**No. 10-50219, 10-50264**

**IN THE**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES C. LYNCH,

Defendant-Appellant.

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# GOVERNMENT'S ANSWERING BRIEF AND BRIEF ON CROSS-APPEAL

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

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**No. 10-50219, 105264**

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# GOVERNMENT'S ANSWERING BRIEF AND BRIEF ON CROSS-APPEAL

## I

## ISSUES PRESENTED

A. Whether the district court erred in admitting government evidence on overt acts and elements of the charged drug conspiracy.

B. Whether defendant's entrapment by estoppel defense was invalid as a matter of law because defendant failed to establish a prima facie case.

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

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

E. Whether the district court properly gave an instruction on jury nullification after finding the issue had been injected into the case by defendant's questioning of a prospective juror.

F. Whether the district court properly refused to instruct the jury on the post-trial consequences of a guilty verdict.

G. Whether the district court plainly erred in its handling of jury communications prior to deliberations.

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

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

K. On cross-appeal, whether the district court's strongly stated views and unusual efforts opposing the required mandatory-minimum sentence in Count One warrants reassignment to a new judge on remand.

L. Whether the district court made other errors in imposing sentence.

## II

## STATEMENT OF THE CASE

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

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

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

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

The narcotics conspiracy in Count One included five objects: (1) possessing with intent to distribute more than 100 kilograms of marijuana; (2) growing more than 100 marijuana plants; (3) possessing with intent to distribute tetrahydrocannobinol ("THC"), the active ingredient in marijuana, (4) operation and use of a drug-involved premises, and (5) distributing marijuana to persons under the age of twenty-one. (ER 438-39). Count One also alleged a number of specific overt acts. (ER 439-44). Prior to trial, the parties agreed to proceed on a redacted indictment, primarily removing overt acts involving the co-defendant and others the government chose not to prove. (CR 119). A second redacted indictment was submitted to the jury. (CR 161).

Jury selection began on July 23, 2008 (CR 132-33), and on August 5, 2008, the jury convicted defendant on all five counts. (CR 169, 175). As to Count One, the jury found that defendant's conspiracy involved both at least 100 marijuana plants and at least 100 kilograms of bulk marijuana, thus triggering a mandatory-minimum sentence of 60 months' imprisonment pursuant to 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(vii). (See ER 3764-76). As to Counts Two and Three, the jury found that each defendant's crimes involved more than five grams of marijuana, thus

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"PSR" refers to the Probation Office's ("USPO") Presentence Report for defendant, followed by paragraph number.

triggering a mandatory-minimum sentence of one year pursuant to 21 U.S.C. §§ 859(a), 841(b)(1)(D). (See ER 3767-68).

On September 4, 2008, defendant filed his first new trial motion. (CR 169, 179). Upon leave from the court (CR 178, 187), defendant filed a revised, second new trial motion on October 10, 2008 (CR 194), which the government opposed. (CR 201). On November 17, 2008, upon finding the second new trial motion inadequately presented, the court granted leave for defendant to file a new motion. (CR 206). On December 15, 2008, defendant filed his third new trial motion. (CR 210). The government filed its opposition on December 29, 2008. (CR 213). On January 5, 2009, the district court held a hearing and denied defendant's prior new trial motions. (CR 217). The court denied defendant's fourth new trial motion during a sentencing hearing on June 11, 2009. (CR 288, 295, 324).

The district court held sentencing hearings on March 23, 2009 (CR 268), March 27, 2009 (CR 272), April 23, 2009 (CR 282), June 4, 2009 (CR 324), June 11, 2009 (CR 324), April 27, 2010 (CR 320, 325), and April 29, 2010. (CR 325). Ultimately, the court issued a sentencing memorandum and sentenced defendant to one year and one day of imprisonment on Counts One through Three, and "time served" on Counts Four and Five. (CR 325, 327, 432; ER 391-431).

B. JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court had jurisdiction under to 18 U.S.C. § 3231. This Court has jurisdiction over defendants' appeal and the government's cross-appeal under 18 U.S.C. § 3731, 3742(a), and 28 U.S.C. § 1291. The district court entered judgment on April 30, 2010, and an amended judgment on May 4, 2010. (CR 326, 328). Defendant filed a notice of appeal on May 6, 2010 (CR 330). The government filed a timely notice of cross-appeal on May 28, 2010. (CR 336; GER 752-57). Defendant is current on bond pending appeal.

C. STATEMENT OF FACTS

1. Overview of Offense Conduct

In the summer of 2005, defendant opened a marijuana store in Atascadero, California. (PSR ¶ 10). The city received complaints about disruptive behavior by store customers, and in January 2006 closed the store for zoning violations. (Id.). On February 26, 2006, defendant entered into a lease for a new store location in Morro Bay, California. (PSR ¶ 9). Defendant opened that store in April 2006, calling it Central Coast Compassionate Caregivers (CCCC). (Id.). As part of his operation, defendant obtained permits and licenses from the City of Morro Bay, and employed approximately ten people to help him run the store, grow marijuana, and provide security. He also worked at the store most days, assisted with sales to customers,

oversaw employees, controlled the store's bank account, and carried cash in a backpack between his home and the store each day. (Id.).

In June 2006, SLOSD deputies began conducting surveillance and undercover operations at the CCCC. (PSR ¶ 11). On March 29, 2007, DEA agents executed a federal search warrant at the CCCC and defendant's home. (PSR ¶ 10). They seized bulk marijuana, hashish, and marijuana plants from the store, small amounts of marijuana, and over $27,328 in cash from defendant's home. (PSR ¶¶ 29-31). They also seized business records of the CCCC's operation from both the store and defendant's home. (PSR ¶ 33-37). After execution of the warrants, defendant re-opened his store and continued to operate it for five more weeks. (PSR ¶¶ 7, 30; ER 409).

2. In Limine Rulings on Medical Marijuana

Under the federal Controlled Substances Act (CSA), marijuana is a Schedule One controlled substance with no acceptable medical use that is illegal to possess, manufacture, or distribute in all circumstances. 21 U.S.C. §§ 821(b)(1), 841(a); Gonzales v. Raich, 545 U.S. 1, 27 (2005); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494-95 (2001). Relying on this and other law, on June 9, 2008, the government moved in limine to exclude evidence and argument about California's state marijuana laws that immunized the medical use

of marijuana in limited circumstances, including defenses and evidence based on state law, the medical use of marijuana, good faith mistake of law, advice of counsel, or entrapment by estoppel based on statements by state officials. (CR 71; ER 474-506).[2]

Defendant filed a "partial" opposition. (CR 82; GER 1-10). He conceded that Ninth Circuit case law expressly held that a defendant could not rely on "the advice of state agent in the presenting an entrapment by estoppel defense to federal crimes." (GER 5). However, he claimed that the "jury should know that the elected officials of his home town, the elected officials of his state, his local police department, and a wide majority of his fellow Californians believed that his decision to operate a medical marijuana dispensary in Morro Bay was a very good thing." Local and state officials had implied that he would be "okay" if he followed their rules, and claimed that such evidence would show that his "compliance with state law." (Id. & n.1). Defendant also sought to call witnesses to "talk about the nuts and bolts" of purchasing marijuana at the CCCC and

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

argued that evidence concerning the medicinal use of marijuana was "inextricably intertwined" with the facts the government would offer of guilt. (Id. at 5-6). The government filed a reply. (CR 92; GER 10-27).

On July 7, 2008, at a hearing two weeks before trial, the court granted the government's motion in substantial part. (CR 105; ER 541-55). It concluded that defendant's positions were either "incorrect as a matter of law" or "do not amount to a defense and hence would be irrelevant and confusing to the jury." (ER 543). It noted the absolute federal ban on marijuana activity and that defendant's knowledge or intent to violate the CSA was not an element of any of the charged crimes. (ER 543-47). It said that "the defendant has not claimed that he was somehow misled by federal agents which might give rise to an entrapment or estoppel claim." (ER 544-45).

It found defendant had not articulated the relevance of the "nuts and bolts" of purchasing marijuana at the CCCC other than to address precluded issues such as "the purported medicinal necessity [of] defendant's customers." (ER 545-46, 552-53). It also said "defendant's witnesses on the nuts and bolts of the operation would seem to be at best repetitive." (ER 545). It would consider such evidence, however, if responsive to the government's presentation of evidence upon a request outside the presence of the jury. (ER 545, 552-53). The court rejected the

view that defendant's purported efforts to distribute marijuana for medical purposes would be "inextricably intertwined" with the government's evidence. (ER 546-47). It concluded by saying that defendant appeared to be offering evidence to make an argument involving an improper issues or to "obtain juror nullification." (ER 546).

Defendant did not to respond or argue with the court's ruling, and thus did not contradict its statement that defendant was not raising an entrapment by estoppel defense based on statement of federal officials, nor the allegation he was seeking to interject jury nullification into the case. (ER 547).

3. The Secret Defense

After receiving discovery from defendant with much material on medical marijuana, the government proposed a written order clarifying the court's in limine ruling which included exclusion of entrapment by estoppel based on actions by federal officials. (CR 99; GER 28-35). Defendant opposed. (CR 104; GER 36-38). The court held a final pretrial status conference on July 21, 2008, the day before trial. (CR 128; ER 607-754). The court noted defendant’s admission that he would not be contesting the sale of marijuana at the CCCC and that he had not noticed a defense. (ER 626-27). The court sought to go through the topics in the government's proposed order, but defendant said

this would reveal an undisclosed defense. (ER 677-80). The court then held an in-camera conversation with the defense who revealed that defendant wanted to assert an affirmative defense of entrapment by estoppel based statements by the DEA in a phone call. (ER 681-87).

The court moved the trial one day to further consider the defense. (ER 687, 692). On July 21, 2008, and on each of the next three court days as jury selection began, the court considered the matter further and held two additional in-camera discussions with the defense. (ER 759-77, 856-72, 1099-1102, 1126-53). The court concluded that it would not disclose the nature of the defense until after the jury was sworn, and the government would not learn its evidentiary basis until opening statements. (ER 748-49, 765-73, 775-77). The court decided to rule on the sufficiency of the defense based on an in-camera evidentiary proffer filed by the defense. (CR 142; GER 51-98; see CR 185). The government objected that the in-camera proceedings prevented it from properly challenging the defense, and prejudiced its trial preparation which was based on prior, specific in limine rulings subject to change on an undisclosed basis that should have been brought forward at earlier hearings. (ER 748-49, 778-82, 792-93, 857-73, 1099-1102).

During in-camera proceedings, the court noted that defendant had remained silent at the July 7, 2008 hearing when

it had said defendant was not relying on estoppel based on statement by federal officials. (ER 1126, 1140-43). It twice said the government had been prejudiced by defendant's failure to disclose its entrapment by estoppel defense until the eve of trial. (ER 1136, 1139; see also ER 1118, 1142 ("the government was clearly misled")).

After the jury was sworn (ER 1304-05), the court informed the government that defendant was raising entrapment by estoppel based on conversations with federal employees. (ER 1316). The government objected that the issue had been raised during in limine motions. (Id.). On July 25, 2008, the court considered the government's challenge to the entrapment by estoppel defense, including the assertion that defendant had been required to, but had not, provided notice pursuant to Fed. Rule Crim. P. 12.3. Defendant conceded that if Rule 12.3 applied, he had violated it. (ER 1350). The district court held that Rule 12.3 did not apply. (ER 1360-61).

The court deferred ruling on whether defendant had made a sufficient prima facie case for the defense, but decided to allow some reference to California state law to put defendant's purported DEA call in context, and also permit defendant to discuss efforts to set up and operate the store including contacts with local government. (ER 1362-72). It held that the "nuts and bolts" and the "medical efficacy of marijuana" would

not be allowed, and excluded defenses based on mistake of law and advice of counsel. (ER 1365-66, 1370-72).

On July 30, 2008, after defendant testified about his call with the DEA, the government moved again to exclude the defense, and filed a further brief. (CR 150; ER 2375-81; GER 99-109). After hearing argument, the court allowed the defense to go forward. (ER 2394-2412). It decided, however, that because defendant had never mentioned sales to minors under twenty-one in his call with DEA, it would not apply the defense to Counts Two and Three. (ER 2413-16, 2971-72).

4. Trial

a. Voir dire and the jury nullification instruction

During the course of voir dire, the court conducted its own questioning of jurors and also permitted attorneys to ask questions. Many jurors expressed confusion, difficulty, or disagreement about the difference between California's medical marijuana laws and the federal prohibition on marijuana. (E.g., ER 978-80, 986-93, 995-1007, 1012-13, 1040-49, 1055-62, 1065-67, 1070-71). The district court took pains to make sure jurors understood that it would instruct on the law, but jurors would determine the facts and make the decision as to guilt or acquittal. (ER 930, 989-90, 999-1001, 1054-55). The court permitted defense counsel to point out to jurors that the judge

would only say what the law is, but that jurors would get to make the "ultimate decision." (ER 1075, 1076).

On the second day of jury selection, one juror, then designated as juror number 25 ("Juror No. 25"), said she had "strong opinion[s]" on the difference between state and federal law on marijuana and "sided with the state of California." (ER 1216). She said she had voted in favor of California's marijuana law. (ER 1216-17). The court asked whether, despite the strong feelings, the juror "could put those feelings aside and follow the court's instruction on the law in this case." The juror said that "[b]ased on what I have heard so far, no." (ER 1217). She said, "I not only side with the state of California, I think that the federal law is seriously flawed." (Id.). She could follow the court's instructions only if something came up that "persuaded" her that her "position was incorrect." (Id.). The district court informed jurors that federal law was "already on the books," so neither the court nor jurors could change it. (Id.). While the court could explain "what the law is" and answer questions about it, it was beyond the scope of trial to "justify the law." (ER 1217-18).

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

marijuana. (ER 1218). Juror No. 25 also expressed other doubts about elements of the government's case. (ER 1236, 1238-39).

During a side bar discussion, the court asked whether the defense would stipulate to dismiss Juror No. 25 because she had three times said that she could not follow the law, but the defense refused. (ER 1258). The government warned that defense counsel had previously asked questions that seemed to suggest "jury nullification," and the court advised the government to object if such a question were asked again. (ER 1259).

Soon thereafter, defense counsel questioned Juror No. 25 before the venire:

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

> JUROR: You finally said something I can relate to. I understand completely. I believe there is something called jury nullification, that if you believe --
>
> THE COURT: No --
>
> JUROR: -- the law is wrong --
>
> THE COURT: No. Let me stop you --
>
> JUROR: -- you don't have to convict a person. That's it.

(ER 1263-64).

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

The government requested that the court use the instruction given by district court and affirmed by the Ninth Circuit in United States v. Rosenthal, 266 F. Supp. 2d 1068, 1085 (N.D. Cal. 2003), aff'd in part, rev'd in part, 454 F.3d 943, 947 (9th Cir. 2006). (ER 1275-76). The district court agreed. (ER 1276). Defendant suggested that the court merely instruct the jurors to follow the law. (ER 1276-77). The district court rejected this approach given that jury nullification had already "been injected" into case. (ER 1277). Reviewing the course of proceedings, it concluded that it was the defendant had brought jury nullification before the jury. (ER 1278-79). It was "[t]oo late" to merely instruct the jurors to follow the law, as that instruction had been give numerous times "ad nauseum" for many hours and there was as juror "indicating that she doesn't feel she has to follow the law . . . in response to the defense questions." (Id.).

The court gave the following instruction to all the jurors:

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

(ER 1282).

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

b. Defendant's opening statement

After a jury selection in which there was controversy about the differences between California and federal law on marijuana, defendant highlighted his connection to California during his opening statement. Defendant referred to customers of the CCCC as "3000 or so Californians," and referred the CCCC's customers five times as "Californians." (ER 1395). Prospective character and other witnesses were also described as "some of your fellow Californians." (ER 1399). At the conclusion, the defense told the jury that it would ask them at the end of the case to find defendant not guilty and to "send him back to his home, his California home. . . ." (ER 1400).

c. The government's case

The government's evidence focused on defendant's involvement in the marijuana distribution, manufacturing and related activities at the CCCC store in Morro Bay, California from its opening in April 1, 2006 until the execution of the DEA search warrants on March 29, 2007. The government offered two categories of evidence: (1) surveillance and undercover operations of the CCCC and its operators over the course of the conspiracy, as testified to by members of the San Luis Obispo

Sheriff's Department (SLOSD), and (2) analysis of records, marijuana products, and other evidence seized from defendant's home and the CCCC during execution of the search warrants, as testified to by federal agents.

With respect to the first category of evidence, on July 14, 2006, October 5, 2006, and December 21, 2006, SLOSD deputies oversaw purchases from the CCCC by a confidential informant of small amount of bulk marijuana, hashish and/or marijuana plants. (ER 1489-1522). An SLOSD detective twice completed undercover purchases of similar scope, posing as a store customer. (ER 1522-39, 1641-60). Deputies also observed between 50 and 100 customers leaving the store, on each of January 23, 2007, January 24, 2007, and February 14, 2007 during longer periods of surveillance. (ER 1417, 1660-70).

There were also occasions when CCCC employees where observed distributing the store's marijuana products to people and places outside the store. On May 11, 2006, the SLOSD observed employee John Candelaria distribute a package to a man on the street outside the CCCC, and later deliver a shopping bag from the CCCC to a home associated with the man. (ER 1407-16, 1806, 2073, 2078, 2081). On July 12, 2006, the CCCC's security chief, Abraham Baxter, sold three-quarters of a pound of marijuana for $3,200 to an SLOSD undercover detective and an informant after first arranging the transaction in a recorded

phone call the day before. (ER 1457-88, 1574-77, 1582-83; GX 3A; GER 758-61). On December 5, 2006, another CCCC security employee, Ryan Doherty, was seen two different times leaving the CCCC and distributing marijuana outside the store, including being pulled over in his car by the SLOSD delivering marijuana plants, which he said he was doing for defendant. (ER 1713-41, 1726-27; GX 41-42; GER 762-63). On February 14, 2007, a CCCC employee was seen leaving the CCCC with a small box, which he sniffed multiple times before mailing it at a post office. (ER 1418-20). Throughout these and other SLOSD surveillance and undercover operations, defendant was observed frequently travelling between the store and his home with money or other items, or meeting with employees like Baxter. (ER 1416-17, 1428-34, 1539-40, 1650, 1654, 1657, 1660-67).

The government's second category of evidence, included marijuana, money, and records seized at defendant's home (ER 1746-51; GX 47-51; GER 764-79), and records, computer files, bulk marijuana, hashish, marijuana plants, growing equipment and marijuana products like THC oils seized at the CCCC. (ER 1786-81, 1818-20, 1860-79, 1891-01). While the case agent testified that she had counted 104 marijuana plants seized at the CCCC, DEA destroyed the rotting plants before the count was corroborated with video or photographs. (ER 1883-89, 2232-34). Accordingly, in the verdict on Count Four, the jury found that

defendant had not possessed over 100 marijuana plants on the day of the search, as argued by the government, but rather between 50 and 100 plants. (ER 3770).

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

The government also presented evidence of sales to customers under 21. This included the specific transactions charged in Counts Two and Thee with respect to customer and employee Justin St. John. (ER 2007-20). Using customer files and related information, along with driver's license

information, it also produced a chart showing that over the course of the conspiracy the CCCC had 271 customers under the age of 21. (ER 1990-2006, 3778-82). It also showed surveillance camera footage from the CCCC's marijuana sales room with excerpts of ten customers under 21 purchasing marijuana. (ER 2020, 2052-86; GX 139, 140; ER 3790-3802).

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

d. Defendant's case

i. Customer Beck

Defendant's first witnesses, Owen Beck, was a CCCC customer who defendant offered as a character witness to testify to his "character for law-abidingness." (ER 2021). The government expressed concern that defendant, who was missing part of one leg, did not have a sufficient foundation to establish defendant's character within the community. (Id.). After conferring with defense counsel, the court said that the witness was not going to testify about the operation of the store, but

rather "defendant's law-abiding nature." (ER 2023). The government said it had moved to exclude witnesses called "solely for the purpose to show that they were customers of the store and were ill to invoke sympathy" from the jury. (Id.). The court warned the defense that it would strike the testimony if it turned out that this was the only reason for the testimony. (ER 2023-24). Defense counsel said that the witness was not ill-looking but rather "a handsome man." (ER 2024). The court said the witness should "not . . . be testifying about his condition." Defense counsel said that Beck would not, adding: "It's not relevant frankly." (Id.).

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

The court excused the jury. (ER 2027). The court allowed defense counsel to make an extensive proffer with the witnesses in which the witness' health and medical treatment continually

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

arose. (ER 2028-29, 2032-33). Defense counsel represented that the witness would establish a foundation for defendant's law abiding nature as a customer of the store who observed operations of the store and defendant's compliance with state and local laws even for ill customers in great need. (ER 2027-47). As to the operations of the store, the court said that "the defense is, for lack of a better term, hell bent on getting those items which the court has already ruled they could not get into the evidence." (ER 2034). The initial testimony and proffer had "made it evidently clear that there are so many [Federal Rule of Evidence] 403 problems with this witness," and that Beck's foundation for testimony as to law-abiding nature as a customer of the store was so limited that the strength of the testimony "would be minimal." (ER 2040, 2044).

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

ii. Defendant's calls to the DEA

Defendant testified as the next defense witness. He sought to establish a defense of entrapment by estoppel based on a telephone call to the DEA. On that topic, defendant said that in the summer or fall of 2005 he formulated the idea of opening

a marijuana dispensary, noting that they were common in California, but that there were none in his own county. (ER 2355-56). He read two California medical marijuana statutes, Proposition 215 and Senate Bill 420, and the text of the later was admitted into evidence. (ER 2357-63, 2446-49; DX 420; GER 1011-26). He also read the Tenth Amendment to the United State constitution "a couple of times." (ER 2363-64, 2559). In addition, he did research on the DEA's website where he said he learned that marijuana was illegal and classified in "schedule one" as a prohibited drug just like heroin, LSD, "ecstasy," and on a higher schedule than cocaine. (ER 2364-65, 2557).

Defendant said he then decided to call the DEA. Using his phone bill as a reference point, he testified that, on September 12, 2005, he called a DEA number in Oakland, California to ask about "their policies regarding medical marijuana" and was given the number of a local DEA office near him in Camarillo, California. (ER 2368-69; DX 421; ER 3701-02). Calling that second number with the same question, defendant spoke to an unidentified man who gave defendant a third DEA number in Los Angeles, California. (ER 2370). Defendant testified that he called the third number and an unidentified man number gave him a fourth, Los Angeles number to call. (ER 2370-71). According to defendant, he called this fourth number and a female answered the phone, "Marijuana Task Force." (ER 2372-73). Defendant

said he asked the woman, "what you guys are going to do about all of the medical marijuana dispensaries around the state." (ER 2373). Defendant said he was then put on hold until a male voice came on the phone. (ER 2374). Defendant asked the same question ("what you guys are going to do about all of the medical marijuana dispensaries around the state") to the male voice who, according to defendant, "told me it was up to the cities and counties to decide how they wanted to handle the matter." (Id.). Defendant's testimony continued, as follows:

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

(Id.). Defendant testified that the response by the male in the fourth call "made sense" to him based on his reading of California law and the Constitution. (ER 2378). Defendant explained in detail that in his interpretation of the law, the Tenth Amendment provided a mechanism for the California legislature to make medical marijuana legal. (ER 2451-55).

On cross-examination, defendant acknowledged that he did not know the name or title of any of the people he spoke to on any of the four calls to DEA, nor their job functions, and he never asked. (ER 2537-43). He was not sure, for example, whether the people on the first or third calls were receptionists, and all he knew about the identity of the person he spoke to on the second call was that the call was to the local DEA field office. (ER 2538-40). He said that the female on the fourth call answered "marijuana task force" but never said she was an agent, nor gave him a title. (ER 2542-43). She never said whether she was a law enforcement officer, and he never asked. (Id.).

As to the male voice on the fourth call, who he claimed spoke to him about marijuana dispensaries, defendant admitted: he never told the man his name nor was he asked it; he never said where he lived; he never found out the man's name or wrote it down; he never learned nor asked the man's title, or gained any information from the call about the man's job position, nor did defendant ask if the man was a law enforcement officer. (ER 2542-45, 2576). The person on the phone did not say he had authority to speak for the DEA and defendant did not ask whether the unnamed man was the only person with whom he needed to speak. (ER 2565-66). Although defendant kept detailed records

of his business, he was unaware of any notes he took of the call and did not send a confirming letter. (ER 2571-72, 2576).

With respect to the facts he provided during the fourth DEA call, defendant admitted that he did not tell the man that he would be growing marijuana plants; that he would be selling hashish; that he would be selling marijuana to people under 21 years old; or that his future store would be selling to thousands of customers. (ER 2545, 2548, 2550-51). Defendant also never called the DEA back after opening his store including after he started selling significant amounts of marijuana, when he started selling marijuana plants, or when he started selling to people under 21. (ER 2563-65, 2689-90). Defendant assumed the man on the call had been to a marijuana dispensary but, admitted that he did not know who the man was. (ER 2548-49). No one on the call discussed or referenced the typical practices of marijuana dispensaries. (ER 2549-50, 2552).

During the fourth call, defendant never discussed the Tenth Amendment, Senate Bill 420, Proposition 215, his "confusion" about the of the law, or Schedule One substances. (ER 2558-63). There was never reference to what the law was, or the words "law" or "legal," and defendant admitted the person on the call did not tell him that marijuana dispensaries were legal. (ER 2555-56 ("Q: [T]he person never said it's legal, did they? A: No."), 2559, 2563). Defendant claimed he would not have opened

his store if the people on his calls had told him it was not "okay", but he also admitted that the person on the phone call never said it was "okay." (ER 2555, 2568). When asked by his counsel if he would have opened the store without the conversation with the DEA, defendant did not answer affirmatively, but instead said that "he would not have opened the store if they had told me not to." (ER 2813). He also declared that he did not "completely" rely on his call to the DEA to determine whether his store would be legal, because he also relied on his reading of California state law and the Tenth Amendment. (ER 2568).

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

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

federal prosecution, or that the specific activities at the CCCC violated federal criminal law. These included:

- A January 2006 Atascadero report on marijuana dispensaries stating that federal CSA "prohibits the possession, cultivation, and dispensing of marijuana regardless of purpose." (ER 2648-54; GX 177; GER 921-24).

- A February 28, 2006 memo by the Morro Bay police chief refusing to sign the CCCC's business license application, which stated that the federal "prohibition on possession and/or use of marijuana is still law" and that "following California law will not protect a person from prosecution under federal law." (ER 2671-81; GX 179; GER 934-36).

- A March 2006 Atascadero planning commission report stating that federal law prohibits all marijuana activities without exception, and distribution "even for medical purposes" under California law "could still lead to criminal prosecutions" without mention of city or county rules. (ER 2655-62; GX 178; GER 925-33).

- An April 2006 Atascadero city attorney report on the current state of the law of medical marijuana dispensaries indicating that distribution of marijuana even for medical purposes under state law "could still lead to criminal prosecution" under federal law. (ER 2662-70; GX 185; GER 1007).

- A July 11, 2006 email from the Morro Bay police chief refusing to sign the CCCC's marijuana plant nursery, stating that the growing and selling marijuana "violates federal law" even if state law permitted it. (ER 2683-90; GX 180; GER 937).

- A May 16, 2006 county health department letter to defendant refusing to approve the sale of marijuana brownies at the CCCC because "your business appears to be illegal under federal law." (ER 2690-95; GX 181; GER 938-39).

Defendant did not tell the Morro Bay police chief about his call to DEA when the chief refused to sign the CCCC business license wrote a memo about the CCCC's violations of federal law, and later refused to approve his nursery permit for similar

reason. (ER 2671-88). He also did not tell county health board officials about the DEA's purported advice when interacting with them and when they concluded his business appeared to violate federal law. (ER 2690-95). Nor did he call the DEA after these events to see if anything had changed since his September 2005 call. He also did not call the DEA to complain or seek clarification after the March 27, 2007 search warrants seizing his and his store's marijuana and equipment or soon thereafter when federal authorities sent him three notices stating they were seeking forfeiture of over $50,000 in cash seized from him. He did not contest the forfeiture. (ER 2700-08; GX 182; GER 940-46 (three forfeiture notices received by defendant)).

When asked if he felt he could still rely on what he had learned from the September 2005 DEA phone call after the DEA raid on his home and store in March 2007, he said he could not remember his thoughts at the time. (ER 2720). On redirect examination he said he had "always" relied on the DEA call, but sometimes it was more in the "back of his mind." (ER 2813).

iv. Defendant's compliance with local rules

In addition to testifying about his September 12, 2005 calls to the DEA, defendant testified to his efforts to open his marijuana store after the DEA calls, including preliminary efforts in the City of Atascadero, and successful efforts in the City of Morro Bay. This included testimony about his efforts to

comply with local laws, such as his obtaining of a business license and permits from Morro Bay (which were admitted into evidence), his meetings and communications with officials such as the Morro Bay city attorney and members of the Morro Bay Police Department, his extensive efforts to comply with each of the eight provisions of his business license, and his understanding that his store "had the blessing of the City of Morro Bay Officials". (ER 2461-65, 2467-84, 2486-2501, 2713; DX 425, 428-31; GER 1031-44). Defendant's bolstered his testimony with testimony from both the mayor and city attorney of Morro Bay. (ER 2783-2788, 2820-22).

v. Defendant's role in the conspiracy

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

Defendant admitted to direct involvement and central role in the CCCC's activities and his knowledge of scope of the CCCC's operations. For example, he testified about his role in how cash was handled and marijuana supplies paid, and that he

prepared the store's forms. (ER 2191). He monitored or participating in approving the supply of marijuana plants to the store and specifically acknowledged participating in several transactions of plants including as many as 300 plants at one time. (ER 2748-53 (admitting involvement in supply to CCCC of different shipments of 301, 10, 52, and 44, 141, 95, and 41 marijuana plants); GX 183-84, GER 947-1002). He also admitted to selling marijuana to customers under the age of 21, and to the specific transactions and quantities reflected on receipts for the sales that formed the basis of Counts Two and Three of the indictment. (ER 2753-58).

e. Rebuttal

Special Agent (SA) Deane Reuter, a DEA special agent in its Los Angeles office, Enforcement Group 2, testified in rebuttal. (ER 2825-51). The phone number reflected in defendant's phone records for his fourth call to the DEA on September 12, 2005 was her number, and was at the time of the call. (ER 2826). Defendant's third call was to a number handled by a receptionist. (ER 2833). SA Reuter said there was no "marijuana task force" at her number or in her building as task forces were joint federal-state operations and her office was federal. (ER 2830, 2854). She did not work in the same office as the case agent investigating defendant, and had not learned that defendant had claimed to have called her phone number until

defendant's opening statement, when someone called to tell her. (ER 2852, 2858-59).

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

She had many times advised people running marijuana stores how to avoid prosecution, telling them to "close down your store or don't open your store." (ER 2845). She had never personally given advice to people who wanted to open a marijuana store that it was a question of state or local law, and based on her work with everyone in her enforcement group, she was not aware of any group member who would give such advice. (ER 2850). At the

specific time of defendant's phone call, all the members of her group were involved in two on-going investigations of marijuana stores; one targeting a single store in Los Angeles, and the other multiple stores in Los Angeles and Northern California. (ER 2872-77). These investigations lead to arrests and prosecutions. (ER 2873-74).

## III

## ARGUMENT

### A. THE DISTRICT COURT PROPERLY ADMITTED PROBATIVE EVIDENCE OF OVERT ACTS AND ELEMENTS OF THE CHARGED OFFENSE

Defendant claims error in the district court's admission of a wide variety of evidence which he claims to have been "inflammatory" and "irrelevant." This includes testimony and evidence regarding: (1) Abraham Baxter's sale of marijuana to an undercover officer; (2) the transportation and distribution of marijuana and marijuana plants outside the CCCC by three store employees including Ryan Doherty and John Candelaria; (3) video evidence and charts regarding the sale at the CCCC of marijuana to minors under the age of 21; (4) documents and evidence concerning strains of marijuana sold at the CCCC; and (5) evidence regarding the total dollar amount of marijuana sales at the store and defendant's role in those sales. (AOB 32-40).

All of this evidence was directly relevant to prove the charges in the indictment, especially the drug conspiracy set forth in Count One. That conspiracy had multiple objects including possessing with intent to distribute marijuana and THC, growing marijuana plants, and distributing marijuana to people under the age of 21. (GER 113). It included specific allegations about the total quantity of marijuana and marijuana plants involved in the conspiracy, marijuana distribution inside and outside of the confines of the CCCC, the total sales of marijuana products at the CCCC, and the number of minor customers at the CCCC. (ER 438-44; GER 114-16). Several of the acts defendant seeks to exclude as somehow prejudicial to him were specifically listed in the indictment as overt acts. Defendant never moved to strike these or other parts of the indictment. The evidence probative of these offenses, acts, and allegations were highly relevant to show defendant's guilt of the charged crimes. Defendant's undeveloped arguments fail to clearly specify how this probative evidence was "inflammatory" and unfairly prejudicial under Rule 403 or otherwise. Viewed properly, the admissibility of this evidence is straight-forward and defendant's arguments unfounded.

1. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion and will be reversed if [they lie] beyond the pale of reasonable

justification under the circumstances. United States v. Hollis, 490 F.3d 1149, 1152-53 (9th Cir. 2007) (quotation omitted). Trial judges have "wide discretion" in determining whether evidence is relevant. United States v. Alvarez, 358 F.3d 1194, 1205 (9th Cir. 2004). Preserved errors are reviewed for harmlessness and will be reversed only if the error more likely than not affected the verdict. United States v. Morales, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc). Where defendant did not object at trial, or where defendant asserts a different basis for his objection on appeal than that asserted at trial, review is for plain error. United States v. Chung, 659 F.3d 815, 833 (9th Cir. 2011). Plain error is reversible only where there was (1) error, (2) that was plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Gonzalez-Aparicio, 663 F.3d 419, 428 (9th Cir. 2011).

Even if not raised by the government below, this Court may affirm the district court on any basis supported by the record. United States v. Lemus, 582 F.3d 958, 961 (9th Cir. 2009).

2. Relevance in Conspiracy Cases

Evidence is relevant if it has it has "any tendency to make the existence of an element of a crime slightly more [or less] probable than it would be without the evidence" Jackson v.

Virginia, 443 U.S. 307, 320 (1979); Fed. R. Evid. 401, 402 need not be conclusive or even strong evidence of a fact to be proved; rather, all that is required is a "tendency" to establish the fact at issue. United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007). Under Federal Rule of Evidence 403, relevant evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403.

When a defendant is charged with conspiracy, evidence tending to show the existence of a conspiracy is admissible even though such evidence does not implicate defendant. United States v. Vega-Limon, 548 F.2d 1390, 1391 (9th Cir. 1977). Once a conspiracy is established, the government need only present evidence of a "slight" connection between a defendant or a co-conspirator and the conspiracy. United States v. Stauffer, 922 F.2d 508, 514-15 (9th Cir. 1990); United States v. Crespo De Llano, 838 F.2d 1006, 1017 (9th Cir. 1987). Every member of a conspiracy need not know every other member nor be aware of all acts committed in furtherance of the conspiracy. E.g., United States v. Escalante, 637 F.2d 1197, 1200 (9th Cir. 1980). Under Pinkerton v. United States, 328 U.S. 640 (1946), a defendant is liable for acts committed in furtherance of the conspiracy, so

long as they were reasonably foreseeable consequences of the conspiracy. United States v. Alvarez-Valenzuela, 231 F.3d 1198, 1202 (9th Cir. 2000).

Moreover, when the government seeks to offer evidence of an overt act in a conspiracy involving a defendant, this Court has instructed that the link between the evidence and the overt act is for the jury, not the court to determine. United States v. Dicesare, 765 F.2d 890 (9th Cir. 1985), as amended, 777 F.2d 543 (9th Cir. 1985). In Dicesare, the defendant argued that the district court erred in denying his motion to strike evidence that was admitted against him from a drug seizure involving a co-conspirator. Id. at 899-900. The defendant claimed an insufficient connection between him and the seizure. Id. This Court rejected the argument because the overt acts were charged in the indictment and "the existence of separate conspiracies is a question of fact, not of law, to be determined by the jury. A defendant need not participate in all phases of a conspiracy to be part of a single conspiracy." Id. (internal citations omitted); see also United States v. Bibbero, 749 F.2d 581, 587 (9th Cir. 1984) ("A single conspiracy may involve several subagreements or subgroups of conspirators.").

3. The Court Did Not Err in Admitting Evidence of CCCC Employee Abraham Baxter's Marijuana Sale

Defendant argues that CCCC security chief Abraham Baxter's July 12, 2006 sale of $3,200 worth of diesel marijuana to law enforcement should have been excluded because there was no evidence of a "link" between the transaction and defendant. (AOB 35).

As a threshold matter, defendant waived this argument at trial. A defendant or counsel waives an assertion of error when he relinquishes it knowingly or intentionally, or where he causes or induces the error. United States v. Perez, 116 F.3d 840, 845 (9th Cir. 1997) (en banc). The July 12, 2006 sale was charged in the indictment as a specific overt act of the narcotics conspiracy in Count One. (ER 442 ¶ 18; GER 115 ¶ 7). Defendant filed a short in limine motion seeking to exclude the transaction. (CR 102). The government opposed in part based on Dieasare. (CR 111; GER 43-45). In its tentative ruling, the district court reasoned the event was admissible under Rule 403. (ER 40). During argument on the motion, defendant counsel admitted the evidence was admissible:

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

(ER 696-95). On hearing this, the district court denied the motion, adopting its tentative opinion, and stated it would permit the evidence. (ER 696). Defendant knowingly abandoned the argument, and it is thus waived. Perez, 116 F.3d at 845.[4]

Even if not waived, the issue is directly controlled by Dicesare. As in that case, the government charged defendant in a narcotics conspiracy that included evidence of a narcotics seizure to which defendant claimed no connection. Here, the charged conspiracy included distribution of marijuana outside the confines of the CCCC as well as inside. As in Dicesare, it was proper for the jury, not the court, to decide whether the disputed transaction was part of the charged conspiracy.

Alternatively, there was more than sufficient evidence tending to show defendant's connection to the Baxter transaction. The deal took place on a day defendant was working for the CCCC and Baxter made reference to the diesel marijuana coming from defendant's store, and said he could get other products from the store. (ER 1484-85, 1582-83, 1902-08; GX 3A,

[4] Two days later, defense counsel said it would renew its objection because it temporarily appeared that the government would proceed to trial on an indictment excluding the overt acts regarding Baxter based on the government's mistaken belief that the transaction had something to do with defendant's then-undisclosed defense. (See ER 1315-17). That proposal was later dropped, and the case proceeded using an indictment with the Baxter overt acts. (ER 602 ¶ 7; GER 115 ¶ 7). The defense never changed its view that the evidence was permissible in those circumstances.

91; GER 760, 792) The diesel strain of marijuana Baxter sold was in frequent supply at the CCC including at the time of the deal, and defendant personally signed for payment on some of the diesel supply. (ER 1936-40; GX 101-02; GER 804-09). In addition to the transaction itself, SLOSD had observed Baxter and defendant together doing store business. (ER 1428-34, 1539-40 (defendant arrives with money backpack to store then joined by Baxter unloading large cardboard box from his vehicle), 1654, 1657 (defendant, Baxter, and third employee talking during undercover buy). There was also evidence showing close links between Baxter and defendant with respect to the marijuana distribution activities at the store, including that: defendant personally interviewed and hired Baxter, and knew about his six prior criminal misdemeanors convictions including for burglary, possession of a deadly weapon, two batteries, and vandalism before he hired him (ER 2724-28; DEX 478; GER 1044); that the two worked together most days the store was open in same room a few feet away, both very close to the store's supply of marijuana (ER 1790, 2729-31; GX 89; GER 783-88); that Baxter was frequently in the marijuana sales room and would sometimes be in the "breakdown area" of the store where large quantities of marijuana were prepared for distribution (ER 2742, 2745, 2747-48); and that defendant advanced salary to Baxter. (ER 1975, 2496-97; GX 112; GER 826).

Given this evidence, defendant's claim that that the government did not show sufficient evidence that Baxter and his activities had the necessary "slight" connection to the charged conspiracy to be admissible lacks merit. Stauffer, 922 F.2d at 514-15; Crespo De Llano, 838 F.2d at 1017.

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

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

Preliminarily, it is worth emphasizing that all these activities were conducted by employees of defendant's marijuana during their period of employment. (ER 1418-19, 1902-10; GX 89-92; GER 783-94). They were observed during or at the end of store hours, and the observation of each employee began at the CCCC itself. Given that defendant himself hired the store's employees (ER 2721, 2724, 2727), and that the store distributed marijuana, there is a solid connection to the charged narcotics conspiracy on this basis alone.

Doherty's transactions also had a clear link to the conspiracy and defendant. First, Doherty left the CCCC and drove to meet a pickup truck. He drove in tandem with the pickup to the parking lot of a retail store where he handed a small brown bag to the driver of the truck before returning to the CCCC. (ER 1713-22, 1726-27). Later that evening, Doherty left the CCCC with two brown shopping bags which he put in his car and drove away with until he was pulled over by an SLOSD deputy for a traffic violation. Doherty's brown bags contained three marijuana plants with a receipt from the CCCC attached. (ER 1722-41; GX 41-42; GER 762-63). Doherty told an SLOSD officer that he worked at the CCCC, and, as a favor for the owner of the CCCC, he was bringing the plants to a grower who was going to grow marijuana and distribute it to the store. Doherty was released and drove with the marijuana plants to a residence in San Luis Obispo. (Id.).

The delivery of three marijuana plants was specifically charged in the indictment. (ER 442 ¶ 25). As with the Baxter transaction, Dicesare controls and for that reason alone defendant's argument fails. Further, the plants were carried in two of the store's shopping bags and had a receipt attached. Doherty's statement that he was making the delivery for defendant to a CCCC grower makes the event relevant to prove a conspiracy to grow marijuana plants, as charged in the

indictment, and defendant's connection to this conspiratorial object. It also further ties his earlier distribution at the parking lot to the conspiracy and defendant. (ER 1713-22, 1726-27).

Candelaria's activities on May 11, 2006 took place directly outside the marijuana store where he met a man who had just left the CCCC. (ER 1408-11). After a short conversation with the man, Candelaria looked back and forth to observe the area and then gave the man a small brown bag (consistent with the bags used for smaller purchases at the store) from inside his jacket. (ER 1411-13). At the end of the day, Candelaria took a brown shopping bag (consistent with the bags used for larger purchases at the store such as marijuana plants like Doherty's three plants) and drove it to a house at the addresses where the same man's car was registered, and where Candelaria brought the shopping bag to several other men inside. (ER 1407-16, 1806, 2073, 2078, 2081). Like Doherty, Candelaria distributed packages similar to those used by the store for its marijuana customers which strengthened the connection established by his employment, the proximity of events to the CCCC, and the fact that Candelaria had signed for purchases of plants at the store. (ER 1949-52; GX 106, 184; GER 814, 964-65).

In the last transaction, on February 14, 2007, a man known to a SLOSD surveillance officer as an employee, but otherwise

unidentified, was seen leaving the CCCC with a small box, which he sniffed multiple times before mailing it at a post office. (ER 1418-20). It is reasonable to infer that the employee was insuring that marijuana odor in the package was masked before he delivered to the post office and returned to the CCCC. His activities thus tend to show he was engaged in CCCC business.

While these events only involved apparently small quantities of narcotics, as they were spread out over the length of the conspiracy, they showed the continuous operation of the CCCC. The SLOSD surveillances and undercover observations such as theses and the Baxter transaction also corroborated the CCCC's historical records seized by the DEA, showing that they reflected actual marijuana transactions in large amounts. (See ER 3080 (government closing argument that jury could consider Baxter and Doherty transaction in making drug quantity determination)). They are thus relevant to the case.

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

Defendant asserts error in the admission of two pieces of evidence the government offered regarding sale of marijuana to minors: (1) video footage from the CCCC's security cameras of customers under 21 purchasing marijuana, and (2) a chart summarizing visits to the store by customers under 21 during the month of March 2007. (AOB 36-38). Defendant suggests that the

evidence unfair because it tended to show that marijuana sales at the store were for recreational drug use rather than medical purposes. (Id.).

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

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

Defendants never objected to the video excerpts on the basis he asserts now. Instead, he objected on privacy grounds for the customers (not asserted on appeal), and made one unspecified Rule 403 objection to a specific portion of the video. (ER 2064, 2066, 2069, 2070, 2080). Defendant did raise a Rule 403 objection to Exhibit 140 on the ground that the total number of sales to individual minors was "irrelevant," but did not mention the recreational use of marijuana, nor did he object on anything other than his abandoned privacy grounds as to Exhibit 139, from which Exhibit 140 was derived. (ER 2059, 2083). Review is for plain error, and there was no error.

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

The video footage was relevant to establish the conspiracy to violate 21 U.S.C. § 859 and was also circumstantially relevant to the charges concerning St. John who was seen

distributing marijuana plants in some of the video excerpts. (ER 2067-69, 2077). It also was probative of defendant's participation in the distribution of marijuana to those under 21, for defendant was seen on the video during one of the sales. (ER 2069).

Defendant claims that the evidence was not necessary because the government already had introduced a chart listing each store customer under the age of 21. (See ER 1998-2006; GX 116; ER 3778-82). Yet that chart, Exhibit 116, was based on each customer's first visit to the store and was not typically based on proven evidence of a specific sale of marijuana to the customer. (Id.). By contrast, the video clearly reflect specific marijuana sales and with more evidentiary weight than historical records. Unlike the charts, the video also showed evidence regarding the specific employees who were distributing marijuana in order to prove that they were over 18 years old at time, a required element of 21 U.S.C. § 859. (ER 2068-69); see United States v. Durham, 464 F.3d 976, 980-81 (9th Cir. 2006). Exhibit 140, showed, as did Exhibit 139, that the sales reflected in the video excerpts were not isolated events, nor limited to a small portion of March 2007. Rather, given the pattern of repeat visits reflected in the chart, the evidence tended to prove that the sales to minors were part of a longer, extensive conspiracy to violate § 859.

Although none of the customer's looked ill, there was no reference to this or to the recreational use of marijuana during testimony or argument, nor in any objection by defense counsel. (See ER 2064-79, 3072-73 (government closing argument that video was evidence of "object of conspiracy" in Count One that defendant "distributed to individuals under 21.")). In fact, there is no "use" depicted in either type of evidence, merely distribution. Given the probative value of the evidence to the charged crimes, the district court did not abuse its "wide discretion" in admitting this material. Alvarez, 358 F.3d at 1205.

6. The Court Did Not Err in Admitting Evidence Concerning Strains of Marijuana at the CCCC

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

The brief reference to "AK-47" brought no objection, and can be readily dismissed. It occurred while the case agent was testifying as to the relationship between price and quantity of

marijuana on Exhibit 56, a photograph of a price list that had been found hanging in the marijuana sales room of the CCCC. (ER 1814-16; GX 56; GER 781). During the testimony, government counsel referenced the first four strains on that list:

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

(ER 1816; GX 56; GER 781). There was no highlighting of the supposed "violent" nature of the strain, nor reference to it in any argument, and no plain error in admitting the relevant testimony.

Government's Exhibit 100 combined three similar charts of marijuana strains, and was found by the DEA in the marijuana sales room of the CCCC. (ER 1935-36, 3724-32 (Exhibit)). Defense counsel objected to its admission, arguing under Rule 403 that the exhibit's references to the "type of high" for each strain was unfairly prejudicial. (ER 1924). The court found that any prejudice in the references to the "high" did not substantially outweigh the document's probative because it

showed which strains were growing at the CCCC, and helped to differentiate the various strains, which the district court said it had not previously understood itself. (ER 1924-25).

The district court's reasoning was sound and within its discretion. The document was probative not only for the reasons the court specified, but also because it had information and handwriting probative of the CCCC's efforts to grow marijuana (ER 3724-26, 3728-31 (describing "weeks to grow each strain")), and because it assisted the case agent in determining which strains were grown at the store. (ER 1935-36). Strain information was also useful to calculate the total qualities of marijuana at the CCC. (ER 1928, 1984-86, 2272-99). On the other hand, the government did not reference the "type of high" in testimony (id.), nor is it unfairly prejudicial for a jury in a narcotics case to see reference to the fact that marijuana has some narcotic effect.

7. The Court Did Not Err in Admitting Evidence Regarding the Total Amount of Marijuana Sales at the CCCC and Defendant's Connection to those Sales

The district court did not abuse its discretion in admitting evidence about the financial aspects of the CCCC such as the total sales, and defendant's control of the store's bank accounts and cash. (See AOB 38-39). This evidence was probative of the quantities of marijuana involved in the charged conspiracy and defendant's role and involvement in that

conspiracy, and the court properly limited any potential prejudicial effect of this evidence.

As an overt act in Count One, the indictment alleged that between April 2006 and March 29, 2007 defendant and his employees sold $2.1 million worth of marijuana and THC products. (GER 115 ¶ 3). Prior to trial, on multiple grounds, the government moved to exclude a defense financial expert who purported to show that defendant made less than $100,000 in profit from his operation of the CCCC. (CR 108; ER 564-89). Defendant argued such testimony was necessary to rebut the notion that he became wealthy from the store, and because the government's alleged sales figure was incorrect. (ER 592).

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

> should be able to offer testimony to demonstrate that the $2.1 million figure is incorrect . . ., but there is no need for Defendant to attempt to offer evidence to the jury as to whether or not the dispensary's operation made him a wealthy man. If defendant is concerned about prejudice as to this point, he can propose a reasonable limiting instruction.

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

Defendant never sought a limiting instruction when the government introduced its evidence. The government proved the

total sales figure by adding CCCC daily sales reports as corroborated by bank account records and the cash found in the backpack at defendant's home which matched daily sales reports found in the backpack. (ER 1749-59 ($27,328 in cash found in defendant's backpack reflected daily sales reports in backpack); ER 1969-1982; GX 50, 112-13, 115; GER 768-76, 825-69; ER 3737-38). Defendant chose not to call his expert to challenge the government's sales figures, but defendant was allowed to go through his store's sales reports at length to explain his view of their meaning to the jury. (ER 2482-99). The government made no reference to whether defendant made a profit, and the parties redacted the indictment sent to the jury to remove all reference to profits. (See GER 110). During closing argument, the government argued that the total sales figure supported the quantity of marijuana involved in the conspiracy. (ER 3080-82).

Defendant does not directly challenge the court's ruling on its expert, but argues that he was unfairly prejudiced by the admission of a check that defendant wrote to himself on the store's bank account, which DEA found in the backpack seized at his home along with $27,328 in cash. (ER 1759). This argument is grounded on the misleading statement that the district court "refused to redact" the check. (AOB 39). At defendant's request, the court did redact the $15,000 amount on the check, but left reference to the fact that the check was written to

defendant because it was probative for showing that defendant "controlled the account." (ER 1759-63; GX 51, GER 778).[5] Later in the trial, during testimony of the IRS agent, another copy of the same check was received into evidence with the amount redacted, but with defendant's endorsement to himself remaining. Defendant did not object. (ER 2266-67, GX 161; GER 871-72). The IRS agent stated that defendant's endorsement on the check showed his control over the CCCC's account. (Id.). Defendant's failure to object at this later time appears to have forfeited his claim that the mere fact that the check was written to defendant when defendant's name was on the account. In any event, the fact that defendant wrote checks on the account, including to himself, is more probative of his control and use of the account than his mere name on it.

Defendant also references the fact that during closing argument the government discussed the cash seized from defendant's house. (AOB 39). Yet those references were not to show that defendant had made a profit, but to prove that the sales reports relied on by the case agent were corroborated by the cash found in defendant backpack. (ER 3079-80). The government also used evidence of the money found in defendant's

[5] Defendant's Excerpts of Record has the unredacted check, Government's Exhibit 51. (ER 3717). A copy of the exhibit as it was received into evidence, with redaction of the amount, is in the Government's Excerpts of Record. (GER 778).

house along with the sales reports there, and the videotape of defendant controlling the store's cash resister, to show that defendant had knowingly joined the conspiracy, a required element of Count One. (ER 3079-80).

In sum, defendant's control over that money through his control of bank accounts and cash was not used to show that he became wealthy, but that he had a central role in that conspiracy and that he should thus be held responsible for the all of the CCCC's marijuana sales. There was no error.

8. Any Hypothetical Error Was Harmless

Even if the district court had excluded some of all of this evidence, it would not have affected the verdict. Morales, 108 F.3d at 1040. Though the evidence was probative it represented only portion of the government's affirmative evidence. Moreover, defendant himself would eventually admit the elements of the charges against him. (ER 2748-58; see also ER 337-38). Nor has defendant articulated any unfair prejudice that undermines confidence in the verdict. Defendant suggest that the evidence unfairly rebutted his entrapment by estoppel defense by countering his "strict compliance with local rules," and his "reasonable reliance on the DEA phone call." (AOB 36, 38). Yet the challenged evidence was offered in support of allegations in an indictment returned long before defendant disclosed his defense, presented primarily in the government's

case-in-chief, and defendant proposed no limiting instructions. Finally, the jury clearly was not inflamed, as shown by the fact that it determined the government had not met its burden of showing more than 100 marijuana plants seized during the search of the CCCC, as charged in Count Four.

B. DEFENDANT'S ENTRAPMENT BY ESTOPPEL DEFENSE WAS INVALID AS A MATTER OF LAW AND THIS COURT SHOULD AFFIRM ALL RULINGS ON THE DEFENSE ON THAT BASIS

Defendant claims error in some of the district court's evidentiary rulings and jury instructions regarding his entrapment by estoppel defense. (AOB 20-32, 43-57). As set forth further below, the district court was correct in those evidentiary rulings and instructions. However, as a threshold matter, this Court should affirm on the independent basis, contrary to the district court's conclusion, that the entrapment by estoppel defense was invalid as a matter of law, because defendant presented insufficient evidence to establish a prima facie case. Lemus, 582 F.3d at 961. The defense never should have been presented to the jury.

1. Standard of Review

A district court may preclude a defense if the defendant fails to make a prima facie showing of a reasonable inference as to each element of the defense. See United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996). Whether a defendant has made a prima facie case of entrapment by estoppel defense is a

question of law reviewed de novo. United States v. Brebner, 951 F.2d 1017, 1024 (9th Cir. 1991). Whether a jury instruction adequately covers a proffered defense is reviewed de novo. See United States v. Morsette, 622 F.3d 1200, 1201 (9th Cir. 2010), but if the instruction fairly and adequately cover the elements of the defense, the precise formulation of the instruction is reviewed for abuse of discretion and harmlessness. See United States v. Woodley, 9 F.3d 774, 780 (9th Cir. 1993).

2. Defendant Failed to Meet His Burden of Establishing Several Required Elements of Entrapment by Estoppel

Entrapment by estoppel is a "narrow exception to the general rule that ignorance of the law is no excuse." United States v. Spires, 79 F.3d 464, 466 (5th Cir. 1996); United States v. Eaton, 179 F.3d 1328, 1332 (11th Cir. 1999). It is the “unintentional entrapment by an official who mistakenly misleads a person into a violation of the law.” United States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9th Cir. 2000). The defense "rests on a due process theory which focuses on the conduct of the government officials rather than on s defendant's state of mind." Brebner, 951 F.2d at 1025; United States v. Smith, 940 F.2d 710 F.2d (1st Cir. 1991) (same); Spires, 79 F.3d at 466 ("The focus of the inquiry is on the conduct of the government not the intent of the accused."). It is the objective circumstances, not the defendant's subjective

misunderstanding, that controls. United States v. Lansing, 424 F.2d 225, 226 (9th Cir. 1970) (defense inapplicable where based on showing that "defendant was as a subjective matter misled, and that the crime resulted from his mistaken belief."); accord United States v. Burrows, 36 F.3d 875, 882 (9th Cir. 1994).

"A defendant has the burden of proving entrapment by estoppel." United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004). To carry that burden, the defendant "must show that (1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) that [the defendant] relied on the false information, and (5) that [the] reliance was reasonable." United States v. Schafer, 625 F.3d 639, 637 (9th Cir. 2010) (quoting Batterjee, 361 F.3d at 1210). The defense is also unavailable if the defendant was "put on notice to make further inquiries" as to the legality of his conduct. Lansing, 424 F.2d at 227.

Here, as a matter of law, defendant did not satisfy the second, third, fourth, or fifth elements of the defense, and each failure provides an independent basis for the court to affirm the district court's other rulings on the defense. In analyzing the elements of entrapment by estoppel, for efficiency, the government will also address defendant's

challenges to the court's jury instructions on some of elements. Specifically, it will address defendant's argument on the jury instructions on the second and third elements of the defense concerning (a) historical facts, and (b) affirmatively misleading statements, (AOB at 47-51), and his related argument, as part of the historical facts analysis, that the defense should have been applied to Counts Two and Three. (AOB 51-54).

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

Defendant failed to establish entrapment by estoppel's second element -- that defendant made the unidentified man on the phone aware of "all the relevant historical facts." Batterjee, 361 F.3d at 1216. It is improper to bind the government to its erroneous advice unless the government official has been made aware of all the necessary information prior to its erroneous statement. United States v. Triana, 468 F.3d 308, 317-18 (6th Cir. 2006); United States v. Trevino-Martinez, 86 F.3d 65, 70 (5th Cir. 1996). As the Second Circuit has explained, the question as to this factor is determined by comparing the disclosed facts to those in the indictment. United States v. Giffen, 473 F.3d 30, 42 (2d Cir. 2006) (no entrapment by estoppel where defendant "did not disclose the conduct alleged in the indictment").

Here, the district court properly recognized that defendant had not met this standard with respect to his disclosure that he would be selling to minors under the age of 21, an offense set forth in a separate statute, 21 U.S.C. § 859, and in separate counts from others in the indictment. (ER 2414-16, 2971-72); see Griffen, 473 F.3d 30, 42. Yet the court should have gone further, and excluded the whole defense on this ground. Defendant did not communicate to the government the most basic facts set forth in the indictment -- his own name and identity, his location or the location of his future store, or when and how it would operate. He also did not discuss growing marijuana plants, selling hashish -- both objects of the conspiracy in Count One -- or give any idea of the large size or scope and duration of his operation with several thousands of customers and millions of dollars in revenue.

Fundamentally, defendant's communication to the DEA was far too limited and hypothetical to fairly bind the government to its response. Where this Court has found entrapment by estoppel viable, a defendant engaged in a specific transaction or began an active course of potentially criminal conduct. See Batterjee, 361 F.3d at 1212 (purchasing a firearm from store); United States v. Tallmadge, 829 F.2d 767, 769-71 (9th Cir. 1987) (same); United States v. Clegg, 846 F.2d 1221, 1222-24 (9th Cir. 1988) (transporting weapons); United States v. Timmins, 464 F.2d

385, 386-87 (9th Cir. 1972) (applying for conscientious objector status to local draft board). That posture gives concrete context to the information provided by the defendant, and the government fair warning that it was dealing with something real, with potentially important consequences to its advice. Here, defendant's short, anonymous "what if" hypothetical telephone question provided no such notice.

Defendant makes two contrary arguments in his brief. First, he claims for the first time on appeal that the district court should have instructed the jury the defendant could prevail even if he did not tell the DEA "every fact that might potentially be relevant to the lawfulness of his conduct." (AOB 47-49). Defendant does not articulate what alternative instruction should have been provided, but it is sufficient to say that that his argument is contrary to the case law above requiring a defendant's to disclose "all" relevant facts about his crime. In any event, the argument is waived, for defendant himself, in his proposed jury instruction on this element, asked the district court to instruct that what was required was for defendant to make the government aware of "all the relevant facts." (ER 1594-95 (citing Batterjee)).

Second, defendant argues that a DEA agent he spoke to during his phone call would know what was meant by defendant's reference to "marijuana dispensary," so that he made a prima

facie case as to Counts Two and Three, for violations of 21 U.S.C. § 859. (AOB 51). Preliminarily, a mere reference to "marijuana dispensary" does not provided identifying information about defendant, the location or times of his operation or whether, for example, he would not only distribute marijuana, but grow it as well (something that changed during the course of the conspiracy). His argument also highlights the lack of evidence that defendant actually spoke to an agent. (ER 2542-43, 2576). Moreover, that record contains no information as to what DEA agents supposedly understood by that bare reference to "marijuana dispensaries." SA Reuter only testified on cross-examination that she knew what the defense counsel "means" when using the term "medical marijuana dispensary" and that she knows "what one is." (ER 2862-63).[6] When asked if she understood that a person calling and asking about a medical marijuana dispensary was asking about "all of the state laws under which they may be legal" she said, "no." (ER 2870). There was no testimony that the term had a fixed meaning to cover all of the illegal activities set forth in the indictment, such as sales to people under 21. And defendant conceded that he never spoke about

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

typical marijuana store practices in his call. (ER 2549-50, 2552). Defendant did not meet his burden on this element.

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

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

The Ninth Circuit and other courts have consistently emphasized that it is "critical[]" to the defense of entrapment by estoppel that there be evidence in the record that the official "expressly" tell the defendant that the conduct at issue was "lawful." Brebner, 951 F.2d at 1025; see United States v. Hancock, 231 F.3d 557, 567 (9th Cir. 2000) ("[T]he defendant must show that the government affirmatively told him the proscribed conduct was permissible") (citation omitted);

Woodley, 9 F.3d at 779 (similar). Thus, in Ramirez-Valencia, the Ninth Circuit held, as a matter of law, that an INS form which stated that it was unlawful for a deported person to return to the country without permission within five years, was insufficient for entrapment by estoppel "because [the form] did not expressly tell defendant that it was lawful for him to return to the United States after five years." Ramirez-Valencia, 202 F.3d at 1109; accord United States v. Aquino-Chacon, 109 F.3d 936 (4th Cir. 1997).

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

The Brebner court also set forth the long history of case law in the Supreme Court, the Ninth Circuit, and other circuits requiring active, affirmative misleading by the relevant official. Brebner, 951 F.2d at 1026. One of those cases,

United States v. Smith, 940 F.2d 710 (1st Cir. 1991) is instructive. There, the First Circuit held that "mixed messages" or "conflicting indications" sent by a federal agent were insufficient as a matter of law to establish entrapment by estoppel. Id. at 715. While the agent told defendant that he could not legally possess a firearm, he also told the defendant that he could keep his firearms to facilitate his work for the government. Id. Dispositive to the court was the fact that, whatever mixed messages the agent gave, the agent never "represented that keeping the guns was, in fact, legal." Id. (emphasis in original). The court thus found any reliance by defendant on the mixed messages unreasonable as a matter of law. Id.; see also Eaton, 179 F.3d at 1333 (no defense as a matter of law where federal official's statement "could be construed several ways"). Many other cases confirm the bright-line requirement of an affirmative, active representation regarding the legality of the charged conduct. See, e.g., United States v. Pardue, 385 F.3d 101, 108-09 (1st Cir. 2004) (no entrapment by estoppel based on implication); United States v. Stewardt, 185 F.3d 112, 124 (3d Cir. 1999); United States v. Nichols, 21 F.3d 1016 (10th Cir. 1994) (similar); United States v. Lachapelle, 969 F.2d 632, 637 (8th Cir. 1992)) ("no explicit assurance of legality").

Defendant did not meet the standard for this element. His purported facts are weaker than in Brebner or the immigration cases from the Ninth Circuit. Defendant confirmed that his short conversation with an unnamed person at DEA never directly contained an explicit affirmative statement regarding the legality of his later conduct under federal law. (ER 2555-56, 2559-60). Moreover, assuming the person at DEA was an authorized official, his statement about what DEA was going to do about the marijuana stores in California, and defendant's hypothetical plan to open a store -- "it's up for to the cities and counties to decide how they want to handle the matter" -- could be interpreted several ways besides a statement that cities and counties would determine their legality. It could have meant, for example, that DEA did not involve itself in the opening or permitting of marijuana stores, which was handled by cities and counties; that the speaker felt city and county officials were in the best position to handle the proliferation of marijuana stores in the state, including defendant's; that cities and counties were the cause of the proliferation of marijuana stores through their actions; that DEA would assist in closing dispensaries only if they were asked by cities and counties; that DEA was basing its enforcement priorities and actions on its evaluation of the actions of cities and counties; or that DEA had decided for a period of time to let the issue be

handled as an enforcement matter by city and county officials. At best, this was an ambiguous statement, and far from the affirmative statement of legality required as a matter of law. Courts have consistently held that the defense cannot be grounded on a "vague or even contradictory statement" or an ambiguous one. Ramirez-Valencia, 202 F.3d at 1109 (quoting Raley v. Ohio, 360 U.S. 423, 438 (1959)); Eaton, 179 F.3d at 1333.

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

Defendant claims that the court should have instructed the jury that he could have been "affirmatively mislead" either "expressly or impliedly." (AOB 49-50). This is counter to the cases set forth above. Defendant cites Batterjee for the proposition that an "affirmative statement need not be expressed" (AOB 50), but the case holds no such thing.

Batterjee was an unlawful possession of a firearm case in which two federally licensed dealers "affirmatively represented" to [defendant] that he would be eligible to purchase the firearm if he provided photo identification and proof of residency -- advice which was wrong. Batterjee, 361 F.3d at 1218; see also Cox v. Louisiana, 379 U.S. 559, 571 (1965) (protesters "affirmatively told" they could demonstrate in specific area later arrested). Defendant cites Raley for the proposition that statements can be combined with conduct to show active misleading (AOB 49-50), but this is merely consistent with Clegg and the other Ninth Circuit law that affirmative misleading can include direct conduct with the defendant. Brebner, 951 F.2d at 1025-26; see also Raley, 360 U.S. at 438 (entrapment where "active misleading"). Here, there was no conduct at all, just a short, highly ambiguous phone conversation. Defendant's erroneous instruction was an attempt to bolster his insufficient evidence on this element.

5. Undisputed Evidence Demonstrates That, in Running His Marijuana Store, Defendant Never Actually Relied on His Phone Call with the DEA

Defendant failed as a matter of law to carry his burden of meeting the fourth element of entrapment by estoppel, that he actually relied on the erroneous advice by the DEA in committing his crimes. Schafer, 625 F.3d at 637. The record shows that he always knew that marijuana was illegal under federal law and

could subject him to prosecution. The only legal misunderstanding (if at all) on which he relied came not from anything said to him in his September 2005 phone call, but from his mistaken views about the interaction between California state law and the 10th Amendment. That mistake of law -- which had nothing to do with any actions by the government -- is not a valid basis for a defense, and his defense thus fails. This Court's opinion in Schafer is directly on point.

In Schafer, the two defendants, a doctor and her husband, were convicted of conspiring to manufacture and distribute large amounts of marijuana as part of a medical marijuana business. Id. at 632-33. On appeal, they challenged the district court's decision to preclude evidence of their entrapment by estoppel defense. Id. at 637. In support of their defense, the defendants submitted pretrial materials supporting their claim that two local detectives working with federal authorities visited their operation and home, and had erroneously told defendants that the marijuana business was legal. Id. at 633-64, 637. The government also submitted material seeking to negate the defense. Id. This Court assumed for the purposes of deciding the issue that the two officials were federally authorized to bind the government, and that they had erroneously advised the defendants that their operation was legal, that is, that the first three elements of an entrapment by estoppel

defense were met. Id. at 637-38. However, the Schafer court determined, as a matter of law, that the defendants had not relied on the erroneous advice.

The Court pointed to the fact that the defendants had handed out recommendation forms to their "patients" throughout the course of their operation that said that "cannabis remains illegal under federal law," and had not represented otherwise. Id. at 638. In addition, the doctor defendant had given testimony in trial admitting that marijuana was a Schedule One controlled substance under federal law and that federal law prohibited her from prescribing it. Defendants submitted no "admissible evidence" that refuted the recommendation form and doctor's testimony about their understanding of federal law or supported an inference that defendants had relied on the representations of the two law enforcement officers. Instead, the Court held:

> the government's uncontested evidence established that Appellants were aware that marijuana was illegal under federal law during the time the [law enforcement officials] allegedly stated that it was legal under federal law - Appellants were not mislead into believing that their conduct was permissible under federal law. "The defense of entrapment by estoppel is inapplicable if the defendant is not misled."

Id. (quoting Tallmadge, 829 F.2d at 775 n.1.). Accordingly, the Schafer Court concluded that the defendants had failed to make a prima facie case of entrapment by estoppel. Id.

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

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

(GER 56 (emphasis added)). Defendant attached a copy of his own caregiver form (entitled "Membership Agreement Form") which contained this language and was signed by him. (GER 86). The form for each customer had defendant's name at the bottom. (Id.). In his in-camera submission to the court, defendant said that the view of the law quoted above was the same one he had when he was arrested on the underlying federal charges by DEA in July 2007, and he submitted a DEA report of his arrest containing his similar statements about the law to the DEA agents on the day of his arrest. (GER 56, 92 ¶ 8). Further, at trial, defendant offered into evidence the employment agreement of his former security chief, Abraham Baxter, dated in April 2006, just as the CCCC was opening in Morro Bay. (ER 2508-14;

DX 478; GER 1044). Defendant testified that he had all the CCCC employees sign this agreement as "regular practice." (ER 2508-14). The employment agreement reflected much the same view of the law as the caregiver agreements with the store customers:

> I understand that Federal Law prohibits Cannabis but California Law Senate Bill 420 allows Medical Cannabis and gives patients a constitutional exception based on the 10th Amendment to the United States of America.

(DX 478; GER 1044 (emphasis added)). At trial, defendant had also testified that he had visited the DEA website before his September 2005 phone call and learned that marijuana was a Schedule One prohibited drug just like heroin and other substances. (ER 2364-65, 2557). Thus, as reflected in his testimony, his proffer to district court, and both his customer and employment agreements, defendant always knew, just like the defendants in Schafer, that marijuana was illegal under federal law, and that it could lead him to be "prosecuted as a federal crime." (GER 56). This understanding of the law formed the basis of his relationships with all the CCCC's customers and employees, and thus permeated all the activities charged in indictment. The undisputed evidence showed that it existed temporally throughout the course of the entire conspiracy. And nowhere in any of these documents or any of these statements about defendant's understanding of the law was there any reference whatsoever to defendant's September 12, 2005 calls to

the DEA. Thus, just as the defendants in Schafer were held not have established a valid entrapment defense as a matter of law, so too was defendant's defense invalid. Schafer, 625 F.3d at 638.

Defendant's understanding of federal law does differ from that of the defendants in Schafer in one respect. In addition to defendant understanding that marijuana was illegal under federal law, defendant relied on his mistaken understanding about the interplay between California marijuana law and the Tenth Amendment. But that mistake of law provides him with no defense to the crimes at issue. All of the charges against him were general intent crimes where knowledge of legality and mistake of law is irrelevant. See, e.g., United States v. Valencia-Roldan, 893 F.2d 1080, 1083 (9th Cir. 1990) (21 U.S.C. § 859); United States v. Delgado, 357 F.3d 1061, 1067 (9th Cir. 2004) (21 U.S.C. §§ 841, 846); United States v. Cain, 130 F.3d 381, 384 (9th Cir. 1997) (21 U.S.C. §§ 841); United States v. Linares, 367 F.3d 941, 948 (D.C. Cir. 2004) (possession of marijuana); United States v. Basinger, 60 F.3d 1400, 1405 (9th Cir. 1995) (21 U.S.C. § 856). That defendant relied on a misconception of state and federal law -- one that made no reference to statements by federal officials -- cannot be the basis for a defense.

Defendant did testify at trial that he "always" relied on his discussion with the DEA, though sometimes it was in the "back of his mind." (ER 2813). However, this statement of his subjective reliance is insufficient as a matter of law to establish entrapment by estoppel, which is based on objective facts, not defendant's subjective state of mind. As this Court has held, there is no defense where "defendant was as a subjective matter misled, and that the crime resulted from his mistaken belief." Lansing, 424 F.2d at 226; see Spires, 79 F.3d at 466; Burrows, 36 F.3d at 882. The defense was deficient as a matter of law.

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

To establish the last element of entrapment by estoppel defendant must show that his reliance on the DEA statement was objectively reasonable. That is, that "a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries." United States v. Weitzenhoff, 35 F.3d 1275, 1290 (9th Cir. 1993). Defendant should have been making further inquiries from the very time he spoke to the DEA in September 2005 given the vague and ambiguous response he received, the incomplete information he provided, and not knowing to whom he spoke or what position the man held. (ER 2542-45, 2548-52,

2558-63, 2565-68, 2576). It was unreasonable as a matter of law for defendant to rely on his September 2005 conversation without further inquiry. See, e.g., Smith, 940 F.2d at 715; Eaton, 179 F.3d at 1332-33 (reliance on ambiguous statement by minor official objectively unreasonable). Similarly, it was unreasonable to fail to make further inquiries when he was confronted with adverse results based on the illegality of his store under federal law, such as the Morro Bay police chief refusing to sign his business license and later his nursery permit, the county health board telling him his store was illegal under federal law, receiving numerous memoranda stating that he could be prosecuted, especially when the DEA executed a search warrant and seized his assets. All of this at the time when he was entering into agreements with his employees and customers indicating that his conduct was prohibited by federal law. Yet the undisputed evidence is that defendant never called DEA or a federal law enforcement agency and made further inquiries. (ER 2563-88, 2689-95, 2700-09). Any reliance was objectively unreasonable as a matter of law, and this court should affirm on this additional basis.

### C. IN ANY EVENT, THE DISTRICT COURT DID NOT ERR IN EXCLUDING INADMISSIBLE AND REPETITIVE EVIDENCE OFFERED IN SUPPORT OF THE ENTRAPMENT BY ESTOPPED DEFENSE

Defendant challenges the district court's exclusion of evidence offered in support of his entrapment by estoppel

defense including: (1) evidence about his compliance with the local rules and ordinances of his city (2) references to the medical use of marijuana at the CCCC, (3) a videotaped statement by an SLOSD spokesman, and (4) statements by his former attorney, live and on the radio, about defendant's phone call with the DEA. As noted above, because the defense was invalid as a matter of law, this Court may affirm these evidentiary rulings on that basis without reaching the merits of these issues. However, the rulings were also correct, and the all of the evidence was properly excluded on sound evidentiary grounds such as hearsay or Rule 403. Moreover, proper examination of the record shows that these rulings went to topics that were undisputed, of limited probative value, or about which defendant offered extensive evidence. Thus, any erroneous ruling on these issues was harmless. Finally, this Court may also affirm on the basis that defendant failed to comply with the notice requirements of Rule 12.3.

1. Standard of Review

As noted previously, non-constitutional rulings pertaining to evidentiary matters are generally subject to abuse of discretion review and stringent harmless-error analysis. United States v. Pelisamen, 641 F.3d 399, 410 (9th Cir. 2011). If a district court ruling precludes the presentation of an entire defense, review is de novo. United States v. Lynch, 437 F.3d

902, 913 (9th Cir. 2006). Where, as here, a defendant is permitted to present a defense's substance to the jury, however, evidentiary exclusions are reviewed for abuse of discretion. United States v. Waters, 627 F.3d 345 (9th Cir. 2010).

2. The District Court Did Not Abuse its Discretion in Excluding Cumulative and Inadmissible Testimony About Defendant's Compliance With Local Law

A central theme of defendant's brief is that the district court's rulings hampered his defense by excluding evidence of his compliance with local law. (AOB 28-31). He points to the court's limitation on the testimony from the mayor and city attorney of Morro Bay. (AOB 29). Defendant provides little context for the court's decisions, nor exactly what evidence was unfairly excluded. In fact, because the theory of defendant's estoppel defense was that the DEA had told defendant that the legality of his conduct would be handled by city and county officials, the court allowed extensive evidence about defendant's interaction with local officials and compliance with city and county rules. (ER 2102-07). It also let both the mayor and city attorney add to this evidence, though it properly limited their testimony to avoid repetition, hearsay, and other problematic testimony.

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

Proper evaluation of defendant's claim that his defense was harmed by the district court's rulings requires consideration of what defendant does not discuss in his brief, the evidence the court did admit on his efforts to comply with city and county rules. Defendant himself testified that he:

- Researched the organization of local cities and counties and their processes for business licenses.
- Approached a landlord and the county clerk's office in Cayucos, California to obtain a business license there.
- Had discussions with a landlord and county officials in Cayucos as part of his licensing process.
- Secured a lease in Atascadero, California, then moved when he was found to have violated zoning ordinances.
- Went to "the City of Morro Bay and told them [his] intentions."
- Filled out a business license application in Morro Bay, which he gave to the city planner.
- Picked up his approved business license from Morro Bay's city hall.
- Displayed the business license in his store.
- Complied with all eight provisions of his city business license, including:
  - running criminal background checks on employees to assure they had no felonies;
  - obtaining security workers to assure that customers had proper identification and paperwork including a valid California state identification and a doctor's recommendation;
  - preventing customers from smoking or consuming marijuana on premises;

  - not growing marijuana plants until he had obtained a nursery permit;
  - obtaining and displaying his nursery permit, and providing officials with a diagram of his business;
  - and complying with the California Health and Safety Code.
- Met and conferred often with the city attorney of Morro Bay.
- Understood that the mayor of Morro Bay was aware he had opened his store.
- Had discussions with an officer from the Morro Bay Police Department, filled out emergency contact information for the officer, and later updated that information.
- Discussed with the Morro Bay Police Department how to check his employees for felony records.
- Reopened his store after the DEA search warrant because he had "the blessing of the City of Morro Bay officials."

(ER 2462-91, 2519). The court also received into evidence defendant's business license application, business license, nursery permit, and the emergency information form he had provided to the Morro Bay Police Department. (ER 2469, 2472, 2478, 2489-09; DX 425, 428, 429, 431; GER 1031-43). Defendant further testified that he reviewed a memorandum from the Morro Bay city attorney regarding the city's proposed business license requirements on marijuana stores which contained analysis of state marijuana laws, and the document was admitted in evidence to "explain defendant's conduct." (ER 2801; DX 422; GER 1027-30).

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

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

Given this undisputed and overwhelming evidence on the topic, further details about defendant's compliance with local law would not have been probative of any issue in dispute at trial. Defendant now criticizes the district court for having

found his compliance with local law undisputed, but at trial defendant had the same view. (See ER 2502 (conceding government had presented no evidence that defendant failed to comply with city rules), 3108 (arguing "[w]e heard evidence that was undisputed that Mr. Lynch complied with every single thing the City of Morro Bay asked him to do.") (emphasis added), 3106-07 (similar), 3109 (similar).[7] Thus, the district court was well within its discretion to find that additional details from the major or city attorney about defendant's compliance with local rules would have been repetitious or offered only to put him in a sympathetic light. See Fed. R. Evid. 403; United States v. Butcher, 926 F.2d 811, 816 (9th Cir. 1991) (district court did not abuse its discretion in concluding that testimony was cumulative); cf. United States v. Harris, 491 F.3d 440, 447 (D.C. Cir. 2007). The district court's ruling is supportable on this ground alone.

In the alternative, and consistent with this ruling, the district court also found that additional testimony from the

[7] Defendant manufactures a dispute from a segment of closing argument where the government said that defendant's contention he ran a "tight ship" was undermined by the marijuana distribution by employees Baxter and Doherty. (AOB 29 (citing ER 3146-47). Those transactions were not part of the estoppel defense but, as noted above, charged overt acts in the drug conspiracy. (ER 442). The government tried to show they were foreseeable despite defendant's denials. (ER 2432, 2440-43, 2508-17). It was defendant who sought to connect Baxter's transaction to his compliance with local laws. (ER 2994).

mayor and city attorney about defendant's compliance with local rules was hearsay or lacked proper foundation. As to the mayor, defendant proffered that her testimony as to defendant's compliance was that she "went around and passed out her card to all the neighboring businesses and she solicited their opinions as to Mr. Lynch's operation and as to Mr. Lynch himself." (ER 2762). She could not say defendant was "always" in compliance. (ER 2761). The court said that the mayor's proposed testimony would be hearsay and she had limited first-hand knowledge. (ER 2753, 2764). Defendant had no response at trial to the hearsay problem and has not addressed these issue in its brief, so the issue is waived. Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) (arguments not raised in opening brief deemed waived); United States v. Saunders, 951 F.2d 1065, 1069 (9th Cir. 1991).

The city attorney would have testified to conversations he had with defendant "to determine [defendant's] compliance with the City of Morro Bay's requirements." (ER 2817). As the court noted at the time, defendant's statements to the city attorney were "not an admission," but hearsay offered by the party making the statement. (Id.). See United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000) (defendant's out-of-court statements offered by defendant are hearsay, not admissions). Again, defendant does not address this issue, nor the fact that

defendant was allowed to offer testimony from the city attorney on defendant's compliance with city law.

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

In sum, the court's rulings were supported on multiple grounds and any error was manifestly harmless given the testimony that was offered at trial.

3. The District Court Did Not Abuse its Discretion in Excluding Evidence about Medical Marijuana

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

Under federal law, marijuana is a Schedule I controlled substance. See 21 U.S.C. § 812, Schedule I(c)(17). That designation reflects a congressional finding that marijuana has no acceptable medical uses, and accordingly that a defendant may not bring a medical necessity or related defense to a marijuana charge even if marijuana was grown or cultivated under California's medical marijuana laws. Id.; Raich, 545 U.S. at (“Congress expressly found that [marijuana] has no acceptable medical uses.”); Oakland Cannabis Buyers’ Coop., 532 U.S. at 489-99. This Court has upheld the exclusion of evidence relating to a defendant’s medical use of marijuana, and has made clear that a defendant’s constitutional right to present a defense is not violated by excluding the evidence. See United States v.

Rosenthal, 334 F. App'x 841, 844 (9th Cir. 2009); Rosenthal, 454 F.3d at 947 (affirming and adopting reasoning of district court in Rosenthal, 266 F.2d at 1074 that medical motive for growing or distributing marijuana irrelevant). The district court thus correctly determined that the medical needs and conditions of customers at the CCCC, as reflected in the basic forms and procedures referencing medical use, were irrelevant to the charges at issue, and also "not essential to the defendant's defense." (ER 544-45, 1605, 1608-09 (finding case would not litigate "medical use of marijuana" when matter had been resolved by finding of Congress).

The court admitted references to medical marijuana with respect to the CCCC's operations where it found the evidence relevant to a disputed issue at trial. For example, in support of defendant's argument that Baxter's marijuana distribution was unforeseeable, the court admitted Baxter's employment agreement which, among other things, referenced the CCCC as a "private medical facility with patients that are seriously ill." (ER 2442, 2508-14; DX 478; GER 1044). The court made clear that it would not let its rulings on medical marijuana hinder efforts by defendant to rebut charges about Baxter. (ER 1610). Defendant also testified that his compliance with local law included assuring that all customers had proper paperwork including a doctor's recommendation. (ER 2475-76). Similar information was

presented pursuant to a limiting instruction during the course of the testimony by the SLOSD detective who purchased marijuana undercover from the CCCC. Defendant described himself in testimony as a "patient." (ER 2709).

Defendant's claim that the "medical use" references or the Beck testimony were relevant to show compliance with state law ignores again the overwhelming and undisputed evidence of defendant's compliance with the rules of his city and county, as described in the prior section. There was little or no probative value to more such information. Moreover, when the district court heard Beck immediately begin to talk about his bone cancer after defense counsel assured the court that his condition was "not relevant" (ER 2024), the district court was entitled to conclude, after a lengthy proffer, that the witnesses weak probative value of the would be outweighed by the danger the testimony was meant to play on the sympathies of the jury or attempt to create animus towards or confusion about federal law which has no exception for medical marijuana use. This view was especially supportable after defendant's attempts to emphasize these improper issues in voir dire and his opening statement. E.g., Trevino v. Gates, 99 F.3d 911, 922 (9th Cir. 1996); United States v. Adames, 56 F.3d 737, 746-47 (7th Cir. 1995).

This concern was confirmed later when defendant called Beck's mother to testify supposedly about the disparity between the number of marijuana plants in her agreement with the CCCC and how many she actually grew. She testified that she only grew one plant "because of [her son's] illness. . . . [H]e was too sick to grow plants." (ER 3013). The whole thrust of the Beck testimony, and defendant's interest in referencing the medical use of marijuana generally had nothing do to with an element of his defense, but rather was to expose the jury to information about sympathetic health condition and the conflicts between federal and state law. The court was thus within its discretion to exclude the evidence. Any error was also harmless considering the evidence defendant did offer, and the undisputed evidence of his compliance with local rules.

4. The District Court Did Not Abuse its Discretion in Excluding a Video by a Sheriffs' Department Spokesman As Minimally Probative, Repetitious, and Confusing

Defendant challenges the exclusion at trial of video footage of a news broadcast in which a SLOSD spokesperson, a sergeant, stated that defendant was free to open his business again after the March 27, 2007 search warrant by DEA. (AOB 30-32; ER 2769). The district court was within its discretion to exclude the evidence, which repeated defendant's own, unchallenged testimony, was minimally probative, and potentially confusing.

On direct examination, defendant provided several reasons for re-opening his store after the DEA's warrant including that he "had the blessing of the City of Morro Bay officials." (ER 2519). Although the district court initially denied defendant's request to bring out as an additional reason that defendant had seen the SLOSD spokesman, defendant was able to volunteer the information on cross-examination. (ER 2710). While government counsel attempted to concentrate questioning on the DEA and federal officials, defendant testified that at the time of the warrants he was "getting mixed messages" because he was not arrested on the day of the search, he spoke to his landlord, he spoke to the "city," and the city reissued him the CCCC's nursery permit. (Id.). He added, "I did happen to see the local Sheriff on the television saying that he was returning the keys to Mr. Lynch and he could do as he pleases." (ER 2710). Later, in response to a question as to whether marijuana stores opening after DEA raids was a factor in his own decision, he volunteered several additional factors. (ER 2711). These included his landlord, the city reissuing his business license and nursery permit, and the "statement of the Sheriff on the local TV station." (Id.). Government counsel confirmed that "none of these people were federal officials." (Id.). Defendant also testified that he could not remember if he was still relying on the September 2005 DEA call when he was making

his decision to re-open after the search warrant. (ER 2720-21). On re-direct, defendant said he always relied on the DEA call, but sometimes in the back of his mind. (ER 2813).

The defense requested to play the video of the SLOSD spokesperson. (ER 2769). Defense counsel argued that the video was probative to rebut the government cross-examination on defendant's re-opening the store, and because the court should find the spokesperson to have been a federal agent based on the fact that the SLOSD had assisted with the warrant. (ER 2769-74, 2809-11). The court denied the request, stating that the point of the government's questioning was to show that defendant was not relying on a statement by DEA, rather than challenging defendant's credibility as to the other reasons for opening. (ER 2770). It found the agency theory "not close," and also concluded the testimony was "repetitive." (ER 2771, 2808-11).

The court's ruling was justifiable on multiple grounds. Defendant testified twice, without contradiction, that the SLOSD statement was one of several reasons for reopening his store. The video thus had little probative value, and could be denied under Rule 403 independently because it was cumulative. Butcher, 926 F.2d at 816. Second, defendant's federal agency theory is supported by no case, and the basic rule in this Circuit, as elsewhere, is that actions by state officials cannot form the basis for entrapment by estoppel. United States v.

Mack, 164 F.3d 467, 471, 474 (9th Cir. 1999); United States v. Collins, 61 F.3d 1379, 1385 (9th Cir. 1995).

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

5. The District Court Did Not Abuse its Discretion in Excluding Hearsay Statements Made by Defendant to His Attorney

a. Background

On July 25, 2008, after the district court had revealed the defense, the government requested production of CCCC attorney-client files concerning defendant's former attorney, Lou Koory that the government had seized during the search warrant, but

had turned over to the defense unreviewed. (ER 1357-59). The district court denied the request, reasoning that defendant's raising entrapment by estoppel did not by itself waive the attorney client privilege with respect to Koory. (ER 1357-60).

The defense did not put Koory on their witness list. (ER 3212). During cross-examination of defendant, defendant said he intended to waive its attorney-client privilege with respect to Koory, and the government again requested the attorney files. (ER 2577). Later, while still putting on its case, the defense said it planned to play an audio recording of Koory talking about defendant's phone call to the DEA in a segment of an unidentified radio program. According to the defense, the video would not be offered "for the truth." (ER 2768-69, 2774, 3284 (transcript of segment)). If the recording was inadmissible, defendant would offer Koory's testimony directly that defendant had told Koory about the September 2005 phone call in terms similar to defendant's testimony. (ER 2775, 2897-98). Koory had his conversation with defendant no earlier than "late January 2006," after defendant had already opened his marijuana store in Atascadero. (ER 2647, 2919, 2920).

The court stated that defense counsel would have to produce the Koory's attorney-client documents, and defense counsel said they could do that. (ER 2776). The government confirmed the ruling:

> [GOVERNMENT COUNSEL]: Just to be clear, Your Honor, if they are going to ask Mr. Koory to testify, can we get all those files today?
>
> THE COURT: Yes.
>
> [GOVERNMENT COUNSEL]: So we can look over them over the weekend.
>
> THE COURT: Yes.
>
> [GOVERNMENT COUNSEL]: They will give us today all the attorney-client files or they will be excluded from having him testify.
>
> THE COURT: I would think that would be pretty much the correct ruling on that.

(ER 2777; see also ER 2898).

The court said it would consider whether Koory's testimony about defendant's call qualified as a prior consistent statement under Fed. R. Evid. 801(d)(1)(B), but warned defendant that "as I've indicated earlier before I would allow [Koory] to testify you have to turn over that material." The defense acknowledged this and said defendant would waive his privilege on the record. (ER 2902). Because it was Friday, and the coming Monday the final day of trial, and because defendant had prior warning, the district court reiterated that the defense was to produce the Koory documents that evening so the government could review them over the weekend before Koory's proposed testimony on Monday. (ER 2902-04, 2906). The defense said it would not produce the documents unless the court first ruled that the testimony would be admissible. (ER 2917). The court rejected this approach

noting that the defense had played "hide the ball" with respect to its defense. The court said it would give a tentative decision on admissibility that evening, but ruled that Koory would not be allowed to testify unless the government received the documents. (ER 2918). It specifically ordered defendant to produce the documents within three hours of the court's tentative decision, and required a defense declaration describing any documents not available. (ER 2922-24).

The court issued a tentative ruling that evening, reasoning that Koory's proposed testimony did not quality as a prior consistent statement. (ER 274-274A). It said that it was open to further argument, but "the Court would require the Defendant to waive his attorney-client privilege on the record and provide the government with the available attorney-client materials." (Id.). Defendant filed a brief, but did not turn over the Koory documents. (ER 2926-30). On August 4, 2008, the court heard further argument, and confirmed its evidentiary ruling. (ER 2935-65, 2961-62). The court also ruled that the radio segment was double hearsay and held the government had not opened the door to the video as part of it cross-examination. (ER 2949-51). The district court noted that defendant had failed to provide the attorney-client information previously ordered, stating that the "the machinations of the defense in this regarding is somewhat surprising." (ER 2951-52). The court

noted that the defense had previously said it was not raising "an attorney-client communications as a defense" and found it "troublesome" that defendant had argued the government was not entitled to the Koory files knowing that Koory had made public statements on the radio inconsistent with the attorney-client privilege. (ER 2952).

After trial, the exclusion of the Koory testimony and radio segment was addressed again as part of defendant's third new trial motion. (ER 3262-84; GER 227-33). The district court denied defendant's new trial motions on the record and in a written ruling. (ER 335-39 (ruling); ER 3287-97). It reaffirmed its hearsay ruling, and in the alternative held that the excluded evidence was not sufficiently probative to have altered the verdict given Koory's bias as a witness and the fact that defendant's "entrapment-by-estoppel defense was such a borderline call as to its prima facie sufficiency." (ER 338-39, 3288-3297). The district court also noted that defendant had never complied with its requirement on the attorney-client privilege. (ER 3293-94).

b. The district court correctly held that Koory's statements about defendant's phone call to the DEA were not admissible under Rule 801(d)(1)(B)

The district court correctly ruled that Koory's proposed testimony about his conversation with defendant did not qualify as a prior consistent statement under Fed. R. Evid.

801(d)(1)(B). Prior consistent statements are admissible as an exception to the hearsay rule only in limited instances. They are not admissible "to counter all forms of impeachment or to bolster the witness merely because [the witness] has been discredited." Tome v. United States, 513 U.S. 150, 157-58 (1995). The "Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." Id. Thus, prior consistent statements are admissible "only if they are offered to rebut a charge of recent fabrication or improper influence or motive." United States v. Frederick, 78 F.3d 1370, 1377 (9th Cir. 1996). To be admissible the prior consistent statement must occur before the date of the alleged motivation to lie or fabricate. Tome, 513 U.S. at 167.

Defendant failed to satisfy two elements of Rule 801(d)(1)(B). First, establishing an express or implied charge of recent improper motive, influence, or fabrication, rather than a general attack on credibility. Second, that the prior the consistent statement -- here the statement of defendant to Koory about his DEA call -- took place before the supposed improper motive arose. See United States v. Collicott, 92 F.3d 973, 979 (9th Cir. 1996) (describing elements of Rule 801(d)(1)(B)). The heart of the dispute is defendant's attempt, contrary to the policies set forth by the Supreme Court in Tome, to turn a general attack on his credibility and defense into a

means to open "the floodgates to any prior consistent statement that satisfied Rule 403." Tome, 513 U.S. at 163.

On the first contested issue, the district court was right to conclude that that "the Government did not charge Lynch with having recently fabricated the contents of his conversation with the DEA -- it argued that he either fabricated or mis-remembered the contents of that conversation from the beginning" of his September 2005 call to the DEA. (ER 338; see also ER 274A ("the Government's contention is not that Lynch's fabrication is of recent origin but occurred in 2005 when he merely heard what he wanted to hear")).

Defendant argues that the government also charged defendant with making up his story for trial. Defendant has had difficulty pointing to precisely where at trial the government made a charge of "recent" fabrication. (ER 2939, 2943) (arguing that general government impeachment and credibility attacks sufficient). As in the district court, defendant suggests that the government did so by introducing the testimony of SA Reuter to contradict defendant's account of his call with the DEA. (AOB 24; ER 2926, 2927). The district court properly rejected this contention (ER 338, 2937), noting that this Court has held that "[m]ere contradictory testimony cannot give rise to an implied charge of fabrication." United States v. Bao, 189 F.3d 860, 865 (9th Cir. 1999). Moreover, SA Reuter's calls went to

circumstances existing at the time of the September 2005 call, not any recent motivation of defendant, confirming the district court's view that any charge of a motive to fabricate went back to the September 2005 call.

Defendant also claims that the government's cross-examination of defendant raised a charge of recent fabrication. (AOB 23). He quotes one cross-examination question: "Isn't it true that the first time you told anyone in the federal government that you had a conversation with the DEA in September of 2005 was when you came to testify in the case?" (ER 2706). However, as the district court noted, this was one of a series of questions that went directly to the issue of whether defendant had reasonably relied on his September 2005 phone conversations. (ER 2690-2710 (cross-examination)). It was not a charge that the story was made up after indictment. (ER 338, 2769-70 (court concludes "the government's point was . . . he was he was not relying on a statement from the DEA"), 2957-59 (citing Breneman v. Kennecott Corp., 799 F.2d 470, 472-73 (9th Cir. 1986)). Reasonable reliance requires facts showing a person "would not have been put on notice to make further inquiries." Weitzenhoff, 35 F.3d at 1290. The government's question showed that defendant never made further inquiries to the DEA despite many indications he should have such as the DEA's execution of warrants. When, as here, questions are

directed at another relevant topic, or a disputed element, or where there is only "faint implication" of fabrication, this Court has held that Rule 801(d)(1)(B) does not open the floodgates to prior consistent statements. See Bao, 189 F.3d at 865 (government evidence that went to "indispensable element" of crime could not be used by defendant to imply a charge of recent fabrication under 801(d)(1)(B)); United States v. Gonzalez, 533 F.3d 1057, 1061 (9th Cir. 2008) ("faint implication" of motive to fabricate does open "the floodgates" to prior consistent statements).

This Ninth Circuit case law also adequately addresses defendant's reliance on United States v. Whitman, 771 F.2d 1348, 1351 (9th Cir. 1985), a case that does not address Rule 801(d)(1)(B), but rather the broader standard for relevance. Id. It thus gives no guidance to the carefully drawn limitations on prior consistent statements set forth by Tome and this Court, and only highlights that binding precedent is adverse to defendant. The district court, who sat through the trial, was within its wide discretion to conclude that any charge of fabrication by the government was directed at September 2005 phone call, and the testimony was inadmissible for this reason alone.

On the second disputed issue, the district court found the motivation to fabricate or otherwise misconstrue the DEA phone

call, as framed by the government's assertions, arose before he was charged with the present crimes, because "he knew that his plans [to open a marijuana store] were in conflict with federal law." (ER 338). As the court explained:

> [O]ne could argue that that's why he contacted the DEA and . . . had the telephone conversation and there was a confusion in his mind, and . . . after having that conversation he believed that he could open the medical marijuana dispensary. But that would all go towards his credibility, not the question of a motive to fabricate.

(ER 2942; see also ER 2945).[8] Thus, this case was similar to Tome, where the motivation at issue took place before the defendant was charged with the crime. Tome, 513 U.S. at 165; see also (ER 274A (district court ruling that "[a]s in Tome, the motive to fabricate arose before the criminal action").

On appeal, defendant does not say when his motivation to fabricate arose. In the district court, he argued that it was only after he was indicted and met with his defense attorneys. (See ER 2929). While the district court's analysis is sufficient to refute this claim, it also should be noted that this argument is logically inconsistent with defendant's contention in his estoppel defense that he relied on his

[8] In its tentative ruling on August 1, 2008 the court incorrectly said that defendant's conversation with Koory took place in June 2006 after the CCCC opened, not late 2006. (ER 274). Given the court's reasoning that that motivation to fabricate arose at the time of the DEA call, the oversight was inconsequential. Further, defendant opened his Atascadero store prior to the conversations with Koory. (ER 2647, 2919, 2920).

September 2005 conversation with the DEA at all relevant times. Hence, his motivation to understand or frame the DEA conversation in a manner that legally authorized his activities, whether through wishful thinking, misperception, or artifice always existed. It became even more concrete when defendant opened his store in Atascadero in January 2006, and received memoranda saying marijuana activity violated federal law, all prior to his talk with Koory in late January. (GX 176-78; GER 919-33).

The proposed statements by Koory on the radio suffer from the same hearsay problems, but with the additional deficiency that they occurred out-of-court, and thus contain an extra layer of hearsay. See Fed. R. Evid. 805 (hearsay within hearsay requires exception as to each part of the combined statements). As the district court recognized, even if defendant's statements to Koory were admissible under an exception to the hearsay rule, there was no exception for the statements of Koory to the radio broadcaster. (ER 338). Nor did they have any probative value if not offered for the truth, but merely to show that they existed, for the government never contested defendant's testimony that the radio segment existed. (Id.; see ER 2698).

Finally, defendant argues that even if inadmissible hearsay court should have let the Koory testimony in on due process grounds because it was reliable and "crucial" to defendant's

defense, to corroborate his story. (AOB 27) (citing United States v. Lopez-Alvarez, 970 F.2d 583, 588 (9th Cir. 1992))). This position is belied by the fact that, as the district court noted, defendant never put Koory on his witness list and did not seek to offer the audio in its case-in-chief. (ER 2943, 2945, 3212). Moreover, as the district court pointed out in denying the new trial motion, Koory was not sufficiently "disinterested" to have "demonstrably shored up any shortcomings in Defendant's credibility." (ER 339). As defendant's former attorney, Koory had a clear interest in vindicating the legality of his client's actions, and he was also a customer of the store. (See GER 164, 189-90). Further, the district court noted that the transcript of the short radio segment with Koory's comments had weak probative value as it had "no reference to date, no reference as to subject matter, no reference as to pretty much anything." (ER 2775, 3284).

As noted in the district court's post-trial ruling, even had Koory been allowed to testify to further establish that defendant had told his version of events to someone, the estoppel defense had so many other difficulties, it would have had little impact. (ER 337-39). For example, the government's reference to defendant's lack of "corroboration" in closing argument that defendant cites in his brief (AOB 23), referred to defendant lacking any notes, letter, or documentation of his

supposedly important phone call, and defendant not even knowing to whom he spoke. (ER 3090-91). Nor is it clear how a private conversation with an attorney could bolster evidence of reliance when defendant did not mention his DEA conversation to local officials like the police chief or to the DEA itself after the search warrants. The Koory testimony would not have addressed these, or the other deficiencies in defendant's case, so any error on this issue was harmless.

c. Alternatively, the district court's preclusion of the Koory evidence should be upheld due to defendant's clear violation of the district court's discovery orders on that evidence

The district court's exclusion of Koory's testimony and radio interview should be upheld on the alternative basis that defendant did not comply with the district court's discovery order, which was an express condition precedent to offering the evidence at trial. Defendant suggests that the issue should be ignored because defendant "was prepared" to waive his attorney-client privilege (AOB 27), but the record clearly shows otherwise.

After multiple warnings, the evening before the last day of trial, the district court gave a clear order that defendant turn over all its documents within three house of the court's tentative decision, so that they could be reviewed by the government prior to testimony. Defendant not only failed to

comply, but never produced the documents while continuing to press his claims of their admissibility through his third new trial motion. (ER 2898, 2902-06, 2922-24). The district court never wavered in its view that any testimony by Koory on his communications with defendant would have to be preceded by the production of documents regarding their prior attorney-client communications. Defendant has not argued in its brief that the district court's order was inappropriate, with the exception of its contention that the radio statement was not an attorney-client communication. Any remaining claim is thus waived on appeal. Smith, 194 F.3d at 1052; Saunders, 951 F.2d at 1069. In any event, defendant never raised or developed any objection to the court's order in the district court, but rather agreed he would comply. Specifically, the defense never argued or objected that the radio statement did not implicate the attorney-client privilege and the statement directly implicated the other attorney documents turned over without review by the government on the basis of the privilege.

In sum, the record shows that defendant made a clear strategic choice to ignore the court's order and withhold the materials, at risk of exclusion of the evidence. In such circumstances it is appropriate to enforce the court's ruling on those grounds. See United States v. Duran, 41 F.3d 540, 545-46 (9th Cir. 1994) (upholding exclusion of evidence that was not

disclosed in violation of Rule 16 where defense counsel failed to produce evidence without showing of cause); United States v. Aceves-Rosales, 832 F.2d 1155, 1157 (9th Cir. 1987) (per curiam) (upholding exclusion of evidence not timely disclosed where defense counsel "made a strategic decision to withhold the document until after the close of the government's case"). Defendant should not be allowed to prevent the government from reviewing material that could have been used to evaluate and test defendant's proposed evidence and then argue that the exclusion of that evidence requires that he receive a new trial. The district court should be affirmed on this independent basis.

6. The District Court Did Not Abuse Its Discretion in Excluding Hearsay Statements Made By Baxter to a Defense Investigator While He Was Represented By Counsel

At trial, the district excluded proposed testimony from a defense investigator about out-of-court statements allegedly made by Baxter when the investigator served Baxter with a trial subpoena.[9] (ER 2777-82, 2877-89). Defendant filed a brief with the proposed testimony set forth in a report from the

[9] To put similar evidentiary issues together, the exclusion of the Baxter evidence is addressed here with rulings on the entrapment by estoppel defense. However, the Baxter evidence was not part of that defense, but part of the government affirmative case, as charged in the indictment. Thus, even if this Court agrees with the government that defendant's entrapment by estoppel charge was invalid, this issue would survive.

investigator, along with legal authority purporting to seek admission of Baxter's statement that "Charlie didn't know anything about his deal," and that defendant was a "really good guy," as non-hearsay statements against penal interest under Fed. R. Evid. 804(b)(3) and United States v. Paguio, 114 F.3d 928, 933 (9th Cir. 1997). (CR 155; ER 2593-2609, 2601 (memorandum containing statements)). Defendant also made the same arguments in his third new trial motion. (ER 3270-72). At trial, the court carefully analyzed all of these arguments, found defendant's analysis mistaken, and ruled that the testimony was inadmissible on multiple grounds. (ER 2877-99). The district court confirmed that ruling in rejecting the new trial motion, adding that a recent affidavit filed by the defense in support of a new trial motion only confirmed that Baxter was not inculpating himself. (ER 337).

The district court did not abuse its discretion in finding that Rule 804(b)(3) was not satisfied. See United States v. Satterfield, 572 F.2d 687, 692 (9th Cir. 1978). The court properly found that the proposed statements by Baxter were not admissible against penal interest as the statements (1) did not tend to subject the declarant to criminal liability, and (2) were not made under circumstances corroborating the trustworthiness of the statement. (ER 2881). Both of these

elements were required for admissibility. Satterfield, 572 F.2d at 690-91.

As to the first element, a statement against interest must (a) "solidly inculpat[e] the declarant," and (b) "be one that a reasonable person in the declarant's position would not have made unless it were true." United States v. Magana-Olvera, 917 F.2d 401, 407 (9th Cir. 1990). Here, Baxter never admitted criminal liability himself, but, at best, only exculpated defendant by stating that defendant knew nothing about the deal. (ER 2601). This is in contrast to Paguio on which defendant relies. There, the hearsay declarant clearly confessed his own criminal liability in great detail, admitting his own creation and execution of each portion of a complex fraudulent scheme, and "not only participation but leadership" in the crime. Paguio, 114 F.3d at 931 & n.1; id. at 933; see also (ER 2884, 2894 (court finds that Paguio not similar), ER 337-38 (same on new trial motion)).

Nor does the context of Baxter's statements contain objective indicia of an understanding that he could be inculpating himself. Williamson v. United States, 512 U.S. 594, 601, 603 (1994) (whether a statement is against interest must be determined "from the circumstances of each case" and can only be determined "by viewing it in context"). As the district noted, in the investigator's report Baxter showed great confusion as to

whether his statements would help or hurt him: he asked the investigator, among other things, where the trial was, whether he was supposed to come, whether the "Sheriff's would be mad at him" for testifying, and "who else would be testifying." (ER 2891-93 (discussing report, ER 2601 ¶¶ 2-3), 2895). Indeed, after being told to contact his attorney by the investigator, Baxter specifically asked "if this could harm or help his case." (See ER 2891-92 (concluding that facts from report do not indicate "admission against interest by Baxter")).

The court also correctly found that the circumstances in which the statements were obtained did not corroborate their trustworthiness, as required under Rule 804(b)(3). (ER 2779-87). At the time of the statements, Baxter was a represented party with criminal charges against him. (ER 2779). Defendant had known for a month that he was represented and sent and investigatory to serve him with a subpoena after leaving a voice message for his attorney. (ER 2779-80 ("we did believe he was represented")). However, Baxter's counsel was not present when the statements were made. (ER 2880). The investigator also did not inform Baxter that the statements could be used against him. (Id.). The district court concluded that "engaging in a conversation with an individual whom the investigator should have known faces possible criminal penalties is problematic." (ER 2779-81 (noting that defense counsel "would be upset" and

would be arguing for exclusion of statements if government obtained statements in similar manner); GER 212, 238-39 (Cal. Rule Prof. Conduct 2-100(A) (barring attorney communications, directly or indirectly, with a represented party)). Paguio supports the court's ruling. There, before any conversations took place, the defense counsel and paralegal advised the declarant that they were not his attorney, that they represented another party, and that any subsequent conversation was not privileged. Paguio, 114 F.3d at 931. As the district court noted, none of that occurred here. (ER 2893).

For the first time on appeal defendant also seeks admission of the statement on due process grounds under Chambers v. Mississippi, 410 U.S. 284, 285 (1973). Chambers is inapplicable given the problems with the statement's trustworthiness set forth above. In addition, the Baxter evidence was far from "critical," as in Chambers. Defendant was able to testify about his relationship with Baxter, denying knowledge of his $3,200 sale to an undercover officer, and discussing the employment relationship he had with him and other restrictions on his activities. (ER 2508-17; DX 478, GER 1044). Thus, defendant contested this issue without the problematic testimony. Further, any error on this point was harmless given the small amount of marijuana at stake in the deal compared to the overall conspiracy, as supported by defendant's own admissions at trial.

As the district court noted in rejecting defendant's new trial motion that "throughout the trial, there was no dispute that Defendant sold large amounts of marijuana. Therefore, even if the jury were to believe Baxter's testimony entirely, it is difficult to see how Lynch's trial would result in an acquittal." (ER 337; see also ER 338).

7. This Court Should Affirm Each of The District Court's Evidentiary Rulings on the Alternative Basis That Defendant Was Required But Prejudicially Failed to Give Notice of Entrapment by Estoppel Under Fed. R. Crim. P. 12.3

Contrary to the ruling of the district court, defendant was required by Federal Rule of Criminal Procedure 12.3 to provide notice of his entrapment by estoppel. His admitted failure to do so, and the established prejudiced it caused, provides an independent basis in the record to affirm the district court's evidentiary rulings regarding the defense.

Rule 12.3 requires a defendant to give notice to the government of a public authority defense at the time set for the filing of pretrial motions, and sets up a procedure for disclosure of witness and other information about the defense. Fed. R. Crim. Pro. 12.3. At trial, the government argued that entrapment by estoppel is a form of public authority defense requiring Rule 12.3 disclosures which defendant had not provided. It moved to preclude the defense on that ground. (ER 1335-38, 1345-60). Defendant conceded that if Rule 12.3 applied

to entrapment by estoppel, he had violated the rule. (ER 1350). The district court also said on two occasions that the government had been prejudiced by defendant's failure to disclose his defense until the eve of trial. (ER 1136, 1139). However, the district court held that while a public authority defense is similar to entrapment by estoppel, there were enough differences to rule that Rule 12.3 did not apply. (ER 1360-61).

The district court erred in ruling that Rule 12.3 did not applied to the defense in this case. This Court should hold that Rule 12.3 notice was required. The government is not aware of a federal court of appeals case on point. But see United States v. Jackson, No. 96 CR 815, 1998 WL 149586, (N.D. Ill. July 25, 1998) (Rule 12.3 applies to entrapment by estoppel). However, the recognition by courts that entrapment by estoppel is a form of public authority defense, or that it derives from the same policy concerns, has caused a leading treatise to conclude that Rule 12.3 covers the defense. 1A Wright & Leipold, FEDERAL PRACTICE AND PROCEDURE § 211, at 545-46 (4th ed. 2008) (public authority similar "to the common law defense of entrapment by estoppel, and Rule 12.3 covers claims under that name as well."); see also United States v. Jumah, 493 F.3d 868, 874 n.4 (7th Cir. 2007); United States v. Neville, 82 F.3d 750, 761 (7th Cir. 1996) ("'public authority,' sometimes called entrapment by estoppel."); Burrows, 36 F.3d at 881-82 (policies

and basis behind two the same); United States v. Pitt, 193 F.3d 751, 758 n.8 (3d Cir. 1999) (no conceptual difference between two defenses). This court should follow this reasoning and case law, and hold that Rule 12.3 applies to entrapment by estoppel.

Defendant's Rule 12.3 violation could not be used to preclude defendant's own testimony. See Fed. R. Crim. Pro. 12.3(c); United States v. Bear, 439 F.3d 565, 571 n.1 (9th Cir. 2006). However, given that the court found the government prejudiced by defendant's late disclosure of the defense, Rule 12.3 should be held to provide an independent basis for affirming the district court's rulings on evidence other than defendant's testimony. Each of the rulings in this section concerned not defendant's own testimony, but evidence seeking to bolster defendant's story. It is exactly the kind of evidence that the government could have investigated, but for defendant's untimely disclosure of his defense.

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

As noted above in Section B of this brief, defendant's entrapment by estoppel claim failed as a matter of law. Thus, this Court need not reach the issue of whether defendant was properly instructed on the issue, because any instruction error was logically harmless. Assuming that there was a valid defense, however, the court made no errors in its jury

instructions on the defense. In Section B, the government addressed defendant's arguments as to instructions on the second element to the entrapment by estoppel defense (AOB 47-49), and the third element (AOB 49-51), as well as his argument that the defense applied to Counts Two and Three. (AOB 51-53). As set forth below, defendant's additional argument that the court erred in instructing on the first element of entrapment by estoppel and on the relevance of the medical use of marijuana to that defense also fail.

1. Standard of Review

The district court's formulation of jury instructions is reviewed for abuse of discretion, and the "relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation." United States v. Hofus, 598 F.3d 1171, 1174 (9th Cir. 2010) (quotation omitted). Whether the instructions misstated an element of the offense is reviewed de novo. Id. As noted, however, if the elements are fairly and adequately covered the precise formulation of the instruction is for abuse of discretion and harmlessness. See Woodley, 9 F.3d at 780. Unpreserved instructional error claims are reviewed for plain error. Hofus, 598 F.3d at 1175. A defendant's mere proposal of an instruction is inadequate to preserve a claim for review; rather, the defendant must object to the jury

instructions with sufficient specificity to make clear the basis of the objection. Id.

2. The Court Properly Instructed on the First Element of Entrapment By Estoppel

As this Court has said on two occasions, the first element of entrapment by estoppel is "an authorized official, empowered to render the claimed erroneous advice." Schafer, 625 F.3d at 637 (quoting Batterjee, 361 F.3d at 1216). The district court tracked this language verbatim in its jury instruction, properly adding that the authorized official must be "federal." (ER 324 (Instruction No. 34)). See Brebner, 951 F.2d at 1027 (defendant must show "federal government official empowered to render the claimed erroneous advice or . . . an authorized agent of the federal government"); Mack, 164 F.3d at 474 (state official not authorized to render advice on federal criminal law); Collins, 61 F.3d at 1385 (same). This instruction was correct.

Defendant argues that use of the word "who was empowered" prevented him from arguing that the official could have "apparent" as opposed to "actual" authority. (AOB 46-47). First, defendant waived this argument in the district court, for defendant himself proposed an instruction defining this element as "an authorized government official empowered to render the claimed erroneous advice," nearly the precise language he objects to on appeal. (ER 1594). Second, the court's language

is taken directly from several decisions by this Court, and to the extent it narrows the defense to actual authority, it is clearly circuit law. See Schafer, 625 F.3d at 637; Batterjee, 361 F.3d at 1216; Brebner, 951 F.2d at 1027.

Third, regardless, defendant failed to show apparent authority. Defendant learned no information about the man who rendered the alleged incorrect advice to him in final DEA call. He did not know the man's title, job or position, or whether the man was an agent or law enforcement officer. (ER 2542-45, 2576). He did not know whether the person could speak for the DEA or the federal government, nor did defendant ask whether this was the only person defendant needed to speak to on the issue. (ER 2565-66). There were not facts conveyed to defendant during the call to show that the person on the phone was someone "who clearly appeared to be the agent of the State in a position to give such assurances." Raley, 360 U.S. at 437 (emphasis added) (Chairman and members of commission where questions were asked gave erroneous legal advice about import of not answering their questions); see also United States v. Baker, 438 F.3d 749, 755-58 (7th Cir. 2006) (no apparent federal authority where state officer showed United States Marshal badge and said he had "no problems at all working with the Feds"). Any technical error was thus harmless.

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

Defendant challenges the district court's instruction regarding federal and state law, specifically instructions Nos. 2 and No. 3 concerning the interaction between state and federal marijuana law (ER 314), and instruction No. 19 which references federal law's prohibition on marijuana for all purposes. He also complains about the court's preliminary instruction regarding marijuana. (AOB 54-57).

First, even if one were to read these instructions as preventing all references to state law and medical marijuana use in the case, as defendant does, it would not by improper based on the testimony at trial. Defendant's defense (assuming it was otherwise viable) did not require any reference to state law. His testimony was that the erroneous advice he received from the DEA was that it was that the legality of marijuana stores was up to the "cities and counties" to decide. Thus, the district court let in ample evidence of defendant's compliance with city and county law such as his interaction with the city and compliance with county health boards. There was no reference in the DEA call to the "medical use of marijuana."

As a factual matter, though not discussed at trial, even officials from Morro Bay never determined whether defendant was complying with state law (ER 3473-74), and the district court

determined at sentencing that he had not. (ER 423 n.25). But, as noted above, the evidence was undisputed that defendant did comply with the laws of his city any county. Defendant could prove his defense without showing evidence of the medical use of marijuana by his customers. Thus, defendant's position that this instruction deprived of his defense is not supportable. Defendant's complaint appears to be that the instructions hindered him from converting a specific (though thin) entrapment by estoppel claim into a means to seek jury nullification by highlighting the difference between state and federal law and the sympathetic circumstances of some of his customers -- defense themes that ran from voir dire, through opening statements, to witnesses like Beck.

Second, Instruction No. 2 read in context with Instruction No. 3 and Instruction No. 34 concerning the entrapment by estoppel defense, and the other jury instructions, shows that the instruction did not constrain the defense. (ER 313-26). Rather, read together, they properly defined the interaction between state and federal law as it applied to the criminal charges in the government's case and the exception to them created by the defense. Instruction No. 2[10] accurately stated

[10] Instruction No. 2 provided:

INSTRUCTION NO. 2

the interaction between state law and the federal criminal charges described in Instruction 3. (ER 314 ("INSTRUCTION NO. 3 The Indictment in this case accuses the defendant . . . of various crimes which are alleged in five different counts of the Indictment. [Describing Five Counts]). That is, that federal law makes marijuana illegal for all purposes and state law cannot override it. This is an accurate statement of the law. E.g., 21 U.S.C. § 841(a); Raich, 545 U.S. at 27; Oakland Cannabis Buyers' Coop., 532 U.S. at 489-99; Rosenthal, 334 F. App'x at 844; Rosenthal, 454 F.3d at 947. The portion of the instruction about which defendant complains: "For example, unless I instruct you otherwise, you should not consider any references to the medical use of marijuana" is given as an example of the type of state law activity -- medical use of

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> This case is governed exclusively by federal law. Under federal law, marijuana is a Scheduled 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 is 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 has legalized marijuana for certain purposes under state law.

marijuana -- that does not override the federal charges against defendant, as shown by the fact that "for example" refers back to the prior sentence about the primacy of federal law. Instruction No. 19 also accurately defines the illegal status of marijuana under federal law in the inapplicability of state law to that status. (ER 318).[11] It again provides accurate context to the description of the elements of the various marijuana offense set forth in Instructions 20 through 33. (ER 314-33). Similarly, the references to the 10th Amendment in instruction No. 2 are correct as a matter of law, and specifically designed to avoid confusion of the jury about evidence that was offered at trial, but also contained errors of law. (E.g., ER 2363, 2367, 2450-53, 2558-59; DX 420, GER 1014 ¶ (e)). Instruction No. 34[12], by contrast, points out that the entrapment by estoppel

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[11] Instruction No. 19 provided:

INSTRUCTION NO. 19

You are instructed as a matter of law, that marijuana, and . . . THC . . . are Schedule I controlled substances. Federal law prohibits the possession, distribution, or manufacture of marijuana, marijuana plants, or THC for any purpose. State and local law cannot trump federal law in this area. (ER 318).

[12] Instruction No. 34 provided, in pertinent part:

INSTRUCTION NO. 34

Defendant has raised an "entrapment by estoppel" defense in this case. Entrapment by estoppel is the unintentional entrapment by a government official who mistakenly misleads a person into a violation of the law. . . .

defense is an exception to the applicable federal law previously defined in Instruction Nos. 2, 3 and 20-33. It is the "otherwise instructed" language referenced in Instruction No. 2 because "[e]ntrapment by estoppel is the unintentional entrapment by government officials who mistakenly misleads a person into a violation of the law." (ER 324 (emphasis added)). Thus, read as a whole, the instructions show that state law does not override the federal charges that apply to the charges in the indictment. However, entrapment by estoppel is a defense based on a mistaken violation of those laws. That defense thus logically could incorporate information and conduct in

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. . .

In order to find the Defendant "not guilty" . . . 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 of local officials or by private parties. As to the third element, the advice or permission received from the federal law would have accepted the information as true, and would not have been put on notice to make further inquiries.

(ER 324)

violation of those federal law, such as marijuana use, while still supporting the defense. The court did not err in giving these instructions.

Defendant does not specify how the result of his case would have been different without these instructions. He does not explain, for example which evidence that came in at trial would have been ignored by the jury by the jury as a result of the instruction as he interprets it. Again, defendant offered ample evidence of his compliance with the laws of "cities and counties" as he claimed he was told by the DEA, so any prelusion of evidence on the non-disputed issue of medical use of marijuana was harmless.

Defendant cites Tallmadge, 829 F.2d at 775 for the proposition that he could rely on state official or state law. As stated previously, the comments by state officials were relevant in Tallmadge because they went directly to misrepresentation by the federal official. Id. Here, defendant offered no statement by a local official that his marijuana store's legality was a matter only of state and local concern. Defendant appears to be asserting a mistake of law defense based on his subjective state of mind which is incompatible with the objectively–based defense. E.g., Lansing, 424 F.2d at 266; Spires, 79 F.3d at 466. In any event, while Instruction No. 34 prohibits reliance on state officials for the second element of

entrapment by estoppel, consistent with Tallmadge and other cases, it has no such restriction on what evidence the jury could consider with respect to defendant's reasonable reliance for the fourth element. Thus, there was no prejudice, in any event. (ER 324). The instructions on this issue were correct even if one adopts defendant's overly-broad view of Tallmadge.

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

### 1. Standard of Review

In reviewing the conduct of the district court during voir dire, this Court "will not reverse unless the procedures used or the questions asked were so unreasonable as to constitute an abuse of discretion." United States v. Pimentel, 654 F.2d 538, 542 (9th Cir. 1981). Moreover, "a trial judge, as governor of the trial, enjoys wide discretion in the matter of charging the jury." Arizona v. Johnson, 351 F.3d 988, 994 (9th Cir. 2003) (internal citations and quotation marks omitted). Accordingly, this Court reviews for an abuse of discretion a district court's formulation of jury instructions, and de novo whether a jury instruction misstates the law. United States v. Cortes, -- F.3d --, 2013 WL 5539622, at *3 (Oct. 9, 2013 9th Cir.).

Appellant does not, and cannot, claim that the district court's instruction during voir dire constituted a misstatement of the law. Accordingly, this Court reviews the district

court's formulation of the instruction and its decision to give the instruction to control the voir dire process for abuse of discretion.

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

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

As this Court has previously held, "while jurors have the power to nullify a verdict, they have no right to do so." Merced v. McGrath, 426 F.3d 1076, 1079 (9th Cir. 2005); see also United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) ("Jury nullification is a fact, because the government cannot appeal an acquittal; it is not a right, either of the jury or of the defendant."). Further, trial courts "manifestly do not have a duty to ensure a jury's free exercise of this power" because nullification is contrary to the duty of jurors to take the law from the court and apply that law to the facts as they find them to be. Merced, 426 F.3d at 1079. Importantly, although courts have no means to undo nullification after the verdict of acquittal has been made, they "'have the duty to forestall or prevent such conduct.'" Merced, 426 F.3d at 1080 (quoting United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997)); see

also Thomas, 116 F.3d at 615 ("[T]he power of juries to 'nullify' or exercise a power of lenity is just that – a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent.").

3. Anti-Nullification Instructions Have Been Widely Accepted By This Court and Other Circuit Courts

Defendant claims that anti-nullification instructions are "so far out of the norm, this Court has not yet addressed the propriety of such a charge." (AOB 64). Defendant is wrong. This Court has approved of anti-nullification instructions. First, in Merced, this Court quoted with approval the following language from Thomas: "trial courts have the duty to forestall or prevent such conduct [jury nullification], whether by firm instruction or admonition . . . ." Merced, 426 F.3d at 1080 (quoting Thomas, 116 F.3d at 615).

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

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

Rosenthal, 266 F. Supp. 2d at 1085, aff'd in part, rev'd in part, 445 F.3d 1239 (9th Cir. 2006).[13] In ruling on the defendant's new trial motion, the district court found no error in that instruction because it was consistent with the court's obligation to prevent nullification. Id. The district court, in Rosenthal also noted, as a practical matter, that "[t]he jury always retains the power to make that decision [to nullify], no matter how the court instructs it" because nullification is, by definition, the jury's decision to ignore the court's instructions. Id. On appeal, this Court found no error in the district court's anti-nullification instruction and adopted the district court's "reasoning in whole" on this issue. Rosenthal, 454 F.3d at 947. Moreover, the instruction in Rosenthal, like the instruction in this case, is consistent with this Court's prior holding that "the jury may not substitute its own determination of objective reasonableness as to the interpretation on the law." United States v. Powell, 955 F.2d 1206, 1212 (9th Cir. 1991).

Furthermore, in the habeas context, this Court ruled that no Supreme Court case establishes that the California anti-nullification instruction violates an existing constitutional

[13] At the government's request, the district court in the present case modeled the anti-nullification instruction given during voir dire after the instruction given in Rosenthal. (ER 1275-76).

right. Brewer v. Hall, 378 F.3d 952, 956 (9th Cir. 2004). To the contrary, this Court noted that Supreme Court authority "emphasized that 'the right to a representative jury [does not include] the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." Id. (quoting Lockett v. Ohio, 438 U.S. 586, 596-97 (1978)); see also Newsom v. Runnels, 378 F. App'x 641, 642 (9th Cir. 2010) ("Nor did the judge violate the Constitution when he instructed the jury to deliberate and follow the law."). The other Circuits to have addressed the issue of anti-nullification instructions have likewise upheld them. See, e.g., United States v. Stegmeier, 701 F.3d 574 (8th Cir. 2012); United States v. Carr, 424 F.3d 213, 219-20 (2d Cir. 2005); United States v. Bruce, 109 F.3d 323, 327 (7th Cir. 1997); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); see also United States v. Appolon, 695 F.3d 44, 65 (1st Cir. 2012); United States v. Pierre, 974 F.2d 1355, 1357 (D.C. Cir. 1992).

4. The District Court Properly Gave a Curative Instruction in Light of the Defense's Injection of Jury Nullification During Voir Dire

Anti-nullification instructions are particularly appropriate in cases where potential or sitting jurors have been exposed to the concept of jury nullification, as here. As discussed above, a trial court has an affirmative duty to

"forestall or prevent" jury nullification. In this case, during voir dire, one juror, Juror No. 25, expressed extreme reluctance and an inability to follow the court's instructions. (ER 1216-18, 1236-39). Defense counsel, however, refused to stipulate to the dismissal of Juror No. 25. (ER 1258). Instead, defense counsel attempted to supposedly "rehabilitate" Juror No. 25 by asking additional provocative questions, which elicited the following response:

> JUROR: You finally said something I can relate to. I understand completely. I believe there is something called jury nullification, that if you believe –
>
> THE COURT: No –
>
> JUROR: - the law is wrong –
>
> THE COURT: No. Let me stop you –
>
> JUROR: -- you don't have to convict a person. That's it.

(ER 1263-64). It was obvious from Juror No. 25's continued interruption of the district court that Juror No. 25 intended to taint the entire jury pool with the concept of jury nullification. To stay silent and not provide the jury pool with an anti-nullification instruction after they have been exposed to the concept of jury nullification would have been a dereliction of the district court's duty to prevent jury nullification. See Thomas, 116 F.3d at 616 ("[I]t would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath."); see also United

States v. Blixt, 548 F.3d 882, 892 (9th Cir. 2008) (district court acted within its discretion when it gave "curative instructions in light of the jury nullification arguments made during closing argument"); United States v. Lawrence, 405 F.3d 888, 904 (10th Cir. 2005) (similar).[14]

F. THE DISTRICT COURT DID NOT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY WHEN IT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE CONSEQUENCES OF THEIR GUILTY VERDICTS

1. Standard of Review

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

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

Defendant's claim that he had a Sixth Amendment right to "trial by a jury with knowledge of the penalty for conviction" (AOB 66), is foreclosed by binding precedent. In United States v. Frank, 956 F.2d 872, 879 (9th Cir. 1992), this Court held that "[i]t has long been the law that it is inappropriate for a jury to consider or be informed of the consequences of their verdict." Rather than requiring a trial court to inform juries

[14] The district court found that defense counsel's questioning had, despite warnings, invoked the issue of jury nullification. (See ER 1266-68, 1274, 1277-79) Accordingly, any supposed error in the district court's instruction was caused by the defense's questioning during voir dire and would not warrant reversal. United States v. Schaff, 948 F.2d 501, 506 (9th Cir. 1991).

of the possible penalties a defendant faces, this Court recognized that "[i]t is the practice in the federal courts to instruct juries that they are not to be concerned with the consequences to the defendant of the verdict, except where required by statute." Id.

The United States Supreme Court has likewise held that a jury "should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" Shannon v. United States, 512 U.S. 573, 579 (1994) (quoting Rogers v. United States, 422 U.S. 35, 40 (1975)). The Court went on to explain the reason for this well-established rule:

> The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.

Id. Although the Court in Shannon was addressing the issue of whether juries should be informed of the consequences of a not guilty by reason of insanity verdict, the Court also noted that "as a general matter, jurors are not informed of mandatory

minimum or maximum sentences, nor are they instructed regarding probation, parole, or the sentencing range accompanying a lesser included offense," regardless of whether jurors harbor misunderstandings about these sentencing options. Id. at 586-87.

While defendant concedes that "precedent is against him on this point," he claims that these cases have been abrogated by the Supreme Court's decisions in Crawford v. Washington, 541 U.S. 36 (2004) or Apprendi v. New Jersey, 530 U.S. 466 (2000). This claim is unsupported by any binding case law, and is rather premised on a district court's decision in the Eastern District of New York, which was expressly rejected by the Second Circuit in United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009). There, the Second Circuit found that the district court could not ignore binding precedent based on a prediction of what the Supreme Court would likely hold in the future. Id. at 160. As the Second Circuit explained:

> If, as the district court believed, the general principles of Booker, Apprendi, and Crawford will lead the Supreme Court to conclude that the circumstances in which a jury must be informed of an applicable mandatory minimum are not as limited as Shannon articulated, that is a decision we must leave to the Supreme Court.

Id. Accordingly, the Second Circuit found that, applying binding precedent, "it is clear that Polizzi had no Sixth

Amendment right to a jury instruction on the applicable mandatory minimum sentence." Id. at 161.

Further, this Court's continued reliance on Frank and Shannon in cases decided well after the Supreme Court decided Apprendi and Crawford demonstrates that there has been no abrogation of the general rule that juries should not be instructed on the consequences of their verdicts. See, e.g., United States v. Garcia, 500 F. App'x 653, 654 (9th Cir. 2012) (citing Frank to support holding that the "district court did not err when it denied [defendant's] request to inform the jury of the mandatory minimum sentence. We have repeatedly held that district judges should not instruct juries on the sentencing consequences of a verdict when the juries have no role in fixing punishment"); United States v. Jones, 346 F. App'x 253, 256 (9th Cir. 2009) (citing Shannon and Frank to support holding that defendant's "argument that the district court should have instructed the jury that he faced a mandatory fifteen-year sentence is likewise foreclosed by precedent").

3. This Case Did Not Fall within Shannon's Narrow Exception As To When Informing The Jury of the Consequences of Their Verdicts May Be Necessary

Defendant claims that the jury should have been informed of the mandatory minimum sentences "to counter a misstatement," namely, that the jury was "actively misled to believe that the district court would be able to exercise discretion in

sentencing" defendant, because they were instructed that "[t]he punishment provided by law for this crime is for the court to decide." (AOB 68 (emphasis in original)).

Defendant's argument is foreclosed by United States v. Wilson, 506 F.2d 521, 522-23 (9th Cir. 1974), superseded by statute on other grounds, 18 U.S.C. § 3561. In Wilson, this Court rejected the defendant's argument that "it was error for the trial judge to instruct the jury that punishment is exclusively a matter for the court when, as here, there is a statutorily imposed sentence." Id. at 522. Instead, the Court held that "[t]he jury's the law to determine guilt; the judge imposes sentence. Even if the statutory sentence were mandatory, it is still the exclusive province of the court to pronounce it." Id. at 522-23.

Thus, there was no error or misstatement in the jury instruction provided to the jury in this case. The district court properly instructed the jury about the division of responsibilities in jury trials.

Furthermore, the Supreme Court in Shannon articulated a narrow exception as to when it would be appropriate for a jury to be informed of the consequences of a not guilty by reason of insanity verdict. The Court explained that in some limited instances, for example if a prosecutor or witness stated that a defendant would "go free" if the jury found him not guilty by

reason of insanity, a district court would have to intervene to correct that misstatement. Shannon, 512 U.S. at 587.

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

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

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

For the first time on appeal, defendant complains about the court's handling of jury questions prior to deliberations. He

seeks reversal based on the court's instruction to jurors on July 31, 2008 that the court would not answer any substantive questions, and the fact that the court did not share jury notes with counsel. Defense counsel neither raised these issues at any time during the course of the trial, nor requested a hearing on the issue after trial despite numerous opportunities. The court had wide discretion on whether to answer questions before deliberation, and any improper handling of jury communications during trial was cured by the court's later jury instructions which made it clear that the jury could then ask questions about the legal issues that had been raised at trial or ask for information about the facts in evidence.

1. Background

On July 22, 2008, at a pre-trial conference, upon the government's objection, the district court determined that jurors would not be allowed to question witnesses during trial. (ER 806-07). On July 24, 2008, the jury was empaneled. (ER 1304). As part of its preliminary instructions to the jury, the court said, "if you need to communicate with me, simply give a signed note by means of handing it to the clerk who will give it to me." (ER 1313, see ER 330). It also instructed "you should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be." (ER 328, 1308).

On July 25, 2008, after opening statements, the court informed counsel that a juror had asked whether they would be allowed to ask questions. The court said "we have raised that issue" and in accord with its past ruling on July 22, 2008, the court said it would inform the juror that there would be no questions from the jury. (ER 1402). Defendant did not ask to see the communication from the juror. Defendant also never objected to either the procedure for informing the clerk of questions, nor the court informing the jury that questions would not be permitted. (Id.). After a recess and presentation of the first witness, the court spoke to the jury:

> Let me just indicate to the jury, my clerk informed me that one of the jurors questioned as to whether or not the jurors were going to be allowed to ask questions. Let me indicate that I have decided in this case the answer is no.
>
> I do not allow questions from jurors in criminal cases because of . . . the major problems of evidence that come into play more seriously in criminal, cases than in civil case, so . . . I do not allow them in criminal cases, so jurors will not be asking question. All right?

(ER 1425). Later that day, upon question from the court, a juror asked for a play back of an audio recording, and the court complied. (ER 1467).

On July 29, 2008, the fifth day of trial and third since the jury was empanelled, the court informed the parties during a recess that a juror had asked the court clerk a question:

> Let me indicate for the record. Earlier there was a question that one the jurors had addressed to my clerk which was taken care of by the questioning of [government counsel], but I just want to make sure it was noted on the record that one juror had a question and that was just . . . that a juror had asked a question as to the status of the sheriff's department and also the DEA agent and that matter was taken care of by the government's subsequent questioning. Let me ask. I presume there is no problem for either side in that regard.
>
> [DEFENSE COUNSEL]: I don't think so, Your Honor.
>
> [GOVERNMENT COUNSEL]: No, your honor.

(ER 1941). Again, defense counsel did not ask for more information about the juror communication, nor did they raise objection to the process by which the jury communicated to the clerk. (Id.).

Later that day, the court told counsel that one juror had asked the court clerk for a definition of the term "minor" as used in trial. The court said it assumed the parties would address that during questioning, but defense counsel said it had "no objection to the court instructing." (ER 2049). The court then said "that same juror indicated that he does not understand what "hash is" though the court noted that this information had been covered at trial, but not in the jury instructions. (ER 2050). Government counsel said that a subsequent witness would cover that topic further, and without objection to the resolution of the matter, the jury was brought in. (Id.). The court then checked with counsel to see if there was any

objection to instructing the jury on the "minors" issue based on the proposed jury instructions, and both parties agreed. (Id.). The court gave an instruction, and the case continued. (ER 2051). There was no objection to the procedure for communicating with the juror who raised the issue.

On July 30, 2008, after a recess, the district court addressed the jury stating that "my clerk has indicated to me that some of you have a question as to when a counsel objects on the basis of 403 or when the court rules on the basis of 403, what does it mean." (ER 2208). The court explained that:

> I will be instructing you that you cannot consider the objections or the basis for the objection. In other words, you are just going to have to accept my ruling. If I make a ruling, even though I may refer to the reasons for my ruling, you can't consider that for purposes of this case. I'm not going to explain to you what 403 means. All right?
>
> [DEFENSE COUNSEL]: May I proceed your honor?
>
> THE COURT: Yes.

(ER 2208). Defense counsel did not object to the instruction, seek information about the juror's communication with the clerk, or object to the court's failure to warn the parties of the issue in advance of speaking to the jury.

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

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

(ER 2505).

The jurors then entered the courtroom. (Id.). After briefly discussing some scheduling matters, the court addressed them on the issue of jury questions:

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

The district court went on to explain to the jury that it would eventually receive all admitted trial exhibits in the jury room with the exception of contraband. (ER 2506-07). The court

asked the jurors if "any of you have any questions on that," and one juror replied:

> JUROR SEAT NO. 7: If there are some witnesses and there are some questions back and forth and you don't follow it or its not answered, could we ask why that question was not answered?

(ER 2506). The court explained to the jury that it made rulings on objections based on rules of evidence and it was not for the jury to speculate about the answer to questions it had excluded. (ER 2506-07). It asked the jurors if they understood, and they nodded their agreement. (ER 2506). The case then continued with further witness testimony. (Id.). At no point did defendant object to the explanation by the district court.

On August 4, 2008, after the close of evidence, the court was preparing to hand out jury instruction prior to reading them to the jury. It informed the jury:

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

(ER 3061).

The court then read the jury instructions. These included the following:

> 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.

(ER 325 (Instruction No. 37))

> 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 to locate and transcribe the testimony and then the attorneys and I will have to review it as well.

(Id. (Instruction No. 38 (pertinent part).

> 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.

(Id. (Instruction No. 41 (pertinent part)).

After the instructions were read, the court asked the jury, "any questions on those instructions? No. All right." (ER 3064).

2. Standard of Review

This Court should review defendant's challenge to the court's handling of jury communications for plain error. United States v. Romero, 282 F.3d 683, 689 (9th Cir. 2002); United States v. Throckmorton, 87 F.3d 1069, 1072-73 (9th Cir. 1996) (plain error review for failure to object to district court's ex

parte answering of jury note). Defense counsel knew that as part of its preliminary instructions on July 24, 2008 the district court had instructed the jury that they could send questions to the clerk during trial by means of a signed note, and did not object to this procedure. Despite learning of a jury notes on July 25, 2008, two notes on July 29, 2008 with three questions, an unspecified communication on July 30, 2008, and other questions on July 31, 2008, counsel never objected to the procedures for these communications, requested that the court direct the jury to handle its communications differently, nor objected when the court instructed the jurors without first consulting the defense on July 30, 2008.

While defendant now complains that the court did not share the specific contents of notes with the parties, on four separate occasions the court discussed juror communication without a request from defense to see the communications. With that background, when defense counsel on July 31, 2008 said he was "curious" to see the jury notes that day, followed by "Yes, your honor" rather than an objection when his request was denied, it cannot be said that defendant raised with the district court the constitutional and statutory claims he is making now in his brief.

Further, and tellingly, while now asking this Court for a hearing on the matter, defendant failed to request a hearing in

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

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

It is not clear that there was any error at all. It is true that a defendant has a statutory right under Fed. R. Crim. P. 43(a) to be present at every stage at trial as well as a constitutional right to be at all critical stages. In order to protect that right, the Supreme Court has set forth procedures for handling jury notes during jury deliberations including answering them in open court after consulting first with defense counsel. See Throckmorton, 87 F.3d at 1073. Yet defendant cites no binding case for the proposition that these procedures apply with respect to jury notes and communications outside the

context of deliberations. United States v. Smith, 31 F.3d 469, 471 (1st Cir. 1994), cited by defendant, held that an ex parte personal visit from the judge to the jury before deliberations began violated Rule 43(a), but did not concern procedures for jury notes. Here, there was no visit between the judge and the jury, and the only communications made by the court to the jury were in open court and without objection. Similarly, defendant's reliance on United States v. Arriagada, 451 F.2d 487, 488 (4th Cir. 1971) is unpersuasive. The court in that case stated that Rule 43(a) applies to pre-deliberation communications between the jury and court, but did so in a case involving contacts during deliberation. Id.

The court's handling of the jury notes must be understood not in terms of handling notes during deliberation, but rather the court's broad powers to manage a trial. Under that power, the court did not have to take questions from the jury at all. "District courts have broad discretion when it comes to trial management." Graves v. Arpaio, 623 F.3d 1043, 1047 (9th Cir. 2010). This includes discretion about whether to permit juror requests for evidence. See United States v. Huebner, 48 F.3d 376, 383 (9th Cir. 1994); United States v. Richardson, 233 F.3d 1285, 1288-89 (11th Cir. 2000) (collecting cases); United States v. Douglas, 81 F.3d 324, 326 (2d Cir. 1996) (questioning by jurors allowed but discouraged). Thus, here, the district court

was within its discretion to ignore pre-deliberation questions from the jury seeking factual information. For example, the post-sentencing juror letter referenced in defendant's brief, lists three factual questions that the court could within its discretion not answer. (ER 3328). Similarly the court could reasonably defer any response on legal questions until after the close of evidence given its wide discretion in handling the charging the jury. See Johnson, 351 F.3d at 994. Courts frequently must wait until that time to know which legal issues are even appropriate for presentation to the jury, and juror discussions of the evidence prior to the close of evidence is prohibited. United States v. Pino-Noriega, 189 F.3d 1089, 1096 (9th Cir. 1999).

Even if one relies on the deliberation cases for guidance in this situation, there was no error, plain or harmless. Throckmorton, 87 F.3d at 1071-73, a plain-error case, is instructive for evaluating defendant's claim that he should have been privy to undisclosed jury notes and communications. In Throckmorton, during deliberation, the trial judge informed the parties that he had "received a few notes which [he] responded to" regarding playback of a videotape. Id. at 1071. The parties were shown the notes but did not ask how the court responded and raised no objections. Id. This Court found the ex parte communications with the jury violated Rule 43 and was

plain error. Id. at 1073. Nonetheless, the Court refused to reverse:

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

Id. at 1073.

Just as the defendant in Throckmorten could not complain about the ex parte communication between the judge and jury when he had made no effort to develop the record in the district court, so too should this Court bar relief due to defendant's failure to request copies of the jury notes or additional information beyond the one reference to being curious. This Court should not have to speculate about what the notes said when defendant did not seek them in the district court, including through a new trial motion. Further, the ex parte communication with the jury in Throckmorton was worse than in this case because there the district court spoke directly to the jury outside the presence of defendant and counsel. Here, the court never gave any reply to the jury except in open court, and defendant never objected to what the court said to the jury at

any time. Nor did the defendant object to the method by which the jury was communicating.

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

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

Finally there was no plain error affecting substantive rights in the court's July 31, 2008 instruction barring further "substantive" questions, to which defendant objects for the first time on appeal. Again, the court never had to answer any factual question from jurors during trial. Nonetheless, the court's later jury instructions contained a procedure for read-back of testimony and a procedure for communicating with the court. Defendant suggests that the court's earlier bar on substantive questions might have somehow overridden the later jury charge, making the jurors feel that their questions were unimportant. In the absence of any evidence, this Court should not presume such prejudice on plain-error review, especially on this record. On July 31, 2008, even after the court said it would answer no more substantive questions, it nonetheless immediately answered a question about exhibits, and -- after asking for follow-up -- responded in detail to another jury question. The court instructed the jury before and after trial that they should not infer from his actions any comment on the evidence or its view of the verdict. Moreover, the court before reading the jury instructions specifically invited the jury to ask it questions about these instructions during deliberations, informed jurors they could ask questions during the reading of the instructions, and asked the jurors if they had questions

after the instructions were read. Defendant's assertion of error should fail.

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

The district court properly rejected defendant's fourth new trial motion asserting violations of Brady v. Maryland, 373 U.S. 83, 87 (1963). The motion was based on a clear misinterpretation of remarks about marijuana charging decisions by one of the prosecutors at a sentencing hearing in order to set up a false contrast between those remarks and SA Reuter's rebuttal testimony. There was no contradiction and no material previously undisclosed to defendant or "suppressed."

### 1. Background

Defendant had called SA Reuter's phone number at the DEA in Los Angeles. (ER 2828). During her rebuttal testimony, SA Reuter testified that she had no recollection of a specific call with defendant, never told people on the telephone that "state or local matters were relevant to federal law" because state or local matters "have nothing to do with federal law." (ER 2843). Nor did she know of a situation in which she would have told a member of the public that opening a marijuana store "would be referred to local officials." (ER 2843-44). On this point, she noted that "federal law has nothing to do with state and local officials" and that it did not "matter what state and local

officials say or do." (ER 2844). Nor would it have mattered in phone calls with the public to her or her group if a marijuana store owner said it would comply with state law, because "it's still illegal under federal law." (ER 2845).

On March 27, 2009, during a telephonic sentencing conference, the district court asked the government about news reports that Attorney General Eric Holder had made statements to the effect that federal law enforcement efforts would be directed only at marijuana stores that violated both state and federal law. (ER 3382, 3385-89). Government counsel responding by explaining the "charging policies" of its "office" (USAO). (ER 3389). The prosecutor said that prior to the statement by the Attorney General federal prosecutors generally were not required to focus on marijuana stores that violated state as well as federal law. (Id.). However, "in this district we already made the determination that in allocating our resources we would focus on those that more clearly violate state law." Thus, the recent statements by the Attorney General had no impact in this district and were "somewhat of a red herring." (Id.). The USAO considered state law only a "factor" in its charging decision as it allocated resources, and always retained the right to prosecute any violation of federal law. (ER 3395-96)).

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

On June 4, 2009, defendant filed a new trial motion arguing that it could have impeached SA Reuter with the prosecutor's statement at the hearing, by pointing out that "it has 'always' mattered for the DEA investigative purposes whether an operator was violating state law" and that "in essence, it has always effectively been up to the counties or states to decide how to handle the matter of medical marijuana dispensaries," which he claimed was what DEA told him in his September 2005 phone call. (ER 3537-38).

On June 9, 2009, the government filed its opposition. (GER 659-743; CR 295). It asserted that the government had turned over all facts relevant to defendant's violations of state law in discovery almost a year before trial. It highlighted the case agent's search warrant affidavit that the prosecutor

referenced at the hearing, which discussed defendant's state law violations. (GER 670-71, 736 ¶ 53). It also included other materials showing that state law violation had been part of defendant's investigation from an early point and that this material was produced to the defense over a year before trial. (GER 670-72, 683-733) The government also showed that there was no inconsistency between the remarks at the sentencing hearing and the testimony of SA Reuter. (GER 673-76).

On June 11, 2009, at a hearing on the motion, government counsel clarified that its remarks had nothing to do with DEA's investigative practices, but rather the government's charging decisions. (ER 3589). When defense counsel asserted that state law was "always relevant to a [DEA] investigation" the district court twice corrected counsel, asserting "[t]here is no evidence of that." (ER 3591, 3592-93).

The district court noted that violations of state law were clearly spelled out in case agent's affidavit. Further, defense counsel could not articulate any specific items the government failed to produce. (ER 3597). The district court denied the motion. (ER 3598).

2. Standard of review

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

3. There Was No Brady Violation

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

There was no undisclosed exculpatory or impeaching materials. Had defense counsel wished to cross-examine SA Reuter on whether state law violations were potentially relevant to DEA and defendant's case they had all the relevant material. The search warrant and other disclosed materials reflect the fact that the CCCC investigation included violations of state law, and this was disclosed to defendant in the search warrant affidavit and other discovery materials long before trial. See (GER 682-743; ER 2174 (at time of affidavit case agent did not know if case would be prosecuted by state or federal prosecutor)).

There was no contradiction or inconsistency between SA Reuter's testimony and the prosecutor's remarks that could have been useful for impeachment or otherwise. As was confirmed at

the hearing on the motion, the prosecutor's remarks about state law only concerned the USAO's charging decisions; they had nothing to do with DEA investigation. As SA Reutter accurately testified at trial, there is a difference between which cases the DEA investigates and which cases the USAO prosecutes in federal court, stating that the latter decision "is not up to me." (ER 2864); see United States v. Hooton, 662 F.2d 628, 634 (9th Cir. 1981) (in vindictive prosecution case distinguishing between decisions of agents and those of the prosecutor); United States v. Hastings, 126 F.3d 310, 314 (4th Cir. 1997) (same in selective prosecution context). Moreover, defendant's testimony regarding his estoppel defense was that the DEA told him that it was up "to cities and counties to decide how they wanted to handle" marijuana dispensaries. (ER 2374 (emphasis added)). There was nothing to suggest that using state law violations as a factor for prosecution decisions is similar to defendant's testimony that federal agencies would leave the matter of marijuana dispensaries to cities and counties.

In addition, there was at least a year-and-a-half difference in the relevant time periods between defendant's call to DEA Group 2 in September 2005 and the time of the USAO's charging decisions, and different agents and offices involved. SA Reuter's testimony concerned the activities of Group 2 in September 2005. (ER 2836). By contrast, the decision to indict

defendant was based on DEA investigation that started in early January 2007, and a search warrant executed in March 2007. (GER 738, 740). Defendant called SA Reuter's group more than a year before DEA's Ventura Office began investigating him. As SA Reuter testified, SA Burkdoll worked in a separate office, and SA Reuter was not aware that she would be testifying in defendant's case until she was informed during defendant's opening statement. (ER 2852, 2859).

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

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

At sentencing, the government sought no more than the five-year mandatory-minimum sentence applicable to Count One. To avoid the five-year mandatory minimum, the district court

construed the aggravating-role enhancement under USSG § 3B1.1 to contain a new exception that applied to defendant and thereby to find defendant had satisfied the so-called safety valve provision, 18 U.S.C. § 3553(f). This ruling was incorrect as a matter of law. Section 3B1.1 by its express terms provides no discretion. Once it factual predicates were met, the court was required to apply the enhancement thus barring safety valve relief. The court erred in ignoring the plain language of § 3B1.1, as confirmed by case law.

1. Sentencing Proceedings

Immediately following the verdict, the district court told the parties that "the issue I do want the parties to argue at some point in time, a mandatory minimum in the face of a medical marijuana conviction. That's what I want the parties to argue." (ER 3182-83). The government asked for clarification and the court replied, "can an argument be made that the mandatory minimums should not apply here? In other words, does the court have the authority to do that." (ER 3183). The court explained that it wanted to know "can the court get around the mandatory minimum in a medical marijuana conviction situation?" (Id.).

On November 3, 2008, the Probation Office disclosed to the parties defendant's initial Presentence Investigation Report ("PSR"). The Probation Office applied the four-level aggravating role enhancement under USSG § 3B1.1(a) because

defendant was an organizer and leader of criminal activity that involved five or more participants. (PSR ¶ 55). Explaining its application of this enhancement, the Probation Office stated:

> The fact that this criminal activity involved more than five participants is clear simply by the number of employees under Lynch's control. Lynch employed ten employees[,] among them employees Armstrong, Baxter, Barellan, Holler, Sosa, Candelaria, and Doherty. These employees helped Lynch run the CCCC by serving in the areas of security, sales, and growing marijuana. His leadership of the criminal activity is also clear given his position as owner and operator of the CCCC, his control over the bank accounts and cash. Additionally, Lynch was the person who entered into the lease for the CCCC's business premises both in Atascadero and then in Morro Bay. Lynch himself was also involved in the day-to-day operations of the store. His position as overseer of his employees and his control over the business indicate that Lynch was the leader of the criminal activity. For this, a four-level increase was applied.

(PSR ¶ 55). The Probation Office noted that Counts Two and Three carried a one-year mandatory-minimum sentence, while the conviction on Court One carried a five-year mandatory minimum. (PSR ¶¶ 3, 39, 142).

At a January 5, 2009 hearing denying defendant's third new trial motion, against the government's request for a "tighter" schedule, the court continued sentencing and set a briefing schedule. (ER 3297-3316). The court noted that it had "no problem sentencing the particular defendant except for the issue of the mandatory minimum. If the mandatory minimum binds me, there is not much I can do. If the mandatory minimum does not

bind me, then I can do other things." (ER 3307-08). In response to the defense's plan to call a number of witnesses to the sentencing hearing, and before any parties had filed sentencing papers, the district court said that "[t]he issue is the legal issue, which is the mandatory minimum" and that equitable factors were "irrelevant" unless it had discretion. (ER 3313). The court twice added that it knew exactly how it would exercise its discretion "if I have it." (ER 3313-14).

The parties filed extensive sentencing briefs. With respect to application of the four-level role enhancement under USSG § 3B1.1, defendant admitted that the Probation Office's recitation of facts supporting application of USSG § 3B1.1 was accurate and correct. (GER 590-91 (citing PSR)). It argued rule enhancement should not apply because it would lead to an "anomalous, unjust, and absurd result," raised several theories none as to why the mandatory minimum should not apply, but did not attack the factual predicates behind the Probation Office's conclusion. (GER 591-99).

The government argued that the court had no discretion but to apply the one and five-year mandatory minimums. (GER 450-62). It filed a separate pleading regarding the safety valve. (GER 418-49). It noted that by its express terms, 18 U.S.C § 3553(f) did not apply to convictions under 21 U.S.C. § 859, and thus to the one-year minimums in Counts Two and Three. (GER 428-30).

The government also pointed out that there were overwhelming facts supporting the Probation Office's conclusion that defendant was an "organizer or leader of a criminal activity that involved five or more participants" within the meaning of USSG § 3B1.1. (GER 433-36). In addition to the facts set forth in the PSR, the government provided the court with the following additional facts, each supported by citations in the record such as trial exhibits, declarations of defendant, and trial testimony. (See GER 435-37 (cataloguing evidence for district court)). These included defendant's hiring and firing of employees and managing their payroll as the owner of the store at the top of the management hierarchy; his leadership and initiative in organizing and setting up the operation and interacting with public officials; and his management and control of the store's records, safes, money, and financial accounts. (ER 1416-18, 1430-33, 2355-57, 2508-11, 2528, 2585-86, 2728, GER 324-29, 403-10, 730-34; GX 45-51, 89, 176, 180-181; GER 406-07, 764-77, 783-88, 919-20, 937-39). It also included his name and signature on all CCCC customer forms and agreements, and his personal involvement in approving or paying for the vast majority of marijuana transactions at the store. (GER 250-51, 289-97; GX 101, 106, 108, 109-11, 166, 183, 184; GER 804-05, 811-12, 814-20, 821-24, 909-917, 947-958).

The government thus asserted that under 18 U.S.C. § 3553(f)(4) application of the § 3B1.1 enhancement barred defendant from satisfying the safety valve. The government opposed defendant's other legal arguments and said that it would be clear error for the district court to fail to apply the role enhancement against defendant and the accompanying five-year mandatory-minimum sentence for Count One. (GER 437-43). With only minor differences from the Probation Office, the government calculated defendant's guideline range to be 135 to 168 months. (GER 469-73). Nonetheless, it requested only the five-year mandatory sentence required by Count One. (GER 481).

The court held its first sentencing hearing on March 23, 2009. (CR 268; ER 3333-73). Although the government was seeking only the mandatory-minimum sentence, the court again delayed sentencing, over government objection, purportedly to obtain new information pertinent to the discretionary sentencing factors under 18 U.S.C. § 3553(a). The court said that it had recently seen statements in the media by the Attorney General concerning marijuana, and it thus ordered the government to provide the court with information from someone in Washington, D.C. regarding whether these statements changed the government's policy towards marijuana stores. (ER 3335-48). The government asked the court to rule on the legal issues regarding the applicability of the mandatory-minimum sentences. The district

court refused without first receiving the government's response to its new inquiry, stating that its sentencing decisions and the § 3353(a) factors were "a gestalt-type of thing." (ER 3360).

On March 27, 2009, the district court conducted a telephonic status conference during which it clarified its request to the government, and overruled the government's arguments that it would unnecessarily delay proceedings, because trial counsel were authorized to speak for the government, and had answers to the court's questions. (CR 272; ER 3377-99). On April 17, 2009, the government filed a letter from the Department of Justice in Washington D.C. stating that the prosecution complied with all policies of the Department and statements of the Attorney General. (CR 276; GER 613-15).

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

The court then made comments about various issues concerning mandatory-minimum sentences, and indicated that it did not wish to apply them:

> As to the safety valve, the safety valve would only work as to Count 1. The safety valve would not work as to Counts 2 and 3. So at this

> point the Court would have to conclude that the Court would be bound by the mandatory minimum in Counts 2 and 3. I can't see at this point any way out of it. And, frankly, to be blunt, I will indicate that -- that my preference would be that if I could find a way out, I would.
>
> . . . .
>
> Because, frankly, I don't think that this particular case is one which merits a mandatory minimum. But again, I'm not the legislature, and the legislature has clearly spoken on this issue.

(ER 3444).

The district court said "no judge on the Ninth Circuit" would allow defendant to be relieved from application of the mandatory sentences for Counts Two and Three. (Id.) However, the court indicated that it still had questions about whether it could find the safety valve applicable to the five-year sentence under Count One by finding that defendant was not an organizer, leader, manager, or supervisor under USSG § 3B1.1. (ER 3444-45). It read out loud Application Note 4 to USSG § 3B1.1. That application note provides various factors for distinguishing between those defendants who qualify for the four-level enhancement as organizer or leaders under § 3B1.1(a) and those who qualify for the three-level enhancement under § 3B1.1(b) as "mere" managers or supervisors. See USSG § 3B1.1 comment. (n.4). Yet the court appeared to believe that the factors could be used to determine whether § 3B1.1 applied at all, questioning whether it could avoid giving an aggravating role adjustment if

defendant reasonably believed his conduct lawful. (ER 3436-37). The court asked for further briefing on the issue. It noted that it had looked for a case that would allow it to avoid applying the mandatory minimums, but had not found one. It invited defense counsel to find it a case and "just let me know." (ER 3483). Later in the hearing, the court also asked for briefing on whether, in imposing the one-year mandatory sentences, defendant was required to serve that time in prison. (ER 3499-3500, 3503-10). The court said that prior to the next hearing it would draft a tentative decision. (ER 3504).

The district court made clear that it was asking for further briefing because it was searching for a way to avoid application of the five-year mandatory-minimum sentence:

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

(ER 3505).

As required, the parties filed additional briefing. The government asserted that § 3B1.1 unambiguously provided a role enhancement without regard to the defendant's scienter,

including his knowledge of the legality of his actions. (CR 286; GER 616-36). It also asserted that only incarceration could satisfy the mandatory prison sentences, and again urged the district court to apply the legally-required sentences notwithstanding the court's determination not to do so. (Id.). Defendant's filing emphasized his "reasonable belief" that this conduct was legal. (CR 289). The district court did not issue a tentative decision, but held a fourth sentencing hearing on June 11, 2009. (CR 324; ER 3572-3663). It reviewed the charges of conviction, and the guideline calculations of the probation office and parties. (ER 3603-08). It discussed marijuana prosecutions in other cases and, after hearing argument, denied defendant's attempts to seek relief from the mandatory-minimum sentences other than as provided by the safety valve provision. (ER 3609-20). It asked the government whether the general policy behind the safety valve or the decision in United States v. Booker, 543 U.S. 220 (2005) gave it flexibility, and the government said that they did not. (ER 3623-34).

The court ruled, however, that it would find "the safety valve applicable in this situation. Therefore, I will not find that the five-year mandatory minimum is applicable in this situation." It said it would sentence defendant to one year and one day in prison on each of Counts One, Two, and Three to run concurrently with a four-year period of supervised release.

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

Notwithstanding its promise to explain its sentencing rulings "within a week" by October 9, 2009, five months later, the district court had not issued its written ruling, or issued a final judgment in the matter. The government filed an ex parte request seeking a ruling by the district court and the filing of a judgment and commitment order. (CR 313). The court did not respond. Over four months later, on February 9, 2009, the government filed a second ex parte request for a ruling, noting that it had been over a year and a half since defendant's conviction. (CR 315). Approximately three months later, on April 27 and 29, 2009, the district court held two short hearings where it circulated its written explanation of its sentencing rulings from its June 11, 2009 opinion, but allowed

no further argument, made only technical corrections, or discussed other matters. (CR 320, 325; ER 3665-89).

It filed its 41-page sentencing memorandum on April 29, 2009. (CR 327; ER 391-431). The sentencing memorandum contained a description of California and federal marijuana law and the district court's characterization of defendant's activities while running the CCCC. (ER 393-409).

The court rejected defendant's arguments for relief from the mandatory-minimum sentences and held that safety valve did not apply to the one-year mandatory sentences under Counts Two and Three. (ER 417-20). However, it ruled that defendant qualified for relief from the five-year minimum sentence for Count One. The district court first found that it did not have to provide any aggravating role enhancement to defendant as an organizer/leader under USSG § 3B1.1(a), or any of the lesser enhancement under § 3B1.1. (ER 422-34). Referencing the application notes and background commentary to that provision, the court held that a court need not apply the provision when the organizer or leader of a criminal activity "did and does not present a danger to the public . . . and is not likely to recidivate." (ER 422). It then recited several facts that it believed demonstrated that defendant was not a risk to the public. (ER 423-25). The court thus concluded that § 3B1.1 did not apply. As the parties agreed that defendant had satisfied

the other four elements of the safety valve, the court concluded that defendant qualified for the safety valve under 18 U.S.C. § 3553(f) and USSG § 5C1.2. (ER 426).

Having found that § 3B1.1 did not apply, and that the defendant was entitled to a two-level reduction under USSG § 5C1.2, the court found defendant's advisory guideline range to be 87 to 108 months. (ER 412). Applying the factors set forth in 18 U.S.C. § 3553(a)) the district court sentenced defendant to serve one year and one day of imprisonment on Counts One through Three, and "time served" on Counts Four and Five. (ER 426).

2. Standard of Review

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

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

"It is axiomatic that a statutory minimum sentence is mandatory. . . . Where 'no exception to the statutory minimum applies . . . , the court lack[s] the authority to refuse to impose the ten-year mandatory minimum.'" United States v. Sykes, 658 F.3d 1140, 1146 (9th Cir. 2011) (quoting United States v. Haynes, 216 F.3d 789, 799-800 (9th Cir. 2000)); see also United States v. Working, 224 F.3d 1093, 1103 (9th Cir.

2000) (no court authority to sentence below statutory mandatory minimum absent government downward departure motion); USSG § 5G1.1 (the sentence imposed on count, regardless of departures, may not be lower than the statutory minimum for that count).

United States v. Booker, 543 U.S. 220 (2005) did not change this rule. United States v. Hernandez-Castro, 473 F.3d 1004, 1007 (9th Cir. 2007); United States v. Dare, 425 F.3d 634, 643 (9th Cir. 2005). Nor does the "parsimony principle" in 18 U.S.C. § 3553(a). United States v. Wipf, 620 F.3d 1168, 1170-71 (9th Cir. 2010). Likewise, the imposition of statutory mandatory-minimum sentences do not violate the Fifth Amendment's Due Process Clause. See, e.g., United States v. Hungerford, 465 F.3d 1113, 1118 (9th Cir. 2006).

There are only two well-established exceptions to the rule that prevents a district court from imposing a sentence below a statutory mandatory minimum. First, for sentences imposed following a motion by the government pursuant to 18 U.S.C. § 3553(e) due to defendant's "substantial assistance" to authorities; Melendez v. United States, 518 U.S. 120, 128 (1996). The government made no such motion in this case.

Second, there is an exception for sentences imposed pursuant to the "safety valve" provision in 18 U.S.C. § 3553(f). Section 3553(f) sets forth five independent criteria that a

defendant must establish in order to authorize a district court to impose a sentence below an otherwise applicable mandatory minimum. 18 U.S.C. § 3553(f)(1)-(5). The one disputed criteria in this case is set forth in 18 U.S.C. § 3553(f)(4):

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

18 U.S.C. § 3553(f)(4). Defendant here was not charged with engaging in continuing criminal enterprise, so application of the safety valve depended on whether he qualified as "an organizer, leader, manager, or supervisor under the sentencing guidelines."

United States Sentencing Commission Section 5C1.2 lists and incorporates the five required safety valve criteria of 18 U.S.C. § 3553(f). See USSG § 5C1.2(a). Section 5C1.2(a)(4) sets forth the "organizer, leader, manager, or supervisor" element from 18 U.S.C. § 3553(f)(4). The commentary to USSG § 5C1.2 explains that an "[o]rganizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines" for the safety valve purposes "means a defendant who receives an adjustment for an aggravating role under [USSG] § 3B1.1. (Aggravating Role)." USSG § 5C1.2 comment. (n.5). Thus, any defendant who receives an aggravating role enhancement under USSG § 3B1.1 fails to meet this

requirement for safety valve eligibility "under the sentencing guidelines" and therefore, by the express terms of 18 U.S.C. § 3553(f)(4), is statutorily ineligible for relief from a mandatory-minimum sentence. See id.

Section 3B1.1 includes three different degrees of offense level enhancements depending on the number of participants involved in the offense, and defendant's level of responsibility. The highest enhancement is the four-level upward adjustment under USSG § 3B1.1(a), which the government sought and the probation office recommended in this case. It provides, as follows:

> Based on defendant's role in the offense, increase the offense level as follows:
>
> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

USSG § 3B1.1. Similarly, USSG § 3B1.1(b) provides a three-level enhancement for being a "manger or supervisor (but not an organizer or leader)" of criminal activity involving five or more participants, and USSG § 3B1.1(c) provides the lowest, two-level enhancement for being a "manager or supervisor" where there are fewer than five participants. USSG § 3B1.1; see generally United States v. Rivera, 527 F.3d 891, 908 (9th Cir. 2008) (discussing distinction between USSG § 3B1.1(a) and (b)). While a defendant may be subject to no more than one of these

three enhancements under § 3B1.1, any of these three aggravating role enhancements precludes safety valve eligibility. USSG § 5C1.2 n.5; USSG § 3B1.1; United States v. Ceron, 286 F. App'x 974 (9th Cir. 2008).

Though the statutory safety valve provision incorporates and references the sentencing guidelines, Booker does not impact the safety valve determination, nor make discretionary those requirements of § 3553(f) that reference the guidelines. United States v. Holguin, 436 F.3d 111, 116-17 (9th Cir. 2006); see also United States v. Cardenas-Juarez, 469 F.3d 1331, 1334-35 (9th Cir. 2006) (Booker does not give district court discretion to disregard safety valve where requirements met). Instead, USSG § 3B1.1 provides clear instruction that if certain factual conditions exist with respect to the size of a criminal organization and defendant's responsibility for overseeing members of that organization, then a defendant receives the specified enhancement to his guidelines offense level. If the factual predicate of the defendant's role and number of participants are met, then the court is commanded to "increase" the offense level. See USSG § 3B1.1; cf. United States v. Williamson, 154 F.3d 504, 505 (3d Cir. 1998) ("the logical structure of the Guideline ('if A, then B') clearly commands that a definite result . . . must follow the occurrence of the stated condition.") (construing USSG § 3C1.1).

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

The application notes to USSG § 3B1.1 provide definition for issues such as who is a "participant" in a crime, and what distinguishes mere "management or supervision" from "leadership and organization." USSG § 3B1.1 comment. (n.1, 4). However, the district court did not take issue with the overwhelming evidence that defendant was an organizer and leader of a crime that involved more than five participants. It acknowledged that the factual predicates of § 3B1.1(a) were met, noting that "Lynch did put together [the marijuana store's] operations which had about ten employees." (ER 425). In trying to show that defendant presented minimal harm to the public, the court highlighted several facts demonstrating defendant's organizer/leader role. It noted his obtaining licenses for the business, "regulating the conduct of CCCC's employees," requiring workers and customers to sign various agreements and forms, and keeping detailed records. (ER 425-26).

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

Note Two provides that:

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

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

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

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

> Background: This section provides a range of adjustments to increase the offense level based on the size of a criminal organization (i.e., the number of participants in the offense) and the

> degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.
>
> In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).

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

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

(Id.). It then found that defendant's actions in running his medical marijuana store showed that he presented a minimal danger to the public or threat of recidivism, and therefore it refused to apply any role enhancement under § 3B1.1. (Id. at 33-35).

5. The District Court Violated Clear Rules of Guideline Interpretation by Ignoring the Text and Mandatory Nature of USSG § 3B1.1

A fundamental flaw in the district court's reasoning is its failure to follow the plain meaning of § 3B1.1, and its refusal to recognize that it was required to apply that meaning once it determined that the factual predicates for § 3B1.1 had been satisfied.

In construing a provision of the guidelines, a court must apply conventional principles of statutory construction. United States v. Soberanes, 318 F.3d 959, 963 n.4 (9th Cir. 2003). If the plain text of the guidelines addresses an issue, it controls, and the analysis ends. E.g., United States v. Valenzuela, 495 F.3d 1127, 1133 (9th Cir. 2007) ("The plain meaning of unambiguous language in a guideline provision controls."); United States v. Alexander, 287 F.3d 811, 820 (9th Cir. 2002) (same).

Background notes are authoritative only to the extent that this commentary is consistent with the text of the guideline itself. See Stinson v. United States, 508 U.S. 36, 43 (1993);

United States v. Powell, 6 F.3d 611, 613-14 (9th Cir. 1993); United States v. Sash, 396 F.3d 515, 521-23 (2d Cir. 2005) (rejecting use of background commentary to overcome plain language of guidelines enhancement; enhancement "may apply in situation not contemplated by background commentary"). It is improper for a district court to create an exception to a guideline provision that is not found in the text of § 3B1.1. As the Eighth Circuit explained in a case where the government argued that a two-level enhancement for aggravating role was appropriate but the Eighth Circuit found that the facts supported a four-level enhancement under § 3B1.1:

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

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

As noted above, the text of § 3B1.1 requires application of the four-level enhancement in § 3B1.1(a) where the defendant was an organizer or leader of that activity and the activity involved more than five participants. USSG § 3B1.1(a). The district court found that these facts had been met, but improperly sought to give itself flexibility and discretion to avoid imposing the enhancement.

The district court's attempt to avoid application of the guideline enhancement runs contrary to well-established appellate case law. These cases hold that application of guidelines with an "if/then increase" structure like USSG § 3B1.1 are mandatory, and "equitable principles do not apply." United States v. Savin, 349 F.3d 27, 30 n.10 (2d Cir. 2003); Williamson, 154 F.3d at 505. This principle has been directly applied in cases involving § 3B1.1. United States v. Jimenez, 68 F.3d 49, 51-52 (2d Cir. 1995) (holding § 3B1.1 "is mandatory once its factual predicates have been established" and reversing district court that refused to apply enhancement after determining that defendant was a manager or supervisor of a drug organization); United States v. Feinman, 930 F.2d 495, 500 (6th Cir. 1991) ("Once a sentencing court makes a factual finding as to the applicability of a particular adjustment provision, the court has no discretion, but must increase the offense level by the amount called for in the provision"; reversing district court's application of two-level enhancement under § 3B1.1(b) where facts supported four-level enhancement under § 3B1.1(a)). It has also been frequently applied in cases involving the obstruction of justice enhancement under USSG § 3C1.1, which is similarly structured. See United States v. Barajas, 360 F.3d 1037, 1043 (9th Cir. 2004) (enhancement for obstruction of justice under USSG § 3C1.1 mandatory once factual predicates

met); United States v. Ancheta, 38 F.3d 1114, 1118 (9th Cir. 1994) (enhancement is "mandatory, not discretionary"); United States v. Zaragoza, 123 F.3d 472, 485-86 (7th Cir. 1997) (reversing district court that refused to apply provision to avoid "excessive sentence"); Hall v. United States, 46 F.3d 855, 858-59 (8th Cir. 1995); United States v. Alvarez, 927 F.2d 300, 303 (6th Cir. 1991) (district court has no discretion but to apply obstruction enhancement where factual prerequisites met).

That the guideline provision at issue had an impact on application of the safety valve does not change the analysis. This Court has been clear and consistent that courts may not use policy or equitable considerations to "create an exception to one of the five [safety valve] criteria established by Congress and the President by judicial fiat." United States v. Yepez, 704 F.3d 1087, 1091 (9th Cir. 2012) (en banc) (internal quotation marks omitted) (rejecting attempt to circumvent requirement in 18 U.S.C. § 3553(f)(1) that defendants have no more than one criminal history point by using state nunc pro tunc order on past conviction); United States v. Valencia-Andrade, 72 F.3d 770, 774 (9th Cir. 1995) (refusing to allow departures to satisfy 18 U.S.C. § 3553(f)(1) where criminal history consisted only of minor traffic violations).

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

reach of a statute beyond the express intention of Congress, to avoid a harsh result" because courts "have no constitutional authority to adopt a new exception to the mandatory minimum penalty requirements of 21 U.S.C. §§ 841, 844, and 846." Valencia-Andrade, 72 F.3d at 774 (quoting Crooks v. Harrelson, 282 U.S. 55 (1930); see Hernandez-Castro, 473 F.3d at 1008 (reaffirming Valencia-Andrade after Booker)).

6. The District Court Misread the Guidelines Commentary on Which it Relied

Even if it were proper for the district court to craft a policy exception to the text of the guidelines from guideline commentary and application sections, the sources relied on by the district court would not support the new rule it created.

Contrary to the district court's reasoning, Application Note Two to § 3B1.1 does not support a distinction between a class of organizer/leaders who "qualify" factually and receive the aggravating role enhancement, and a different group (including defendant) who "qualify" but do not receive the enhancement. Note Two distinguishes between organizers/leaders of human criminal participants, all of whom are covered by the clear text of § 3B1.1, and those defendants who do not supervise people, but manage "property, assets, or activities of a criminal organization." USSG § 3B1.1 comment. (n.2). This latter group who lead, organize, supervise, or manage no

participants at all are not covered by the text of §3B1.1, but might be eligible for an upward departure under the guidelines generally. Id. Nothing in Note Two suggests there would be a group of organizer/leaders of other criminal participants who could somehow avoid receiving an aggravating role enhancement based on other factors.

The district court also misread the background commentary to USSG § 3B1.1. As set forth in full above, and consistent with the text of § 3B1.1, the background commentary starts by pointing out that § 3B1.1 "provides a range of adjustments to increase the offense level based on the size of a criminal organization . . . and the degree to which the defendant was responsible for committing the offense." USSG § 3B1.1 comment. (backg'd). It refers to the fact that under the provision the offence level adjustment increases from two to four under subsections (a) through (c) depending on the size of the organization and responsibility of the defendant. It says nothing about creating an exception to § 3B1.1 based on factors other than supervisory role and size of the organization, as the district court did. The district court also gave insufficient consideration to the next sentence which states that "[t]his adjustment is included primarily because of concerns about relative responsibility," (id.) (emphasis added)) a point which again would in this case properly focus attention on defendant's

leading role with respect to his other conspirators, rather than the other factors relied on by the district court.

The district court did rely heavily on the next sentence, which notes that "it is also likely" that supervisors and managers "tend to profit more" and present a "greater danger to the public" or likelihood of recidivism. But in selectively over-relying on this one sentence, the court ignored that use of the word "likely" and the absence of any statement that § 3B1.1 does not apply in the absence of facts showing greater profit or greater public danger. See United States v. Calvert, 511 F.3d 1237, 1244 (9th Cir. 2008) (background commentary noting that conduct "frequently" involves an effort to obstruct ongoing proceeding "necessarily means that it does not 'always' have to be tied to such a proceeding"). The district court also ignored the context provided by the very next sentence of the background section, which states that it is the "Commission's intent" that "this adjustment should increase with both the size of the organization and the degree of responsibility." (Id.). This formulation directly follows the factors set forth in the text of §3B1.1 without reference to danger to the public, or recidivism, that the district court used to formulate its exception.

In sum, the background and commentary to § 3B1.1 support the plain reading and straight-forward application of that

provision. It applies to defendant based solely on his supervisory role and the number of participates in the crime. It undermines the district court's attempt to create an exception to § 3B1.1 based on other factors.

7. The District Court Committed Additional Errors in its Safety Valve Analysis

The district court made further errors in its safety valve determination. At the start of its analysis of § 3B1.1, the district court referenced the Supreme Court's decision in Koon v. United States, 518 U.S. 81 (1996). (ER 422). Although not expressly relying on this reasoning, the district court suggested that Koon might permit it to find that defendant's medical marijuana activities presented an "atypical" case "outside the heartland" that would "justify a departure from the ordinary/conventional view of what characteristics/activities are used to define the status of being an 'organizer, leader, manager or supervisor.'" (Id.).

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

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

Although the district court's fundamental misunderstanding of Koon and the structure of the sentencing guidelines was not clearly a part of its § 3B1.1 ruling, it highlights the breadth of the district court's error, and the extent of its effort to reach the result it desired.[15]

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

J. DUE TO THE DISTRICT COURT'S STRONGLY HELD VIEW AND UNUSUAL EFFORTS AGAINST APPLYING THE REQUIRED SENTENCE, THIS COURT SHOULD REASSIGN THE CASE TO A NEW JUDGE ON REMAND

Should the government succeed in reversing the district court's ruling on § 3B1.1 and application of the five-year mandatory-minimum sentence, one might expect that the matter should be resolved thereafter quickly on remand with imposition of the required five-year sentence. However, the district court's actions in this case counsel otherwise. The district court made a number of blunt statements opposing the five-year mandatory sentence. It engaged in highly unusual and protracted efforts to search for any legal rationale to avoid the sentence, and showed a willingness -- often without explanation -- to delay proceedings for months and even years. These factors raise a strong possibility that the district court will seek to frustrate, or to further unacceptably delay, the consequences of a successful government appeal. For these reasons, following a successful government appeal, the government seeks to have the case reassigned on remand to a new judge.

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

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected,
>
> (2) whether reassignment is advisable to preserve the appearance of justice, and
>
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Jacobs, 855 F.2d 652, 656 (9th Cir. 1988); accord United States v. Paul, 561 F.3d 970, 975 (9th Cir. 2009).

It is easy to conclude that the district court would have great difficulty putting out of its mind its previously expressed views opposing application of the mandatory-minimum sentence in this case. The court stated its firm views directly and repeatedly. Twice at the April 23, 2009 sentencing hearing, it stated its opposition to applying the minimum sentence and also said that it was actively attempting to "find a way out," and inviting the defense to help. (ER 3444, 3505). Immediately after the verdict it said it was looking for a way to “get around” the mandatory minimum. (ER 3183). Just as problematic was the court twice saying on January 5, 2009, before either party had filed a sentencing position, that it knew the sentencing result it wanted to reach. (ER 3313-14 ("I know what I'm going to do . . . if I have discretion.")). The court had formed a hardened opinion early on and had little concern for

the adversarial process or the procedures required during sentencing. Indeed, the extraordinary lengths the court went to during sentencing -- a total of four sentencing hearings, multiple rounds of briefing, a request for comment from Washington D.C., and a final delay of approximately 11 months before issuing its opinion -- reflect a substantial commitment by the district court to reach its flawed conclusion.

Taken as a whole, the nature of the past proceedings also demonstrate why reassignment is necessary to preserve the appearance of justice. Most significant are the issues of fairness and delay. The district court continually sacrificed the efficient administration of justice in the interest of searching for a rationale or event to reach its desired result of keeping defendant from a lengthy prison term. The court took the highly unusual step of requiring trial counsel to confirm the government's sentencing position with officials in Washington, then essentially ignored the Department's response in its subsequent sentencing ruling. (ER 402 n.7). The court delayed the issuance of its written sentencing opinion for eleven months after announcing it had reached its conclusion and said would be able provide its rationale "within a week." It appears that the court was either waiting for some new legal or political decision to make its task easier, or had -- contrary

to its representations -- not figured out the legal rationale for its sentencing decision when it announced it.

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

Finally, a new judge would not be overly-burdened on remand. As the government will be seeking only the applicable mandatory-minimum sentence as to Count One, the judge need only properly apply that legally required minimum, and not revisit the district court's other sentencing rulings.

## K. DEFENDANT'S CURSORY ARGUMENTS SEEKING TO OVERTURN THE SENTENCE THE DISTRICT COURT IMPOSED ARE INCONSEQUENTIAL IN LIGHT OF THE APPLICABILITY OF THE FIVE-YEAR SENTENCE, AND ALSO LACK MERIT

Defendant raises two brief arguments against the sentence the district court imposed on Counts One through Three. Since those sentences were below the five-year sentence the court was

required to impose on defendant these arguments are of little consequence, and they lack merit.[16]

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

For the first time on appeal, defendant argues that the district court erred by imposing a one-year sentencing on Count One. (AOB 78). Although the issue was never raised below, he suggests that the Court imposed this sentence because it mistakenly thought that it was required to because one of objects of that count was violations of 21 U.S.C § 859, and that statute carried one-year minimums for Counts Two and Three. Defendant correctly notes that there was no jury finding to support a mandatory one-year sentence under § 859 for Count One. However, as set forth above, the court should have imposed the applicable five-year mandatory sentence on Count One, thus mooting defendant's argument. In any event, it is not clear that the court would have sentenced defendant to less than a year on Count One given that his sales to minors under 21 as

[16] As the district court correctly held, by its express terms, the safety valve, 18 U.S.C. § 355(f), does not apply to convictions under 21 U.S.C. § 859, and thus the one-year minimums in Counts Two and Three. (ER 420); see United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir. 2000). Without analysis, defendant also seeks to preserve an argument that Kakatin was wrongly decided. (AOB 80). As the government noted below, Kakatin correctly interprets clear statutory text, so it need not be reexamined. (GER 428-31).

part of the conspiracy included the two individual transactions that led to one-year sentences in Counts Two and Three, in addition to many additional other transactions with minors proven at trial. Also, on multiple separate occasions, the court expressed its intent to impose the one-year sentence on Count One, and did not reference the mandatory minimum in so doing. (ER 429, 3656-59, 3682-84). There was no plain error.

2. The One-Year Mandatory Minimum Sentences in Counts Two and Three under 21 U.S.C § 859 Apply Notwithstanding the Longer Mandatory Minimum in Count One

Defendant suggests that the language of 21 U.S.C. § 859 can be read to preclude application of any mandatory sentence to him. (AOB 79-80). In the district court, defendant relied on United States v. Williams, 558 F.3d 166 (2d Cir. 2009), a case interpreting 18 U.S.C. § 924(c), to argue as he does now that the second sentence of 21 U.S.C. § 859(a), the so-called "except clause," prevented application of the one-year mandatory minimum to him because there was a higher mandatory minimum potentially applicable to him in Count One, even though the district court might not impose the Count One minimum. (ER 3512-3526). The government opposed the argument (CR 290; GER 650-59), and the district court rejected it, finding it an "unnatural reading of the statute." (ER 3613-22, 3637). The Supreme Court rejected the Second Circuit's reasoning in Abbott v. United States, 131

S. Ct. 18 (2010); see also United States v. Tejada, 631 F.3d 614, 617-19 (2d Cir. 2011).

As set forth in the government's brief to the district court, even before Abbott overruled the Williams case on which defendant relied, defendant's arguments for construing § 859 to allow him to avoid application of any mandatory sentence merely because there is a mandatory minimum available in Count One under 21 §§ U.S.C. 841(a)(1), 841(b)(1)(B) was even weaker here than in the § 924(c) context in Williams. (GER 652-58). As explained in detail in that earlier pleading, defendant's argument focuses on the “except clause” of § 859, while ignoring the rest of the statue. The plain meaning of "except to the extent a greater minimum sentence is otherwise provided by section 841(b)" is to reference mandatory penalties for charged conduct under a specific § 859 charge, not conduct separate and apart from the violation of § 859. Defendant's reading would radically suggest that the “except clause” can apply to vitiate the mandatory minimum for him if there was a mandatory charge to him on another count and thus put him in a better place than a person who was not charged with a drug conspiracy. (Id.). No court has adopted defendant's argument, and it should fail.

## IV

## CONCLUSION

For these reasons, the conviction should be affirmed, and the court should reverse the district court's decision to not apply the five-year mandatory-minimum sentence.

Dated: November 1, 2013

Respectfully submitted,

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## STATEMENT OF RELATED CASES

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

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