briefing is completed. (*See* CTA 94, 97, 100.) This Court regularly refers motions to the merits panel assigned to hear an appeal where, as here, the issues in the motion implicate and/or overlap with the briefing on the appeal. *See, e.g., United States v. Gonzalez*, 981 F.3d 1037, 1038 (9th Cir. 1992) (holding that, where a defendant's allegation that the government breached his plea agreement "call[ed] into question the validity of the [defendant's appeal] waiver," the breach issue "should be resolved by a merits panel, along with any other issues that the merits panel determines are properly before it"); Christopher A. Goelz et al., CALIFORNIA PRACTICE GUIDE: FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE ¶ 6:104 (Feb. 2015 ed.) ("Where the grounds for [a] motion [to strike an appellate filing] are substantive or tied up with the merits of the appeal (*e.g.,* failure to raise the issue below), the clerk's office typically refers the motion to a merits panel for disposition." (citing *Simo v. Union of Needletrades, Industrial & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 624 (9th Cir. 2003))).

Here, not only has this Court indicated that defendant could raise the rider in his next brief, but also there are several issues raised in defendant's Motion that are "tied up with the merits of the appeal," Goelz et al., *supra*, such that they should be resolved by a merits panel familiar with the full record. For example, as he did in his *2015* motion to this Court (CTA 91 at 3, 11-12), defendant relies on, and attaches, the district court's jury instructions at trial to show that the instructions "prevented the state from giving practical effect" to its marijuana laws. (Mot. at 16-17 & Ex. F.) However, the merits appeal also includes extensive briefing on those jury instructions including whether instructions on the irrelevance of state marijuana law were correct based on the fact and circumstances in the district court. (*See*, *e.g.*, GAB 92-95 (analyzing jury instruction on state law issues); *id*. at 4-7, 71-74 (evidentiary rulings regarding state marijuana law evidence).)

Defendant's Motion also seeks a ruling on appeal that he fully and strictly complied with all California state marijuana laws. (Mot. at 25-27.) However, the panel reviewing the full record already presented and briefed will know that the district court held at sentencing that defendant had *not* complied with state law. (*See* GAB 93 (citing sentencing hearings and the district court's sentencing memorandum).) It will have the full records showing that in the course briefing on the state law issue at sentencing defendant expressly

disclaimed the theory of state law compliance as a collective that he has raised in his indicative motion. (*See* GER 488-94, 545-46.) The record from the trial and sentencing will also include evidence of several violations of California marijuana law by defendant's employees, which may be pertinent to his own compliance. (*See* GAB 14-15, 35-37 (describing transactions); GER 546 (defense admits violation of state law by employee hired by defendant).) Further, the panel reviewing the full record already presented and briefed will also know in resolving defendant's unsupported *Brady* claim that evidence of his violations of California marijuana law were evident throughout the government's investigation, highlighted in the government's search warrants, turned over to defendant in discovery, discussed during sentencing hearings, and argued in connection with the denial of defendant's fourth new-trial motion. (*See* GAB 116-20.)[5]

Finally, defendant's alternative request for a remand to the district court is also intertwined with the merits of the appeal. As noted above, the

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[5] In connection with the current Motion, defendant does not even include several of the district court records about state law presented in the indicative motion to the district court. (*See* Mot. & Ex. B at 12, Ex. C at 2 (listing government exhibits), 17-22 (concerning Elford and state law); CR 452-2 (Def.'s Ex. B in district court), 458-1, 458-2, 458-5, 458-7, 458-8 (Gov't Exs. A, B, E, G, & H in district court).)

government —with the approval of the United States Solicitor General—has on cross-appeal sought reassignment to a different district judge for any further proceedings on remand. (*See* GAB 142-45.) As reflected in the government's second brief on cross-appeal, the reassignment was not only premised on the court's strongly expressed view at sentencing, but that the government continually sought prompt resolution of sentencing and other post-trial issues in district court, only to be thwarted by the successful attempts of defendant and the district court to repeatedly continue and delay matters such that judgment was not entered for almost two years after defendant's guilty verdicts. (*Id*. 126-30.) Defendant was able to unfairly circumvent the reassignment issue, and again delay resolution of the appeal, by filing his indicative motion directly with the district court (which avoided the reassignment issue). (*See* Mot., Ex. B at 8, Ex E. at 34-35.) This Court should not compound the delay and issue-avoidance by ruling on the current motion without also resolving the reassignment issue.

Defendant's final argument for piecemeal litigation of the rider is that it could potentially prevent the government from spending money litigating this appeal or the case, in general. (*See* Mot. at 13.) Even if this argument did not run afoul of the prohibition on piecemeal litigation set forth in *Hollywood Motor Car* and other cases, it would be improper to restrain the government's ability

to spend funds defending its conviction. This Court has already rejected defendant's attempt to enjoin the government's spending on this case, notwithstanding lengthy motions, exhibits, and a request rehearing *en banc* by defendant. (*See* CTA 100-12.) No case has imposed such a litigation restriction, and *Olive* specifically rejected one. *Olive*, 792 F.3d at 1150-51. Further, *McIntosh* recognized the government's right to represent its interests in proceedings in which § 542 challenges are raised, including to litigate whether defendants have strictly complied with state medical marijuana law. *McIntosh*, 833 F.3d at 1179. This is consistent with the practice of courts being able to examine their jurisdiction even when held ultimately to lack jurisdiction over a matter. *E.g., United States v. Ruiz*, 536 U.S. 622, 628 (2002).

In sum, it would be more efficient, fair, and consistent with this Court's practice for the same panel that considers the merits of the issues already on appeal and cross-appeal to consider any arguments on the appropriations rider. Defendant's request for piecemeal litigation is contrary to precedent, and would promote incomplete consideration of issues while furthering delay.

C. If the Motion's Panel Does Consider the Issue, the Appropriations Rider Does Not Apply

If, contrary to the analysis above, this Court chooses to address the issues regarding the appropriations rider at this preliminary stage, the Court should rule that the rider does not apply or undermine defendant's conviction.

McIntosh applied the appropriations rider to criminal prosecutions, but otherwise *McIntosh*, and the subsequent case *United States v. Nixon*, interpreted the rider narrowly. They limit the rider temporally and to Department of Justice (DOJ) spending only, while holding that the rider provides no immunity from the Controlled Substances Act (CSA). That narrow interpretation, and binding rules of statutory interpretation, dictate that the rider not apply retroactively to cases like this where the defendant's sentence and judgment occurred before the rider's enactment, nor does the rider give courts the power to dismiss an otherwise valid judgment. Even if the rider did otherwise apply, undisputed facts, defendant's own admissions, and findings by the district court conclusively show that defendant did not fully and strictly comply with all California medical marijuana laws, as required by *McIntosh*.

1. *The appropriations rider and McIntosh*

Although defendant's Motion only mentions *McIntosh*, this Court has addressed the appropriations rider's scope in three published decisions. In *Olive*, this Court held that, notwithstanding the appropriations rider, a medical marijuana business could not deduct its business expenses under the federal tax code, because the business, even if compliant with California law, was engaged in drug trafficking under federal law. *Olive*, 792 F.3d at 1149. *Olive* rejected the claim that the appropriations rider barred the government from continuing

to litigate the appeal. *Id.* at 1150-51. Among other things, the Court held that the rider did not change the CSA, and that while enforcement of the tax made it "more costly to run the dispensary," it did not change whether the business was "*authorized* in the state." *Id.* at 1151 (emphasis retained).

In *McIntosh*, the Court considered ten consolidated pre-conviction interlocutory appeals and petitions for writs of mandamus brought by defendants pending trial in three separate cases on marijuana-based Title 21 violations. The question presented was "whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the [DOJ] from spending funds to prevent states' implementation of their own medical marijuana laws." *McIntosh*, 833 F.3d at 1168. The Court rejected the government's contention that the appropriations rider did not apply to criminal prosecutions at all, but otherwise interpreted the provision narrowly. It held that "§ 542 prohibits DOJ from spending money on actions that prevent the Medical Marijuana States giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.* at 1176. This means that DOJ is prohibited from "spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with

such laws." *Id*. 1177. However, "[i]ndividuals who do not *strictly* comply with *all* state-law conditions regarding the use, distribution, possession and cultivation of medical marijuana have engaged in conduct that is unauthorized and prosecuting such individuals does not violate § 542." *Id*. at 1177-78 (emphasis added).

Equally important is what the appropriations rider did not do. First, *McIntosh* emphasized that "§ 542 does not provide immunity from prosecution for federal marijuana offenses" and that marijuana possession, distribution, and manufacture, including for medical purposes, remains prohibited under the CSA. *Id*. at 1179 n.5. Thus, defendants who violate the CSA through marijuana activity remain subject to federal prosecution under the CSA. *Id*. Section 542 only "prohibits DOJ from spending funds on certain actions." *Id*. at 1173. Second, § 542 is "temporal[ly]" limited to the term of the appropriations bill in which it was included. *Id*. at 1179 ("DOJ is currently prohibited from spending funds from specific appropriations . . . for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow."). Finally, in ruling that § 542 extends only to those defendants in "strict" and "full" compliance with all state medical marijuana laws, the Court expressly rejected the defendants' argument that the appropriations rider be extended to include individuals out

of strict compliance, but for whom there is a "reasonable debate" that they complied with state marijuana law. *Id*. at 1177.

McIntosh thus remanded each interlocutory appeal to the district court for further evidentiary hearings as to whether the defendants' "conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana." *Id*. at 1179. The Court noted that "in almost all circumstances, federal criminal defendants cannot obtain injunctions of their ongoing prosecutions," but § 542 did allow defendants to seek to enjoin DOJ's spending of funds. *Id*. at 1172. The Court deferred to the district court "to determine, in the first instance and in each case, the precise remedy that would be appropriate" given the "temporal nature" of the appropriations restriction and each defendant's Sixth Amendment right to a speedy trial. *Id.* at 1179.

Nixon further emphasized the limited scope of the appropriations rider. *Nixon*, 839 F.3d at 885. In *Nixon*, the defendant moved the district court under the appropriations rider to allow him to use marijuana in compliance with California medical marijuana law. *Id*. at 887. The district court denied the motion, ruling that the appropriations rider had "no effect on the Court or the Probation Office" and federal law continued to require a prohibition on

marijuana use on probation. *Id*. This Court affirmed, holding that § 542 "restricts only the DOJ's ability to use certain funds on particular prosecutions during a specific fiscal year." *Id*. at 888. It also emphasized *McIntosh's* holding that the CSA remains in effect nationally. *Id*.

2. *The appropriations rider does not apply retroactively to this case*

Following *McIntosh*'s emphasis on the limited, "temporal" nature of the appropriations rider, *Nixon*'s reluctance to expand its scope to implicate the power and actions of courts, and long-standing rules of statutory construction, this Court should hold that the appropriations rider does not apply to defendant because he was convicted and sentenced prior to the rider's enactment. The rider does not nullify or unwind past investigations and prosecutions, or confer power or jurisdiction on courts to reopen otherwise valid convictions, but rather prevents DOJ spending on prospective interference with State medical marijuana law. Here, the investigation, prosecution, and conviction, and the expenditures to support them, all took place before the appropriations rider went into effect, thus taking them outside § 542's scope. A binding rule of statutory construction, and the general statutory savings clause, 1 U.S.C § 109, as broadly interpreted by this Court and the Supreme Court, each independently compel this conclusion.

First, there is no mention in the appropriations rider's text of past prosecutions or convictions. It is well-established that "[a]bsent clear legislative intent, commonly expressed through a retroactivity clause, a statute is not given retroactive effect." *United States v. Rewald*, 835 F.2d 215, 216 (9th Cir. 1987) (citing *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1504 (9th Cir. 1984) (collecting cases)); *see United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"); *United States Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible to any other"); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169 (10th Cir. 2015) ("the presumption that legislation operates only prospectively is nearly as old as common law"). Applying this rule of construction in *Rewald*, this Court held that a new sentencing act would not apply to criminal defendants sentenced prior to its effective date if the statute's text were silent or ambiguous as to its retroactivity. *Id.* Lacking a retroactivity clause, the appropriations rider must be construed identically -- to apply, if at all, only prospectively to defendants who have not yet been sentenced. This construction is not only commanded by the rider's text and this precedent, but

is also consistent with *McIntosh*'s emphasis on the "temporal" nature of the appropriations rider limited to a specific fiscal year. *McIntosh*, 833 F.3d at 1179. It is also generally consistent with the treatment of government obligations under Anti-Deficiency Act, cited by defendant (Mot. at 13). That law, and the Appropriations Clause of the Constitution, cited in *McIntosh*, 833 F.3d at 1174-75, do not work retroactively to extinguish obligations or debts previously incurred by the government even after authorized appropriations have run out or been withdrawn by Congress. *See Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181, 2188-89, 2193 (2012).[6]

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[6] This rule against retroactivity should also cover prosecutions initiated, but not brought to judgment, prior to the enactment of the appropriations rider. It is not clear from the text of the *McIntosh* opinion whether it included pre-trial matters in that procedural posture. (Defendant cites to case numbers listed prior to the Court's opinion (Mot. at 15), not the opinion itself). In any event, *McIntosh* clearly did not consider or address the rider's retroactivity, thus providing no precedent on the issue. *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of [an appellate] court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *accord Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions."). The recent, unpublished opinion *United States v. Silkeutsabay*, Nos 15-30392-93, 2017 WL 766985 (9th Cir. Feb. 28, 2017), similarly contains no analysis of retroactivity.

Second, both *McIntosh* and *Nixon* stressed that the appropriations rider did not repeal the CSA or provide "immunity" from federal prosecution. Individuals are subject to federal prosecution for marijuana activity for the entire period of the applicable statute of limitations. *McIntosh*, 833 F.3d at 1179 & n.5; *Nixon*, 839 F.3d at 887-88. Because individuals remain subject to prosecution under the CSA despite engaging in medical marijuana activity during the effective period of the appropriations rider, it would be illogical and contrary to this precedent to allow those who engaged in such activity and were prosecuted and convicted outside the rider's effective period to unwind their convictions as if the CSA was no longer controlling statutory authority.

Significantly, even if Congress had taken the more dramatic, consequential step of repealing defendant's statutes of conviction in the appropriations rider, the repeal would not impact defendant's conviction. The federal savings statute, 1 U.S.C. § 109, states that absent an express contrary provision in the repealing law itself, "the repeal of any statute shall not have the effect to release or extinguish *any penalty, forfeiture or liability* incurred under the statute, . . . and such statute shall be treated as remaining in force for the purpose of *sustaining any proper action or prosecution*." 1 U.S.C. § 109 (emphasis added). The Supreme Court has held that this statute creates a "demanding interpretive requirement" that a new statute reducing criminal liability be

applied only prospectively to new criminal conduct after the date of enactment unless retroactivity is expressly stated in the statute or manifest by "necessary implication." *Dorsey v. United States*, 132 S.Ct 2321, 2331 (2012). The law applies to all cases based on conduct prior to the new law's enactment including those pending on appeal at the time of enactment. *Warden v. Marrero*, 417 U.S. 653, 660 (1974) (statute abrogated the common law presumption that criminal statute's repeal abated prosecutions "which had not reached final disposition in the highest court"); *see Dorsey*, 132 S.Ct. at 2332 (statute applies to "pre-Act offenders").

The statute's rule against retroactivity applies to "all legislation that becomes inoperative upon the occurrence of any legislatively established condition" and has been applied "broadly in criminal and civil contexts" such as to terms of parole, civil forfeitures, and regulations. *United States v. Avila-Anguiano*, 609 F.3d 1046, 1050-51 (9th Cir. 2011) (collecting cases); *Martin v. United States Parole Comm'n*, 108 F.3d 1104, 1106 (9th Cir. 1997) (statute applies to "all forms of punishment for crime"); *United States v. Breier*, 813 F.2d 212, 215-16 (9th Cir. 1987) (post-trial change in statutory definition during pendency of appeal narrowing scope of criminal liability did not apply retroactively).

The savings statue, separate from but consistent with the general presumption against statutory retroactivity referenced in *Rewald* and *Menhorn,* should apply to bar application of the appropriations rider here. The rider contains no textual statement of retroactivity, nor is retroactivity necessarily implied by the CSA or another statute. *Compare Dorsey*, 132 S.Ct. at 2332-34 (notwithstanding § 109, elimination of mandatory minimum sentences in Fair Sentencing Act (FSA) partially retroactive to time of sentencing due to specific competing timing rule in sentencing law and related factors) *with United States v. Augustine*, 712 F.3d 1290, 1294-95 (9th Cir. 2013) (distinguishing *Dorsey* for defendants sentenced prior to FSA due to lack of expressed statutory intention to apply more lenient law to them) *and United States v. Baptist*, 646 F.3d 1225, 1226-28 (9th Cir. 2011) (no Congressional intention to apply FSA to sentenced defendants on direct appeal notwithstanding post-enactment letters from act's sponsors seeking such retroactive application).

Defendant incurred his "liability" within the meaning of § 109 well before the enactment of the appropriations rider when he committed his crimes in violation of the CSA. *See Dorsey*, 132 S.Ct. at 2331 (liability incurred when offender "commits the underlying conduct that makes the offender liable"). At minimum, by seeking dismissal of his already-established judgment through the rider, defendant is clearly attempting to use a subsequent legislative

enactment to remove a "penalty" or "liability," within the meaning of § 109. Therefore, even if this Court were hesitant to apply § 109 to pre-conviction prosecutions such as in *McIntosh*, it should apply the statute to cases such as this where a criminal sentence has been entered. Moreover, defendant's argument that the government's pursuit of its cross-appeal constitutes the application of a "punishment" and is part of a "prosecution" (Mot. at 17) further demonstrates that this case is covered by § 109 which covers all punishments and specifically references "sustaining . . . prosecutions" from legislative action. 1 U.S.C. § 109.

3. *The rider does not provide for dismissal of a valid conviction*

The third, independent reason defendant cannot rely on the appropriations rider is that the remedy of dismissal sought by defendant is inconsistent with *Nixon* and *McIntosh*. This case is substantially different from the pre-conviction interlocutory appeals of denials of injunctions in *McIntosh* where the cases were remanded to look for a remedy consistent with a defendant's speedy trial rights. Here, by contrast, not only has the government finished its prosecution, but the district court has rendered sentence and entered a judgment and commitment order which remains in effect. The holding and result in *Nixon* show that the appropriations rider does not affect a court's power to issue or review orders. *Nixon*, 839 F.3d at 887-88. Both *Nixon*

and *McIntosh* also emphasize that marijuana activity remains illegal under federal law. Moreover, following the text of the appropriations rider, this Court has applied it only to spending by DOJ, not to courts or any other organ of government. *Nixon*, 839 F.3d at 888; *McIntosh*, 833 F.3d at 1172-73. Thus, There is no hint in the appropriations rider or this Court's decisions that the rider could change a district court's duly entered judgment, or alter this Court's power to review that judgment, and to affirm that judgment if otherwise free from error.[7]

Indeed, absent the applicability of an independent legal rule like the statute of limitations or the Speedy Trial Act, dismissal of an indictment or conviction should not be an available remedy even for the narrow category of individuals in pre-conviction cases to whom § 542 may otherwise apply. Defendant has not cited any rule or precedent whereby a spending provision like the appropriations rider gives a court the power to dismiss an otherwise valid criminal case. As noted above, Supreme Court anti-deficiency law holds

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[7] This should especially be the case here, where the government's principal briefing was filed well before Section 542 even went into effect. Even if this Court were to be the first to conclude that DOJ should not participate in an active appeal during Section 542's effective period, this Court needs nothing more from the government to review the district court's judgment of conviction and sentence.

that a restriction of appropriations by Congress cannot retroactively unwind or extinguish a previously-incurred *civil* debts and obligations. *See Ramah Navajo Chapter*, 132 S.Ct. at 2188-89. *McIntosh*, itself suggests the lack of such power to dismiss a criminal judgment. While the *McIntosh* cases involved requests for injunctive relief and dismissal, this Court never authorized dismissal, and instead took "no view" on the relief required by the rider. *McIntosh*, 833 F.3d at 1172 n.2. *McIntosh* did note that district courts have "ancillary jurisdiction . . to adjudicate and determine matters incidental to the exercise of primary jurisdiction over a case under review." *Id.* Yet, as the cases cited by *McIntosh* for that proposition show, ancillary jurisdiction is a circumscribed power, limited to collateral matters far less fundamental than the dismissal of the underlying action. *United States v. Sumner*, 226 F.3d 1005, 1013 (9th Cir. 2000) (no ancillary jurisdiction to expunge defendant's conviction and arrest records on equitable grounds); *see Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 378-81 (1994) (no ancillary jurisdiction to enforce settlement agreement from dismissed case previously before court); *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006) (ancillary jurisdiction to hear fee dispute between party and attorney). Thus, there is no basis for this Court to dismiss this matter on appeal, and unless this Court were to reverse and remand defendant's conviction on some other basis, remand to the district court for proceedings

under the rider would be superfluous, for the district court could not alter defendant's conviction.

4. *In any event, defendant did not strictly and fully comply with all California medical marijuana laws*

a. Defendant bears the burden of showing strict compliance

Should this Court reach the issue, the burden of showing strict compliance with state marijuana law under the appropriations rider, is on the defendant raising the rider to obtain relief. Tellingly, defendant argues that the closest analogous federal precedent on the burden of proof is *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), which puts the burden on the government to demonstrate that it employed the least restricting means of advancing a compelling government interest under the Religious Freedom Restoration Act (RFRA). (Mot. at 21.) Yet that case actually directly undermines defendant's argument, for the text of RFRA explicitly places the burden on the government, while the appropriation rider contains no such burden shifting provision. *See* 42 U.S.C. § 2000bb-1; *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. at 424, 428. The burden of showing compliance under the rider rests with defendant because (1) Congress did not put the burden on the government in the plain language of the statute as it did in RFRA, (2) § 542 does not alter the elements of a CSA offense or provide for

an affirmative defense that negates any particular element;[8] and (3) defendant, as a moving party, is attempting to thwart his lawful conviction and sentence on a ground unrelated to his guilt or innocence (and, indeed, unrelated to any defect in the proceedings leading to his conviction and sentence).[9] In addition, as the district court recognized, to the extent defendant is seeking to enjoin the government, the burden of proof falls on him . (Mot., Ex. E at 38.)[10]

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[8] *See, e.g., Smith v. United States*, 133 S. Ct. 714, 719, 720 (2013) (defendant bears burden to establish statute-of-limitations defense; "statute-of-limitations defense does not call the criminality of the defendant's conduct into question, but rather reflects a policy judgment . . . that the lapse of time may render criminal acts ill-suited for prosecution").

[9] *E.g.*, *United States v. Zone*, 403 F.3d 1101, 1105 (9th Cir. 2005) (defendant bears burden of motion to dismiss double jeopardy claim by preponderance of evidence); *United States v. Ziskin*, 360 F.3d 934, 943 (9th Cir. 2003) (same); *United States v. Lazarevich*, 147 F.3d 1061, 1065 (1998) (outrageous government conduct); *United States v. Edmonds*, 103 F.3d 822, 855 (9th Cir. 1996) (same); *United States v. Villareal,* 707 F.3d 942, 953 (8th Cir. 2013) (defendant bears burden on motion to dismiss for speedy trial violation); *cf. INS v. Abudu*, 485 U.S. 94 (1988) (movant bears burden on motion to reopen deportation proceeding, just as movant bears burden on new trial motion).

[10] *See Winter v. Natural Res. Def. Counsel, Inc.*, 555 U.S.. 7, 20 (2008) (party seeking injunction bears burden of proof of required elements); *Speilman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95-96 (1935) (interference with enforcement of criminal statute requires exceptional circumstances and "clear showing that an injunction is necessary") (placing burden on defendant seeking to enjoin government).

Moreover, defendant is in the best position to explain why his offense conduct was authorized by state law.

b. Defendant cannot show strict compliance

Defendant cannot meet his burden. Unlike *McIntosh*, which arose from pre-trial interlocutory appeals, the record in this case is sufficiently developed from trial, post-trial briefing, sentencing, defendant's admissions, and district court findings to show conclusively that defendant did not strictly and fully comply with all California marijuana law requirements. The district court found correctly at sentencing that defendant did *not* comply with California state marijuana law. The heightened requirement for defendant under *McIntosh* that he meet the burden of proving "strict" compliance with "all" state marijuana laws only reinforces the point. Indeed, even if the burden were not on defendant, the undisputed facts and defendant's admissions and shifting, contradictory theories for state law compliance, are fatal to defendant's claim.

Notwithstanding California's general prohibition on marijuana, two state statutes provide limited defenses for certain individuals who possess or sell marijuana for legitimate medical purposes. The CUA, California Health & Safety Code § 11362.5, provides that the laws against possession and cultivation of marijuana "shall not apply to a patient, or to a patient's primary

caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." *People v. Hochanadel*, 176 Cal.App.4th 997, 1007 (2009). The CUA defines a "primary caregiver" as the individual who "has consistently assumed responsibility for the housing, health, or safety of that person." *Id*. As many courts have observed, the defense in the CUA is quite limited. *See, e.g., People v. Mentch*, 45 Cal.4th 274, 286 n.7 ("The [CUA] is a narrow measure with narrow ends."); *People v. Mitchell*, 225 Cal.App.4th 1189, 1203 (2013) (the CUA "was not intended to decriminalize marijuana on a wholesale basis nor eviscerate this state's marijuana laws").

A second statute, the 2003 MMPA, California Health & Safety Code § 11361.5, et seq., enacted to clarify the application of the CUA, provides for the establishment of collectives to cultivate marijuana for medical purposes. Only collective cultivation is immunized under Health & Safety Code § 11362.775, and the MMPA specifies that collectives shall not profit from the sale of marijuana. Cal. Health & Safety Code § 11362.765; *Hochanadel*, 176 Cal.App.4th at 1008-09. As *Hochanadel* observed:

> [S]elling marijuana, . . . is a violation of [sections] 11359 and 11360. In California there is no authority for the existence of storefront marijuana businesses. The [MMPA] allows patients and primary caregivers to grow and cultivate marijuana, no one else. A primary caregiver is defined as an 'individual' who has

> consistently assumed responsibility for the housing, health or safety of a patient. A storefront marijuana business cannot, under the law, be a primary caregiver.

Hochanadel, 176 Cal.app.4th at 1005.

At sentencing, the government asserted that defendant had violated California law not only because he was not a primary caregiver as he had always asserted while operating his store (which contained the name "Caregiver" in it), but also because defendant's CCCC was not a collective or cooperative under the MMPA. (GER 489-94.) Rather than organized as a non-profit with joint ownership, as required by California case law and interpretive guidelines promulgated in 2008 by California's Attorney General, defendant admitted that the CCCC was a sole proprietorship. (GER 492-94; *see also* GER 409 ¶ 31; Mot., Ex. I (Lynch 1/30/2009 Decl.) ¶ 31 (business was sole proprietorship).) The government produced evidence showing that defendant did not even purport to run a collective or cooperative, or try to be anything other than a primary caregiver (which he plainly was not). (GER 248, 288-97 (forms), GER 409, 492-93; Mot., Ex. I ¶ 31 (defendant considered himself a "primary caregiver").) The government also set forth evidence, including admissions through counsel by defendant's own financial expert, that defendant operated a for-profit enterprise, also contrary to the MMPA. (GER 164, 177-70, 324-28, 493.)

In his reply to this portion of the government's sentencing position, defendant *conceded* that the government was correct that he had not run collective/cooperative under the MMPA:

> The government correctly notes that Mr. Lynch did not operate a collective or a cooperative, but rather a storefront dispensary.... **Mr. Lynch does not dispute the government's assertion that he made no attempt to operate a classic collective,** as now defined in the Attorney General's opinion.

(GER 545 (emphasis added).) Defendant never altered this position prior to judgment. Rather, he argued only that, contrary to the government's assertion, he qualified as a primary caregiver under the California case *People ex rel. Lungren v. Peron*, 59 Cal.App.4th 1383 (1997). (*Id*.).

After extensive litigation and four sentencing hearings, the district court concluded that defendant's marijuana store "was *not* operated in conformity with California state law." (Mot., Ex. A at 33 n. 25 (emphasis added).) The court said that "medical marijuana distribution operations (such as the CCCC)" could not show that they fall within the definition of "primary caregiver" under either the CUA or the MMPA. (*Id*.) The court reasoned that, among other things, California case law, starting as early as *Peron* in 1997, and confirmed by the California Supreme Court later in *Mentch*, had held that a primary caregiver must prove that he or she consistently provided care independent of, and prior to, the provision of marijuana. (*Id*.)

Although the correct requirement for valid primary caregiver status had been set forth as early as *Peron*, the district court suggested that due to the "somewhat unsettled" nature of the law at the time of defendant's criminal conduct, defendant "could have reasonably believed" that the CCCC "complied with California law because it was acting in the capacity of a primary caregiver." (*Id*.) The court also explained the MMPA in detail, including quoting Cal H&S Code § 11362.775, the Cal A.G. Guidelines, and case law for the proposition that California law provides "for properly organized" collectives and cooperatives "that dispense medical marijuana though a storefront." (Mot., Ex. A at 7-9.) Nonetheless, the court concluded that defendant had not complied with state marijuana law. (*Id*. at 33 n. 25.)

This ruling alone defeats defendant's present attempt to rely on the appropriations rider. The district court's finding that defendant did not comply with state marijuana law, without resort to defendant's burden or the heightened standard of "strict" compliance under *McIntosh*, precludes application of § 542. *McIntosh*, 833 F.3d at 1177-78. That defendant "could have" reasonably believed he was complying with state law is irrelevant. *McIntosh* specifically restricted the scope of § 542 to those in actual strict state law compliance, rejecting that the provision could apply to those for whom there was a "reasonable debate" about their compliance. *Id*. at 1177.

To avoid the impact of this dispositive finding against him, in his post-judgment filings in the district court and his current Motion, defendant has engaged in a series of shifting and contradictory claims about his supposed compliance with California law. In his recent indicative motion in the district court, defendant reversed his position from sentencing, and argued that he had complied with state law *not* because he was a primary caregiver, but because his CCCC had, after all, been a collective or cooperative under the MMPA. (*See* Mot., Ex. B at 11-13.) In support of this new position defendant expressly adopted the brief of amicus curie Joseph Elford filed in this Court in support of defendant's first brief on cross-appeal. (*See id.* (adopting amicus brief filed at CR 453-2 as Exhibit B to motion in district court and as CTA 42 in this Court).) That amicus brief relied heavily on the 2008 Cal. A.G. Guidelines on medical marijuana, and cases such as *Hochanadel*, to suggest that defendant had run a collective or cooperative under the MMPA, or at least defendant "reasonably believed this was so." (CTA 42 at 13-14; *see id.* at 8, 9, 12 (citing and relying on Cal. A.G. Guidelines).)

Defendant's revised position, in direct contradiction with his position at sentencing, is both waived and barred by the doctrine of judicial estoppel. *Marx v. Loral Corp.*, 87 F.3d 1049, 1056 (9th Cir. 1996) (party waived argument by taking directly contradictory position; finding "about-face, at best,

inventive" and barring revised theory), *overruled on other grounds by Lee v. Maricopa County*, 693 F.3d 893, 925-28 (9th Cir. 2010) (en banc); *see also Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 782 (9th Cir. 2001) (applying judicial estoppel to bar party from advancing inconsistent position; litigants may not "tak[e] inconsistent positions" and "play[] fast and loose with courts"); *Hefland v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) (applying judicial estoppel to inconsistent attorney arguments regarding party's intent, holding that doctrine applies both to factual and legal assertions). At minimum, defendant's earlier admissions fully support the district court's conclusion that defendant failed to comply with California law. Indeed, the district court heard from Elford at sentencing and specifically rejected the notion that defendant had run a collective or cooperative under the MMPA. (RT 4/23/09: 81-82; ER 3482-83 (finding defendant did not operate a collective but a sole proprietorship that "was selling to people who were not part of the collective").)

Further, as shown, in the government's opposition to defendant's indicative motion, substantial evidence in the record and California case law establish that defendant did not run a collective or cooperative as understood by the MMPA. First, defendant directly admitted that he did not even attempt to organize or run his sole proprietorship as a collective or cooperative. (Mot.,

Ex. I (Lynch 1/30/2009 Decl.) ¶ 31.) *see Hochanadel*, 176 Cal.App.4th at 1010 ("collective" jointly owned and operated). Second, as the court noted at sentencing, and as proven in his customer forms and other evidence, the vast majority of defendant's customers designated defendant as a primary caregiver, but had no relationship with his store other than as marijuana purchasers. (*E.g.*, GER 248 ¶ 2, 250-51, 288-97; Def. Ex. A at 33 n.35.); *see Hochanadel*, 176 Cal.App.4th at 1018 (where purchasers merely required to fill out primary caregiver form with no evidence of other relationship with collective/cooperative "strong indication of unlawful activity). There is no evidence, for example, that defendant shared financial information with customers, as required by lawful collectives/cooperatives. *See People v. Solis*,, 217 Cal.App.4th 51, 58-59; *People v. Jackson*, 210 Cal.App.4th 525, 539 (2010).

Third, contrary to the MMPA, defendant made no effort to set up or run his sole proprietorship as a non-profit enterprise. *See* Cal. Health & Safety Code § 11362.765 (MMPA does not permit for-profit marijuana activity); *People v. London*, 228 Cal.App.4th 544, 554, 566 (2014) (same) (no MMPA defense instruction where defendant did not register as non-profit and insufficient proof of non-profit sales); *People v. Mitchell*, 225 Cal.App.4th 1189, 1193, 1207-08 (2014) (MMPA collective defense inapplicable for grower of marijuana for purported collective where marijuana not grown on non-profit

basis even though neither grower or collective made money). In addition to the evidence in the government's sentencing position set forth above, defendant admitted in his safety valve interview with the government (a transcript of which was made part of the record at sentencing) that he sold marijuana at a market price, rather than an amount solely to cover costs and expenses. (Mot., Ex. J, Tr. at 224-27.) This also violates the MMPA. *See Hochanadel*, 176 Cal.App.4th at 1010-11 (any monetary "reimbursements" from members of a collective/cooperative "should only be amount necessary to cover overhead costs and operating expenses."); *accord London*, 228 Cal.App.4th at 566; *Jackson*, 210 Cal.App.4th at 535-536.

Defendant also admitted to taking $3,500 every two weeks out of his store's revenues which he used to pay personal expenses, including his mortgage and personal debts. He typically also took an additional sum to support a software business he owned as a sole proprietorship prior to starting the CCCC. (Mot., Ex. J, Tr. at 109-14, 220.) On one occasion, defendant took $10,000 out of the CCCC to pay down a prior debt he had incurred on this software business. (*Id*. at 113-14.) This unfettered salary-taking further shows that defendant did not operate a valid cooperative/collective under the MMPA. *London*, 228 Cal.App.4th at 565-66; *Solis*, 217 Cal.App.4th at 59-60 (no valid MMPA defense for defendant running 1,700-member dispensary who

took payment to himself of annual salary as "reasonable compensation" unaccompanied by financial accountability to member/customers or effort to match compensation to specific store expenditures); *compare People v. Holistic Health*, 213 Cal.App.4th 1029, 1033-34, 1039-41 (2013) (lawful MMPA cooperative, where, among other things, store organized as non-profit, including articles of incorporation, all money received went back to cooperative as confirmed by tax returns, and store never had more than three pounds of marijuana on premises).

Finally, and significantly, under California law, a valid collective/cooperative under the MMPA, must be a "closed-circuit" that does not involve purchases or sales of marijuana with non-members. *London*, 228 Cal.App.4th at 555; *Solis*, 217 Cal.App.4th at 59-60 (in violation of MMPA defendant made purchases of marijuana from two vendors without membership records who provided false names); *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal.App.4th 747-48 (2010). Yet, here, defendant admitted that he stocked his store in part with marijuana he purchased from non-member stores in Oakland. (Mot., Ex. J, Tr. at 70-84.) Additionally, he allowed an employee to make multiple trips to Northern California to buy marijuana for the CCCC from non-member vendors not listed in any store record. (*Id*. at 70-

74, 80-81.) In sum, the record overwhelmingly rebuts defendant's changed theory of state law compliance.

Defendant's final gambit in the present Motion is to change his position on state law compliance yet again. After relying on the Cal. A.G. Guidelines in his indicative motion to the district court, he now changes course and suggests that they not be relied on because they were promulgated after his criminal conduct. (Mot. at 19-20, 26-27.) First, this argument should also be rejected on waiver and estoppel grounds given defendant's reliance on the same guidelines on the same issue in this litigation. Second, the argument is barred by *McIntosh* which emphasized that a defendant seeking protection under the rider must show "strict compliance" so that his conduct was "completely" authorized by "all relevant conditions imposed by state law," and further noted that the broad definition of "law" under the rider included "sets of rules," as well as "regulations" and "administrative decisions," *McIntosh*, 833 F.3d at 1177, 1778-79. By not complying with the Cal. AG Guidelines, he did not strictly and completely comply with "all" state laws. Third, and obviously, defendant did not just violate the Cal. A.G. Guidelines, he violated the MMPA statute itself, as the statute has been interpreted by case law. The Guidelines -- along with the cases cited above -- merely interpret the MMPA, which was existing at all relevant times of defendant's criminal

conduct. *See London*, 228 Cal.App.4th at 554. Defendant himself acknowledged this connection between the guidelines and the MMPA when adopting Elford's amicus brief. (*See* CTA 42 at 8 (Cal. A.G. Guidelines based on MMPA).) Indeed, nearly all the California cases cited by defendant in his Motion rely and adopt these guidelines in their interpretation of the MMPA, and none rejects them. *See People v. Anderson*, 232 Cal.App.4th at 1277-78 (2015); *London;* 228 Cal.App.4th at 554-56; *People v. Colvin*, 203 Cal.App.4th 1029, 1040-41 (2012); *Hochanadel*, 176 Cal.App.4th at 1009-10. As noted above, unlike statutes, case law interpreting statutes apply retrospectively. *E.g.*, *Security Indus. Bank*, 459 U.S. at 79. Thus, defendant cannot escape the import of his failure to comply with the MMPA through a revised, contradictory theory, and his claim under the rider must fail.

IV. *CONCLUSION*

For the reasons set forth above, defendant's motion should be denied, and this Court should order that defendant third brief on cross-appeal be filed without further delay.

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

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