EILEEN M. DECKER
United States Attorney
PATRICK R. FITZGERALD
Assistant United States Attorney
Chief, National Security Division
DAVID KOWAL (Cal. State Bar No. 188651)
Assistant United States Attorney
Cyber and Intellectual Property Crimes Section
1500 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-5136
Facsimile: (213) 894-8601
E-mail: david.kowal@usdoj.gov

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES LYNCH, Defendant.	No. CR 07-689-GW GOVERNMENT'S OPPOSITION TO DEFENDANT'S REQUEST FOR AN INDICATIVE RULING **Hearing Date:** Feb. 2, 2017, 8:00 a.m.

The United States of America, by and through its counsel of record, the United States Attorney for the Central District of California, hereby files its opposition to the motion filed on December 12, 2016 as the district court clerk's docket number ("CR") 453 by defendant Charles Lynch ("defendant") seeking "Indication That the Court Would Grant or Entertain A Motion for McIntosh Relief" ("Motion").

The government's opposition is based on the files and records in this case, the attached memorandum of points and authorities, and the exhibits attached hereto.

Many of the relevant documents pertinent to this opposition have been electronically filed on the docket of this Court, or on the docket of the Court of Appeals case in which this matter is pending, Court of Appeals case numbers 10-50219 and 10-50264. Court of Appeals documents are referenced herein by "CTA" followed by their electronic filing number for the document. Due to the size of the Court's docket in this case, for the convenience of the Court and counsel, the government has attached pertinent parts of the record as exhibits to this opposition, as follows:

Ex. A	Govt.'s Amended Sentencing Position, dated 03/06/2009 (CR 252).
Ex. B	Declaration of Special Agent Rachel Burkdoll and Exhibits 9-11 thereto, filed 2/20/2009 (CR 236).
Ex. C	August 2008 California Attorney General Guidelines on marijuana, filed 2/20/2009 as Exhibit 15 to Burkdoll declaration (CR 236).
Ex. D	Declaration of Charles C. Lynch, dated 1/30/2009, filed 3/3/2009 (CR 246-2).
Ex. E	Defendant Lynch's Reply to Government's Sentencing Position, filed 3/9/2009 (CR 255).
Ex. F	Sentencing Memorandum, filed by the Court 4/29/20010 (CR 327).
Ex. G	Declaration of Joseph D. Elford in Support of Charles C. Lynch's Position Re: Sentencing, dated and filed 4/22/2009 (CR 279).
Ex. H	Excerpts of Transcript of Sentencing Hearing on 8/4/2010. (CR 367).
Ex. I [Filed separately under seal]	Excerpt of transcript of safety valve interview, dated 3/19/2009, filed UNDER SEAL as part of CR 293 on 6/8/2009.

Ex. J	Government's Motion For Leave To File Response to Defendant's Section 538 Motion With Fourth Brief on Cross-Appeal, filed in the Ninth Circuit 3/9/2015 (CTA 94).
Ex. K	Defendant's Opposition to Delay Adjudication of Motion to Enforce Section 538, filed in the Ninth Circuit 3/23/2015 (CTA 96).
Ex. L	Government's Reply re Motion of Leave, filed in the Ninth Circuit 4/2/2015 (CTA 97).
Ex. M	Defendant's Motion for Rehearing En Banc, filed in the Ninth Circuit 4/27/2015 (CTA 101).

As noted, Exhibit I is filed separately under seal. It contains materials previously filed under seal in this Court.

Dated: January 19, 2017

Respectfully submitted,

EILEEN M. DECKER
United States Attorney

PATRICK R. FITZGERALD
Assistant United States Attorney
Chief, National Security Division

/s/
DAVID KOWAL
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES:

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

FEDERAL RULES:

MEMORANDUM OF POINTS AND AUTHORITIES

Several years after his sentencing for federal marijuana crimes, twenty months after the Ninth Circuit denied a similar motion during his pending appeal yet allowed him to raise the same issues in his final appellate brief, but only weeks before that brief was due after years of delay, defendant filed the present motion for a non-binding indicative ruling (the "Motion"). The Motion asks that defendant's case be dismissed or that the government be prevented from spending money on his appeal under the terms of a Congressional appropriations rider regarding medical marijuana. Defendant's motion is badly flawed both substantively and procedurally, as it ignores and distorts both the law and the record.

Procedurally, defendant's Motion ignores Fed. R. Crim. P. 37 which governs his indicative motion. That rule and case law require that this Court defer ruling on the Motion because it presents a legal question on an existing evidentiary record that is properly resolved in the Ninth Circuit as part of his pending appeal. A decision by this Court would also improperly circumvent the government's pending request that the Court of Appeals reassign this case on remand to a new district court judge. Rule 37 further requires motions to be "timely," but defendant's is manifestly and unreasonably late as he unjustifiably delayed the filing of his motion for nearly two years.

Should the Court decide to address it, the substance of defendant's motion is no better. The appropriation rider on which defendant relies restricts spending to a narrow category of prospective marijuana prosecutions, but cannot unwind defendant's investigation, conviction, judgment, or appeal -- all of which

commenced before the rider went into effect. Under United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016), the rider also applies only to defendants who can meet the burden of showing that their conduct "strictly" and "fully" complied with "all" state medical marijuana laws. Contrary to the statements in defendant's motion, this Court already ruled at sentencing that defendant's CCCC business "was not operated in conformity with California law." Defendant's attempt to get around that ruling by positing that he ran a legal marijuana collective is fatally undermined by his prior, emphatic statement at sentencing that he did not even attempt to operate a collective, by this Court's rejection at sentencing of any collective/cooperative defense, and by the overwhelming evidence in the record that defendant did not comply with state marijuana law.

I. BACKGROUND

On August 5, 2008, a jury convicted defendant of five marijuana-related Title 21 narcotics charges arising from his ownership and operation of a marijuana business, the Central Coast Compassionate Caregivers ("CCCC"). After post-trial motions, the Court held four sentencing hearings between March 23 and June 11, 2009, during which it heard testimony from multiple defense witnesses. (CR 361-64 (tr. of hearings)). The parties also submitted extensive sentencing briefs. (See Ex. F at 2-3). In its sentencing recommendation, the government argued that in addition to violating federal law, defendant's conduct had violated state marijuana law because defendant was not a "primary caregiver," and because he had not operated a collective or cooperative under state marijuana law. (Ex. A at 12-13). In reply, defendant acknowledged that the government was "correct" that defendant did not operate a collective or

cooperative, and in fact "he made no attempt" to operate a collective as described in the 2008 Guidelines of the California Attorney General ("Cal. AG Guidelines," attached as Exhibit C) on state marijuana law. (Ex. E at 15).

In April 2010, the Court issued a 41-page sentencing memorandum and a judgement and commitment order, sentencing defendant to one year in prison. (Ex. F; CR 328). In explaining its sentencing rulings, the Court said that it agreed with the government that the "CCCC was not operated in conformity with California state law." (Ex. F at 33-34, n. 25). Both sides appealed.

After defendant filed his opening brief, the government filed its combined answering brief and opening brief on cross-appeal on March 14, 2014. (Mot., Ex. C). Defendant's final brief, the third brief on cross-appeal, was initially due May 11, 2014. On November 5, 2014, the circuit granted defendant's second extension to March 12, 2015. (CTA 89).

On December 16, 2014 -- long after defendant had been convicted and sentenced, and nine months after the government had filed its second brief on cross-appeal -- the President signed into law a budget bill, which became the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130. Section 538 of that act prohibited the use of federal funds to "prevent [California] from implementing [its] own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Id. § 538, 128 Stat. 2217 (the "appropriations rider"). On December 18, 2015, the appropriations rider was reenacted as Section 542 of the Consolidated Appropriations Act of 2016. Pub. L. No. 114-113, 129 Stat. 2242, 2332-33, § 542.

("§ 542," or the "appropriations rider"). On December 10, 2016, the appropriations rider was included as part of the Continuing Appropriations Act of Fiscal Year 2017 which extended the December 18, 2015 law through April 28, 2017. Pub. L. No 114-254.

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

On April 13, 2015, the Ninth Circuit denied defendant's "urgent" motion without prejudice to defendant renewing his arguments in his final brief on appeal. The Circuit also denied defendant's alternative request for remand, without prejudice to defendant seeking an indicative ruling in the district court pursuant to Fed. R. App. P. 12.1. (See Mot., Ex. A).

Defendant moved for reconsideration or rehearing en banc, arguing, among other things, that his motion presented "purely legal questions" appropriate for resolution by the Circuit. (Ex. M at 15-16). On June 22, 2015, the Ninth Circuit denied defendant's request and granted defendant until August 21, 2014 to file his third brief

on cross appeal. (CTA 112). Defendant then obtained seven more extensions to file his brief. Recognizing defendant's delay, the Ninth Circuit has twice ordered that further extensions would be "disfavored" and twice more "strongly disfavored." (CTA 114, 119, 121, 123, 125, 127, 129). Defendant's brief is now due on February 13, 2017. On December 12, 2017, twenty months after the Ninth Circuit denied defendant's "urgent" motion under the appropriations rider and referenced the indicative motion procedure, defendant filed the present Motion.

II. ANALYSIS

A. The Court Should Decline Defendant's Request for An Indicative Ruling Because It Is Not Proper Under Fed. R. Crim. P. 37

1. Ruling Is Inappropriate Given The Procedural Posture of the Case and The Issues Presented

Under Federal Rule of Criminal Procedure 37(a)(1) this Court should defer ruling on defendant's Motion until after the Ninth Circuit decides the appeal. Such deferral -- or, alternatively, outright denial of the motion under Fed. R. Crim. P. 37(a)(2) -- is appropriate since defendant only seeks a legal ruling based on the existing record, and the Ninth Circuit has allowed defendant to raise the same issues in his final appellate brief. It is also correct for this Court to defer ruling on the Motion until after the Ninth Circuit appeal is complete because the government's cross-appeal includes a pending request that this matter be reassigned on remand.

Although not cited by defendant, Federal Rule of Criminal Procedure 37 is the operative rule governing his motion for an "indicative" ruling where the district court lacks jurisdiction due to a pending appeal.[1] That rule works in combination with Fed. R.

[1] Fed. R. Crim. P. 37 (passed in 2012), provides:

App. P. 12.1 to alert the court of appeals to a potential district court ruling which may impact the appeal. See Fed. R. Crim. P. 37; Fed. R. App. P. 12.1; see United States v. Maldonado-Rios, 790 F.3d 62, 64-65 (1st Cir. 2015) (explaining procedure). Due to the pendency of the appeal, the district court lacks jurisdiction to grant the relief sought in an indicative motion. Maldonado-Rios, 790 F.3d at 64. If the district court chooses not to defer or deny the motion under Fed R. Crim. P. 37(a)(1) or (2), then pursuant to Fed R. Crim. P. 37(a)(3) it may indicate that it would grant the motion on remand or that the motion presents a substantial question, and the movant must promptly alert the court of appeals. Id. The court of appeals then has the option of remanding the matter to the district court to rule on the motion. Id.

The advisory committee notes to Rule 37 explain that the rule "will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) . . . , reduced sentence motions under Criminal Rule 35(b), and motions" to reduce a sentence based on retroactive change to the guideline range. Fed. R. Crim. P. 37, Adv. Comm. Notes. Notably, each of these types of motion depend on the development of new factual information or

---

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

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

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

Sentencing Guidelines that were not part of the existing record on appeal.

Here, by contrast, defendant expressly rejects adding to the evidentiary record, which he claims is "already well developed." (Mot. at 6, 16). Instead, he seeks a legal ruling on the existing record as applied to a statute and case law. This is consistent with his prior representations in the Ninth Circuit that seeking relief under the appropriations rider presents "purely legal questions" that should be decided by the Circuit. (See Ex. M at 15-16). Defendant's Motion thus does not raise an issue proper for a decision under Rule 37. Instead, the Ninth Circuit should decide the matter in the first instance. As the Ninth Circuit has held, if a matter for remand to the district court concerns primarily a question of law and the primary factual issues are not in dispute, then "policies of judicial efficiency and finality weigh in favor of [the Circuit] resolving the question." United States v. Saxman, 325 F.3d 1168, 1172 (9th Cir. 2003).

This is especially true here where defendant can raise the application of the appropriations rider in his next appellate brief. If the Court of Appeals determines that further district court proceedings are necessary, it can remand after deciding issues on appeal. Indeed, because the Ninth Circuit reviews all legal rulings by a district court de novo, a ruling on this Motion would add little or nothing, except to further delay proceedings in the Ninth Circuit or to seek to have this Court ignore its prior ruling that defendant did not comply with California state marijuana law notwithstanding that there is no change to the facts on which that ruling was based.

Any review of defendant's compliance with state law should be in the Court of Appeals.

A ruling by this Court on defendant's Rule 37 motion is also improper because the government has requested in its appellate brief that that the Ninth Circuit re-assign this case to a new judge on remand after the appeal due to the Court's actions and statements indicating strongly held views about the result it wished to reach at sentencing. (Mot., Ex. C at 142-45). This Court should decline to rule on the Motion until the Ninth Circuit rules on this threshold procedural issue. See Fed. R. Crim. P. 37, Adv. Comm. Notes (court may chooses not to rule under Rule 37 because "[an indicative] motion may either be mooted or be presented in a different context by a decision of the issues raised on appeal."). Particularly where defendant can present the issues in his Motion to the Ninth Circuit, Rule 37 should not allow defendant to circumvent a ruling on the government's request for reassignment.

2. Even if Otherwise Proper, Defendant's Motion is Untimely Under Rule 37

The Court should also not rule on the merits of defendant's motion because it is untimely. As clearly indicated in the text of the rule, "[b]efore a district court may exercise jurisdiction under Fed R. Crim. P. 37 . . . the motion for relief must be timely." United States v. Amado, 841 F.3d 867, 871 (10th Cir. 2016); Fed R. Crim. P. 37(a). In considering which time limit applies for the purpose of determining timeliness under Fed. R. Crim. P. 37, "[t]he substances of the motion, not its form or label, controls it's disposition." Amado, 841 F.3d at 871 (holding that defendant's

second motion for a sentencing reduction under § 3582(c)(2) was controlled by the 14-day period for a motion to reconsider).

Here, defendant not only failed to cite Rule 37, but he does not indicate the rule of procedure under which he seeks his remedies. The analysis is made more difficult by the fact that the actual, proper procedure for defendant is incompatible with the Motion -- requesting relief in the Ninth Circuit as part of his pending direct appeal. However, as the substance of defendant's motion is to seek relief from a prior federal criminal conviction and sentence based on new law, the best source for the timing rule is a post-conviction motion under 28 U.S.C. § 2255. Section 2255 is the quintessential vehicle to challenge the validity of a federal conviction or sentence after judgment in the district court. E.g., Porter v. Adams, 244 F.3d 1006, 1006 (9th Cir. 2001). The applicable time period for defendant's motion was, therefore, the one-year period for a § 2255 motion under 28 U.S.C. § 2255(f). Where, as here, a claim only became viable with the announcement of new law, the one-year period would accrue at the time of the passage of the appropriations rider on December 16, 2014. Cf. Dodd v. United States, 125 S. Ct. 2478, 2482 (2005) (time for filing § 2255 motion based on new right starts on date of decision announcing the right).

Clearly defendant was aware of the appropriations rider in January, 2015 when he threatened to enjoin the government under the rider, or when the following month he filed his urgent motion in the Ninth Circuit. Defendant would have also been fully aware of his ability to file his motion on April 13, 2015 when the Ninth Circuit denied defendant's urgent motion and specifically referenced filing an indicative motion in the district court. Nonetheless, defendant

did not file the present Motion until well more than a year after the Ninth Circuit denied defendant's subsequent request for en banc review on June 22, 2015. The Motion is untimely.

Even using a weaker analogy to the less definitive time periods for a civil motion for relief from a judgment under Fed. R. Civ. P. 60(b)(6), defendant's delay is unreasonable. By the time defendant's en banc request was denied on June 22, 2015, he had filed multiple briefs and hundreds of pages of exhibits on the appropriations rider, consistently seeking relief similar to what he requests now. Yet defendant did not file a motion for an indicative ruling for 17 months, requesting a hearing just weeks before his final appellate brief was due after repeated warnings that the Ninth Circuit was growing impatient with delays and that further extensions to file his brief would be disfavored. Defendant delayed his Motion for this extended period despite at all times having four counsel of record in the district court, plus two more in the Ninth Circuit. Given these facts, and defendant's own concession that he is not seeking any development of the evidentiary record, this Court should conclude that defendant's motion seeks to unreasonably extend an already inexcusable period of delay.

B. Even Were Defendant's Motion Procedural Proper, Defendant Is Not Entitled to Protection Under the Appropriation Rider

1. The Appropriation Rider

The Ninth Circuit has addressed the scope of the appropriations rider in three cases. In McIntosh, the court considered ten consolidated interlocutory appeals and petitions for writs of mandamus brought by defendants in three separate cases who were pending trial on marijuana-based Title 21 violations. The question presented was "whether criminal defendants may avoid prosecution for

various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice [DOJ] from spending funds to prevent states' implementation of their own medical marijuana laws." McIntosh, 833 F.3d at 1. The court interpreted the appropriations rider narrowly. It held that "§ 542 prohibits DOJ from spending money on actions that prevent the Medical Marijuana States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Id. at 1176. This means that DOJ is prohibited from "spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." Id. 1177. However, "[i]ndividuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession and cultivation of medical marijuana have engaged in conduct that is unauthorized and prosecuting such individuals does not violate § 542." Id. at 1177-78 (emphasis added).

Equally important is what the appropriations rider did not do. First, the Ninth Circuit emphasized that "§ 542 does not provide immunity from prosecution for federal marijuana offenses" and that possession, distribution, and manufacture of marijuana, including for medical purposes, remains prohibited under the Controlled Substances Act ("CSA"). Id. at 1179 n.5. Thus, defendants who violate the CSA through marijuana activity remain subject to federal prosecution under the CSA. Id. Section 542 only "prohibits DOJ from spending funds on certain actions." Id. at 1173. Second, § 542 is "temporal[ly]" limited to the term of the appropriations bill in which it was included. Id. at 1179. ("DOJ is currently prohibited

from spending funds from specific appropriations . . . for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow."). Finally, in ruling that § 542 extends only to those defendants in "strict" and "full" compliance all state medical marijuana laws, the court expressly rejected the defendants' argument that the appropriations rider be extended to include individuals out of strict compliance, but for whom there is a "reasonable debate" that they complied with state marijuana law. Id. at 1177.

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

Other Ninth Circuit cases have also emphasized the limited scope of the appropriations rider. In United States v. Nixon, the defendant moved the district court under the appropriations rider to allow him to use marijuana in compliance with California's Compassionate Use Act (CUA) regarding medical marijuana. 839 F.3d

885, 887 (9th Cir. 2016). The district court denied the motion, ruling that the appropriation rider had "no effect on the Court or the Probation Office" and federal law continued to require a prohibition on marijuana use on probation. Id. The Ninth Circuit affirmed, holding that § 542 "restricts only the DOJ's ability to use certain funds on particular prosecutions during a specific fiscal year." Id. at 888. It also emphasized that the CSA remains in effect nationally. Id.

In Olive v. Commissioner, decided prior to McIntosh, the Court of Appeals held that notwithstanding the appropriations rider, a medical marijuana business could not deduct its business expenses under the federal tax code, because the business, even if compliant with California law, was engaged in drug trafficking under federal law. Olive v. Commissioner, 792 F.3d 1146, 1149 (9th Cir. 2015). Olive rejected the appellant's request to prevent the government from continuing to work on the appeal under the authority of the appropriations rider. Id. at 1150-51. Among other reasons, the court held that the rider did not apply. While government enforcement of the tax made it "more costly to run the dispensary" it did not change whether the business was "authorized in the state." Id. at 1151 (emphasis retained).

2. The Appropriations Rider Does not Apply Because Defendant Has Already Been Convicted, and Because It Does Not Provide The Remedies Defendant Seeks

The rider does not apply to the convictions at issue here. Section 542 does not purport to nullify or unwind past investigations and prosecutions but rather to prevent spending on prospective interference with State medical marijuana law. It merely bars the prospective expenditure of funds by the Executive Branch acting

through DOJ to prevent implementation of state medical marijuana laws. There is no mention of past prosecutions or convictions. The Ninth Circuit stressed the "temporal" nature of the appropriations rider limited to a specific fiscal year. McIntosh, 833 F.3d at 1179. Here, the investigation, prosecution, and conviction, and the expenditures to support them, all took place prior to a time when the appropriation rider was in effect, thus taking them outside of § 542's scope. The rider thus does not apply. Moreover, both McIntosh and Nixon stressed that § 542 did not repeal the CSA or provide "immunity" from federal prosecution. Individuals are subject to federal prosecution for marijuana activity for the entire period of the applicable statute of limitations. McIntosh, 833 F.3d at 1179 & n.5; Nixon, 839 F.3d at 887-88. As individuals remain subject to prosecution under the CSA despite engaging in medical marijuana activity during the effective period of the appropriations rider, it would be contrary to this precedent to allow those who engaged in such activity outside the rider's effective period to unwind their convictions as if the CSA no longer applied.

The remedies sought by defendant are also inappropriate in a case where a judgment has already been entered. This case is substantially different from the pre-conviction situation in McIntosh where the cases were remanded to look for a remedy consistent with a defendant's speedy trial rights. Even in that situation, it is doubtful that dismissal is the correct remedy for the narrow category of individuals to whom § 542 applies. See United States v. Chavez, No. 2:15-cr-210, 2016 WL 916324, at *1 (E.D. Cal. Mar. 10, 2016) (dismissal of marijuana charge inappropriate remedy for violations of appropriations rider given Congress' choice "not to repeal the

statutory provisions giving rise to that [criminal] charge"). Here, by contrast, this Court has already issued a judgement and commitment order which remains valid after the passage of § 542. Both sides have also filed notices appeal and their opening briefs in the Court of Appeals, giving the Ninth Circuit jurisdiction to review that judgment. Nixon and McIntosh made clear that the appropriations rider did not affect courts' power to issue or to review orders, and that marijuana activity remains illegal under federal law. Nixon, 839 F.3d at 887-88. The rider thus does not extend to this Court's judgment, nor undermine the Circuit's power to review that judgment.

Nor would it be appropriate to enjoin the government from spending funds to file its final brief on appeal or otherwise continuing to participate in the litigation over the scope of § 542 as applied to this case. The Ninth Circuit has already denied defendant's urgent motion to bar the government from continuing to spend funds on the appeal. (Mot., Ex. A). Moreover, McIntosh recognized the government's right to represent its interests in proceedings in which § 542 challenges are raised, including to litigate whether defendants have strictly complied with state medical marijuana law. McIntosh, 833 F.3d at 1179; see also Olive, 792 F.3d at 1150-51. McIntosh put no restrictions on the government's ability to argue, on remand, that the defendants had not strictly complied with state law, or to argue what remedies, if any, § 542 allows. This is entirely appropriate. Even courts which are held to ultimately lack jurisdiction over a matter, are not prevented from examining that jurisdiction in the first place. E.g., United States

v. Ruiz, 536 U.S. 622, 628 (2002); Armstrong v. Armstrong, 350 U.S. 568, 574 (1956).[2]

3. Even if Section 542 Were Otherwise Applicable, It Does Not Apply To Defendant Because Defendant Did Not Strictly Comply With California Medical Marijuana Law

a. Defendant bears the burden to show strict compliance

The burden of establishing that § 542 bars the government's from spending funds to work on this case during the period of the appropriations rider rests with defendant, not the government. This is apparent from: (1) the plain language of the statute, which does not place the burden on the government;[3] (2) the fact that § 542 does not alter the elements of a CSA offense or provide for an affirmative defense that negates any particular element;[4] and (3) the fact that defendant, as a moving party, is attempting to thwart his lawful conviction and sentence on a ground unrelated to his guilt or innocence (and, indeed, unrelated to any defect in the proceedings

---

[2] That some of the legislators involved in the passage of the appropriations rider support its application to defendant is of no consequence. (Mot. at 13 & Ex. B). McIntosh squarely rejected the proposition that the views of individual members of Congress were relevant to interpreting the appropriations rider. McIntosh, 833 F.3d at 1178-79.

[3] Contrast Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006) (Religious Freedom Restoration Act explicitly places burden on government to demonstrate that prohibiting use of controlled substance in religious ceremony represents the least restrictive means of advancing a compelling government interest); 42 U.S.C. § 2000bb-1.

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

leading to his conviction and sentence).[5] Moreover, defendant is in the best position to explain why his conduct is authorized by state law. Cf. People v. Solis, 217 Cal.App.4th 51, 57 (2013) (defendant bears burden of showing defense under California marijuana law).

b. Defendant cannot establish strict compliance

Defendant cannot meet his burden. This Court held correctly at sentencing that defendant did not comply with California state marijuana law. The heightened requirement for defendant in the present motion under McIntosh that defendant meet the burden of proving "strict" compliance with "all" state marijuana laws only reinforces the point, fatally undermining defendant's request for relief under § 542.

After extensive litigation and four sentencing hearings, in a sentencing memorandum which contained several rulings favorable to defendant, this Court concluded that defendant's marijuana store, the CCCC, "was not operated in conformity with California state law." (Ex. F at 33 n. 25 (emphasis added)). The Court said that "medical marijuana distribution operations (such as the CCCC)" could not show that they fall within the definition of "primary caregiver" under California's CUA and Medical Marijuana Program Act (MMPA), the state's two medical marijuana laws. (Id.) The Court reasoned that the California case law had held, among other things, that a primary caregiver must prove that he or she consistently provided care independent of, and prior to, the provision of marijuana. (Id.) This requirement for valid primary caregiver status had been set

[5] United States v. Villareal, 707 F.3d 942, 953 (8th Cir. 2013) (defendant bears burden on motion to dismiss for speedy trial violation); cf. INS v. Abudu, 485 U.S. 94 (1988) (movant bears burden on motion to reopen deportation proceeding, just as movant bears burden on new trial motion).

forth as early as People v. Peron, 59 Cal. App. 4th 1383, 1395-97 (1997). The Court suggested, however, that due to the "somewhat unsettled" nature of the law at the time of defendant's criminal conduct, defendant "could have reasonably believed" that the CCCC "complied with California law because it was acting in the capacity of a primary caregiver." (Id.)

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

In his Motion, defendant asks that this Court ignore its prior holding regarding his failure to comply with state law. But he offers no new facts or any evidence that was not considered by the Court during sentencing proceedings. Instead, he claims that the Court erred by "conflat[ing]" California state law's provisions for primary caregivers with the limited immunity given to marijuana cooperatives under the MMPA Cal. Health & Safety ("H&S") Code § 11362.775 (2003 ed.). (Mot. at 14). Relying on the legal analysis set forth in a previously-filed amicus briefs in the Court of Appeals, he now claims that the CCCC was a legal marijuana cooperative under the MMPA, as interpreted by the Cal. AG Guidelines, and a line of cases staring with People v. Urziceanu, 132 Cal.App.4th

747 (2005) and including People v. Hochandel, 176 Cal.App.4th 997 (2009). (Mot. at 12-14 & Ex. B). Even if it were proper for the Court to reconsider its prior ruling in the procedural posture here, this is a deeply disingenuous position, totally at odds with the record and defendant's past representations to this Court.

During sentencing, the government asserted that defendant had violated California law not only because he was not a primary caregiver, but also because the CCCC was not a collective or cooperative under state law. (Ex. A at 12-13). Rather than organized as a non-profit with join ownership, as required by the Cal. AG Guidelines, CCCC was a sole proprietorship. (Id. (citing Cal. AG Guidelines); see also Ex. D (Lynch 1/30/2009 Decl.) ¶ 31 (business was sole proprietorship)). Defendant did not even purport to be a collective or cooperative, or anything other than a primary caregiver. (Ex. A at 12-13; Ex. B (forms)); Ex. D (Lynch 1/30/2009 Decl.) ¶ 31 (defendant considered himself a "primary caregiver")). The government also set forth evidence that defendant operated a for-profit enterprise, contrary to the requirements of the MMPA. (Ex. A at 13).

In his reply to this portion of the government's sentencing position defendant agreed that the collective/cooperative provisions of the MMPA did not apply either factually or legally:

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

(Ex. E at 15 (emphasis added)). Defendant never altered this position prior to judgment. Rather, he argued that that the Cal. AG

Guidelines were flawed, and that he qualified as a primary caregiver under Peron. (Id.).

In his current Motion, defendant never acknowledges these earlier facts and admissions. Instead, he blithely takes a totally contradictory position by claiming that he ran a cooperative under the MMPA and the Cal AG's Guidelines. Such tactics should be rejected. Defendant's new position is both waived and barred by the doctrine of judicial estoppel. Marx v. Loral Corp., 87 F.3d 1049, 1056 (9th Cir. 1996) (party waived argument by taking directly contradictory position; finding "about-face, at best, inventive" and barring revised theory), overruled on other grounds by, Lee v. Maricopa County, 693 F.3d 893, 925-28 (9th Cir. 2010) (en banc); see also Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001) (applying judicial estoppel to bar party from advancing inconsistent position; litigants may not "tak[e] inconsistent positions" and "play[] fast and loose with courts"); Hefland v. Gerson, 105 F.3d 530, 535 (9th Cir. 1997) (applying judicial estoppel to inconsistent attorney arguments regarding party's intent, holding that doctrine applies both to factual and legal assertions). At minimum, defendant's earlier admissions fully support the conclusion that this Court "conflated" nothing when it ruled that defendant failed to comply with California law. It ruled correctly based on the record, and defendant's current motion must therefore fail.

It is also at best ironic that in seeking to meet his burden of showing strict compliance with state marijuana law in the present Motion, defendant relies heavily on Elford's legal analysis without admitting that the district court fully considered and rejected Elford's same analysis during sentencing. Unmentioned by defendant,

Elford submitted a declaration in the district court opining that defendant could claim protection as a collective/cooperative under MMPA § 11362.775, the Cal. AG Guidelines, Urziceanu and related case law. (Ex. G). Elford also argued extensively during sentencing. (Ex. H (Tr. of 8/4/10 hearing) at 76-84). After Elford set forth in detail the same theory that the CCCC was a collective/cooperative under the MMPA raised again in the present Motion, the Court interrupted:

> Let me stop you. What you've just described, that doesn't fit Mr. Lynch's operation because, first of all, there wasn't a group. It was operated by himself. And the other thing is it was selling to people who were not part of the collective in that situation.

(Id. at 81). Elford argued that defendant's customers were "patients" but the Court replied: "Well, no. There is no indication that they were members of a collective." (Id. at 81-82). After further discussion, the Court indicated that it understood Elford's position and would look at law he had cited. (Id. at 83-84); see also (Id. at 7-8 (Court acknowledges that it had read Elford declaration but did not believe it agreed with it)).[6] Nor did the Court somehow forget about the law on collective/cooperatives, and Elford's theory of state law compliance, when it held that defendant's operation violated state law. In its sentencing memorandum, the Court explained the MMPA in detail, including quoting Cal H&S Code § 11362.775, the Cal A.G. Guidelines regarding collectives and cooperatives, and cited Urziceanu and Hochandel -- the same line of authority relied by defendant in his current Motion

[6] Elford's opinions on the scope of California marijuana law have been twice unanimously rejected by the California Supreme Court. See City of Riverside v. Inland Empire Patients Health & Wellness Cntr., Inc., 56 Cal.4th 729 (2013); People v. Mentch, 45 Cal. 4th 274 (2008).

-- for the proposition that California law provides "for properly organized" collectives and cooperatives "that dispense medical marijuana though a storefront." (Ex. F at 7-9). Nonetheless, the Court concluded that defendant had not complied with state marijuana law. (Id. at 33 n. 25).

The record fully supports the Court's rejection of the cooperative/collective theory, its statement that the CCCC was not a collective, and thus that defendant cannot met his burden under § 542. First, as noted above, defendant directly admitted that he did not even attempt to organize or run his sole proprietorship business as a collective or cooperative. See Cal. AG Guidelines (Ex. C) at 8; Hochanadel, 176 Cal.App.4th at 1010 ("collective" is jointly owned and operated). Second, as the Court noted at sentencing, and as proven in his customer forms and other evidence, the vast majority of defendant's customers designated defendant as primary caregivers, but had no relationship with his store other than as marijuana purchasers. See id. at 1018 (where purchasers merely required to fill out primary caregiver form with no evidence of other relationship with collective/cooperative "strong indication of unlawful activity") (citing Cal. AG Guidelines at 11)). There's no evidence, for example, that defendant shared financial information with customers, as required by lawful collectives/cooperatives. See Solis, 217 Cal.App.4th 51, 58-59; People v. Jackson, 210 Cal.App.4th 525, 539 (2010).

Third, contrary to the MMPA, defendant made no effort to set up or run his sole proprietorship as a non-profit enterprise. See Cal. H&S Code § 11362.765 (MMPA does not permit for-profit marijuana activity); People v. London, 228 Cal.App.4th 544, 554, 566 (2014)

(same) (no MMPA defense instruction where defendant did not register as non-profit and insufficient proof of non-profit sales). Defendant admitted in his safety valve interview with the government (a transcript of which was made part of the record at sentencing) that he sold marijuana at a market price, rather than an amount solely to cover costs and expenses. (Ex. I, Tr. at 224-27). This clearly violates the MMPA. See Hochanadel, 176 Cal.App.4th at 1010-11 (any monetary "reimbursements" from members of a collective/cooperative "should only be amount necessary to cover overhead costs and operating expenses."); accord London, 228 Cal.App.4th at 566; Jackson, 210 Cal.App.4th at 535-536.

Defendant also admitted to taking $3,500 every two weeks out of his store's revenues which used to pay personal expenses, including his mortgage and personal debts. He typically also took an additional sum to support a software business he owned as a sole proprietorship prior to stating the CCCC. (Ex. I, Tr. at 109-14, 220). On one occasion, defendant took $10,000 out of the CCCC to pay down a prior debt he had incurred on this software business. (Id. at 113-14). This unfettered salary-taking further shows that defendant did not operate a valid cooperative/collective under the MMPA. London, 228 Cal.App.4th at 565-66; Solis, 217 Cal.App.4th at 59-60 (no valid MMPA defense for defendant running 1,700-member dispensary who took payment to himself of annual salary as "reasonable compensation" unaccompanied by financial accountability to member/customers or effort to match compensation to specific store expenditures); compare People v. Holistic Health, 213 Cal.App.4th 1029, 1033-34, 1039-41 (2013) (lawful MMPA cooperative, where, among other things, store organized as non-profit, including articles of

incorporation, all money received went back to cooperative as confirmed by tax returns, and store never had more than three pounds of marijuana on premises).[7]

Lastly, under California law, a valid collective/cooperative, must be a "closed-circuit" that does not involve purchases or sales of marijuana with non-members. Cal. AG Guidelines at 8-10 ("Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members"); London, 228 Cal.App.4th at 555; Solis, 217 Cal.App.4th at 59-60 (in violation of MMPA defendant made purchases of marijuana from two vendors without membership records who provided false names). Yet, here, defendant admitted that he stocked his store in part with marijuana he purchased from non-member dispensaries in Oakland. (CR 287, Tr. at 70-84). Additionally, he allowed an employee to make multiple trips to Northern California to buy marijuana for the CCCC from non-member vendors not listed in any store record. (Id. at 70-74, 80-81).

In sum, the evidence overwhelmingly supports the Court's prior conclusion that defendant did not strictly comply with state medical marijuana law. If the Court does chose to reach the merits of defendant's motion, it should deny it.[8]

---

[7] While the Court found insufficient evidence in the record at sentencing to determine whether the CCCC was a "profitable" venture, despite defendant's expert disclosure that it was (CR 327 at 17 & n.14), that finding further undermines defendant's position since he must affirmatively prove non-profit operations to show strict compliance with California law. Cf. People v. Mitchell, 225 Cal.App.4th 1189, 1193, 1207-08 (2014) (MMPA collective defense inapplicable for grower of marijuana for purported collective where marijuana not grown on non-profit basis even though neither grower or collective made money).

[8] Defendant claim that the government made concessions about defendant's state law compliance on appeal again distorts the record. (Mot. at 11). In discussing the Court's evidentiary rulings on

III. CONCLUSION

For the forgoing reasons, the government respectfully requests that pursuant to Fed. R. Crim. P. 37 (a)(1) the Court defer considering the motion until completion of the pending appeal in this matter before the Ninth Circuit. Alternatively, the Court should deny the motion under Fed. R. Crim. P. 37 (a)(2).

---

defendant's theory of entrapment by estoppel, the government pointed to evidence regarding defendant's compliance with local law. (Def. Mot., Ex. C at 81-84). Section 542 says nothing about local law but requires strict compliance with all state law. In its brief discussing the Court's jury instructions on state law, the government explained that with respect to state law, "Morro Bay officials never determined whether defendant complied with state law, and the [district] court held at sentencing that defendant had not." (Id. at 70, 93). There was no concession. Nor was there need to respond to Elford's gratuitous amicus brief on appeal since it did not directly address any issue raised by defendant on appeal.