CA NOS. 10-50219, 10-50264

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee/Cross-Appellant, v. CHARLES C. LYNCH, Defendant-Appellant/Cross-Appellee.	DC NO. CR 07-689-GW

DEFENDANT-APPELLANT'S FRAP 12.1 NOTICE AND REQUEST FOR A *MCINTOSH* REMAND OR RELIEF

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

HONORABLE GEORGE H. WU
United States District Judge

HILARY POTASHNER
Federal Public Defender
ALEXANDRA W. YATES
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5059
Facsimile: (213) 894-0081
E-mail: Alexandra_Yates@fd.org

Attorneys for Defendant-Appellant/
Cross-Appellee

CA NOS. 10-50219, 10-50264

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee/Cross-Appellant, v. CHARLES C. LYNCH, Defendant-Appellant/Cross-Appellee.	DC NO. CR 07-689-GW

DEFENDANT-APPELLANT'S FRAP 12.1 NOTICE AND REQUEST FOR A *MCINTOSH* REMAND OR RELIEF

Defendant-Appellant/Cross-Appellee Charles C. Lynch, by and through counsel of record Deputy Federal Public Defender Alexandra W. Yates, provides formal notice of the district court's indicative ruling on his motion for injunctive relief or dismissal, pursuant to Federal Rule of Appellate Procedure 12.1. Mr. Lynch asks this Court to remand his case for a hearing pursuant to *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), or alternatively to consider his *McIntosh* motion on the merits and grant relief. Mr. Lynch specifically requests that the Court resolve this motion separate from and prior to the pending cross-appeals from his conviction and sentence.

This motion is based upon the attached Memorandum of Points and Authorities, Exhibits A through J, all files and records in this case, and any other information the Court may request.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: March 3, 2017

By */s Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

Attorneys for Defendant-Appellant/
Cross-Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

State Cases

Doceketed Cases

Federal Constitutional Provisions, Statutes, Acts, and Rules

TABLE OF AUTHORITIES

Page(s)

State Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), this Court held that a congressional appropriations rider prohibits the Department of Justice from spending funds on a criminal prosecution if the defendant's conduct was authorized by state medical marijuana laws. *McIntosh* instructed defendants seeking such injunctions to request district court hearings on whether they fully complied with relevant state medical marijuana laws.

Defendant Charles C. Lynch, whose case is on appeal, filed a *McIntosh* motion in district court, and asked the court to issue an indicative ruling on the motion, as permitted by Federal Rule of Appellate Procedure 12.1. The court held a hearing and ruled that the motion presented several substantial issues, but declined to resolve the matter without guidance from this Court.

Mr. Lynch now provides Rule 12.1 notice of the district court's indicative ruling, and asks this Court to address the district court's preliminary questions and either remand for a hearing or alternatively grant relief. Moreover, because an affirmative ruling on the motion would moot the cross-appeals, and because the government is violating federal statutory and constitutional law every time it spends funds on this case, Mr. Lynch asks the Court to resolve this motion separate from and prior to his appeal.

II. BACKGROUND

A. Mr. Lynch Operated a Medical Marijuana Dispensary in California

From approximately April 2006 through March 2007, Mr. Lynch operated the Central Coast Compassionate Caregivers ("CCCC") medical marijuana dispensary in Morro Bay, California. As the district court explained, "the purpose of the CCCC's distribution of marijuana was not for recipients to 'get high' or for recreational enjoyment. Rather, it was pursuant to the CUA's [Compassionate Use Act] goal of providing marijuana to Californians for medical uses as prescribed by their treating physicians." Ex. A (Sentencing Mem.) at 33.[1] Mr. Lynch operated the CCCC "under the guidelines set forth by the State of California," in order "to provide marijuana to those who, under California law, were qualified to receive it for medical reasons." *Id*. at 12 (alterations and internal quotation marks omitted).

B. The Government Charged Mr. Lynch With and Tried Him for Violations of Federal Drug Laws

In March 2007, the Drug Enforcement Agency raided the CCCC and Mr. Lynch's home, pursuant to a federal search warrant. On July 13, 2007, the federal government filed an indictment charging Mr. Lynch with five drug counts, each relating to marijuana distribution; four days later federal authorities arrested him.

[1] All citations are to the ECF docket heading pagination, not the internal pagination of the documents themselves.

A magistrate judge ordered Mr. Lynch released on bond, and he has been under the supervision of U.S. Probation and Pretrial Services ever since.

Following a ten-day trial, at which the district court instructed that California medical marijuana laws were irrelevant to the case, a jury found Mr. Lynch guilty of all five federal drug counts. The court sentenced Mr. Lynch to one year and one day in prison, followed by four years of supervised release.

C. The Parties Cross-Appealed Mr. Lynch's Conviction and Sentence

Mr. Lynch appealed his conviction and sentence, and the government cross-appealed the sentence, seeking a five-year prison term. Mr. Lynch filed the First Cross-Appeal Brief in July 2012. *See* Dkt. Nos. 37, 46.[2] Two groups of amici curiae filed briefs in support of Mr. Lynch. *See* Dkt. Nos. 41, 42. The government filed the Second Cross-Appeal Brief in April 2014. *See* Dkt. Nos. 79, 80.[3]

D. Congress Enacted Legislation That Prohibits the Department of Justice from Using Funds To Prevent States from Implementing Their Medical Marijuana Laws

In December 2014, Congress enacted and the President signed into law a 2015 appropriations bill; it contained a rider prohibiting the Department of Justice ("DOJ") from spending funds to prevent states from implementing their medical marijuana laws. Consolidated and Further Continuing Appropriations Act, 2015,

[2] All docket citations are to *United States v. Lynch*, CA No. 10-50219.

[3] Mr. Lynch's Third Cross-Appeal Brief is due on March 31, 2017. The government's optional reply brief is due seventeen days later.

Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Congress has included the rider in every subsequent appropriations bill and short-term extension. *See McIntosh*, 833 F.3d at 1169-70; Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, Pub. L. No. 114-223, Div. C, § 101(a)(2), 130 Stat. 857, 908 (2016). The rider currently governs the DOJ's expenditure of funds through April 28, 2017. *See* Further and Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-___, Div. A, § 101, ___ Stat. ___, ___ (2016), 2015 CONG US HR 2028 (Westlaw).

Colloquially known as "Section 542" or the "Rohrabacher-Farr Amendment," after its coauthors, the rider in its current form states:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to

> prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

E. Mr. Lynch Moved in This Court To Enforce the Rider in His Case, but the Court Tabled Consideration of His Arguments

In February 2015, Mr. Lynch moved this Court to enjoin the DOJ from spending funds on his case in violation of the rider. He argued that the rider restricts expenditures in any federal prosecution where the defendant has a colorable claim that state medical marijuana laws authorized his conduct. *See* Dkt. No. 91. A motions panel denied relief in a brief order, without deciding the merits and without prejudice to Mr. Lynch renewing the matter in his Third Cross-Appeal Brief or in Rule 12.1 proceedings in district court. *See* Dkt. No. 100.

Mr. Lynch sought en banc review of the motions panel's decision, and two new groups of amici curiae filed briefs in support. *See* Dkt. Nos. 101, 103, 107. In their amici curiae brief, U.S. Representatives Dana Rohrabacher (R-CA) and Sam Farr (D-CA), the lead authors of Section 542, explained that the rider was intended to apply to cases like Mr. Lynch's—*and to this case in particular*. Specifically, they wrote that the purpose of their amendment was stopping federal prosecutions "like the one pending . . . against Charles Lynch." Dkt. No. 103, at 8. Referring to this case, the Congressmen cautioned that "[p]ermitting the DOJ to spend more

federal funds to prosecute *one of the very cases* Congress intended for the DOJ to *cease* prosecuting defeats the purpose of the Rohrabacher-Farr Amendment *entirely*." *Id.* at 11 (second and third alterations in original).

In a separate amici curiae brief, current and former members of the California Senate, including the principal coauthor of California's governing medical marijuana statute, expressed their view that Mr. Lynch operated the CCCC in compliance with state law, and urged this Court to enforce Section 542 in this case. *See* Dkt. No. 107, at 7-21.

This Court denied Mr. Lynch's motion for en banc review in June 2015. *See* Dkt. No. 112.

F. This Court Subsequently Held That the Rider Prevents the DOJ from Spending Funds Prosecuting Individuals Who Engaged in Conduct Authorized by State Medical Marijuana Laws

In August 2016, this Court issued a published decision, *United States v. McIntosh*, holding that "§ 542 prohibits DOJ from spending money on actions that prevent Medical Marijuana States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana," including "prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws." *McIntosh*, 833 F.3d at 1176. "[A]t a minimum," the Court wrote, "§ 542 prohibits DOJ 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.* at 1177. The Court rejected the *McIntosh* defendants' broader argument that the rider applies to any defendant with a colorable claim of state-authorized conduct. *See id.* at 1177-78.[4]

McIntosh delegated to district courts the authority for determining whether a defendant's "conduct was completely authorized by state law," i.e., whether the defendant "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 left it "to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate," *id.*, but made clear that an injunction prohibiting the DOJ from spending funds on the case was one possibility, *see id.* at 1172-73.

On November 29, 2016, this Court denied a petition for rehearing in *McIntosh*, at which point the decision became final. *See United States v. McIntosh*, CA No. 15-10117, Dkt. No. 95.

[4] Mr. Lynch preserves for the record his position that *McIntosh* was wrongly decided on this point because the rider applies more broadly, as discussed in his initial Section 542 motion to this Court. However, because the Court is bound by *McIntosh*, and because Mr. Lynch wins even under *McIntosh*'s stricter standard, he uses the *McIntosh* test in this motion.

G. Mr. Lynch Moved for *McIntosh* Relief in District Court

Less than two weeks later, Mr. Lynch sought relief in district court, as *McIntosh* instructed defendants with Section 542 claims to do. Specifically, he moved for a written indication that the court would grant or entertain a motion for injunctive relief or dismissal based on its prior findings of compliance, or—if the court believed further factual development was necessary—hold a *McIntosh* hearing. *See* Ex. B (Def. Mtn.).

Notwithstanding the fact that this Court has jurisdiction over Mr. Lynch's appeal, the district court had authority to issue such a ruling. Federal Rule of Criminal Procedure 37 and Federal Rule of Appellate Procedure 12.1 authorize a district court to issue an indicative ruling on any "timely motion . . . for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Crim. P. 37(a); Fed. R. App. P. 12.1(a). If the court "states that it would grant the motion of that the motion raises a substantial issue, the court of appeals may remand for further proceedings" on the motion, while retaining jurisdiction over the appeal. Fed. R. App. P. 12.1(b); *see also Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976), *partially superseded on other grounds by* Fed. R. App. P. 4.

The government opposed Mr. Lynch's motion on procedural and substantive grounds, and asked the court to defer considering it until after the cross-appeals are

resolved, or alternatively to deny it. *See* Ex. C (Govt. Opp.). Mr. Lynch filed a reply, *see* Ex. D (Def. Reply), and on February 2, 2017, the district court held a hearing on the matter, *see* Ex. E (Transcript).

H. The District Court Stated That Mr. Lynch's Motion Raises Substantial Issues That the Court Preferred Not To Resolve Without Guidance from This Court

After rejecting the government's procedural objections to Mr. Lynch's motion, *see id.* at 9-15, the district court proceeded to the merits. As the court repeatedly explained, Mr. Lynch's motion raised substantial issues. *See id.* at 29 (referring to "a substantial issue"); *id.* at 31 (same); *id.* at 43 (referring to "a serious issue"); *id.* at 44 (referring to "an important issue"); *see also id.* at 30 ("There are a lot of questions that have to be answered."); *id*. at 31(explaining "there are issues of both fact and law that have to be resolved, and that is going to take some time"); *id.* at 43 ("I think both sides have good arguments."). But the court wanted guidance from this Court before it would hold a *McIntosh* hearing. *See id.* at 17-19, 21-22, 25-26, 28-34, 37-38, 42-48.

Specifically, the court sought instruction on these preliminary legal questions:

- Does Section 542 apply to defendants whose cases are on appeal? *See id.* at 17-19, 25.

- Should the court consider state medical marijuana laws not in effect at the time of defendant's conduct? *See id.* at 30, 47.
- Does a district court have authority to bar federal prosecutors from spending funds in the Ninth Circuit? *See id.* at 42-43, 46.
- May the court order not only an injunction, but also dismissal of the case? *See id.* at 18-19, 28-31, 37-38, 44, 46-47.

The court also raised the issue of which party bears the burden of proving compliance or noncompliance. *See id.* at 38-41.

At the conclusion of the hearing, the court stated that it would

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

Id. at 47-48.

III. RULE 12.1 NOTICE

Federal Rule of Appellate Procedure 12.1 requires a party to "promptly notify the circuit clerk if the district court states either that it would grant the [party's] motion or that the motion raises a substantial issue." Fed. R. App. P. 12.1(a). Here, the district court repeatedly stated that Mr. Lynch's motion raises substantial issues. The court also "state[d] the reasons why it prefers to decide [the motion] only if the court of appeals agrees that it would be useful to decide the

motion before decision of the pending appeal," which the Advisory Rules Committee describes as a statement "that the motion raises a substantial issue." Fed. R. Crim. P. 37 advisory committee notes.

For these reasons, Mr. Lynch notified this Court of the district court's ruling four days after the February 2nd hearing, *see* Dkt. No. 130, at 5, and hereby provides formal notice under Rule 12.1(a) within thirty days of the court's ruling.

Prior to receiving a transcript of the February 2nd hearing, the government expressed its disagreement with Mr. Lynch's characterization of the district court's ruling as a statement that his motion raises substantial issues. *See* Dkt. No. 131, at 9 n.1. It is unclear whether the government will maintain that position in the face of the district court's clearly recorded statements.

But it does not matter whether the district court found substantial issues or not. This Court has the statutory authority to remand to the district court, even without a "substantial issue" finding. *See* 28 U.S.C. § 2106; *Barber v. United States*, 711 F.2d 128, 131 (9th Cir. 1983). For that reason, although Rule 12.1 requires Mr. Lynch to provide notice of the district court's decision, this Court may entertain the instant motion even absent a "substantial issue" finding.

IV. ARGUMENT

A. This Court Has Discretion To Remand for a Hearing or Resolve the Section 542 Issue Without a Remand, but Should Exercise That Discretion Before Deciding the Pending Appeal

This Court may exercise its discretion to remand to the district court for further proceedings on Mr. Lynch's *McIntosh* motion. Alternatively, if the Court believes a remand is unnecessary, it may resolve the motion directly. *See* Fed. R. App. P. 12.1 advisory committee notes ("Remand is in the court of appeals' discretion."). Either way, the Court should resolve the Section 542 issue separate from and prior to the pending cross-appeals from Mr. Lynch's conviction and sentence.

Importantly, if the Court rules that Section 542 prohibits the DOJ from spending funds on Mr. Lynch's prosecution, that decision will moot the substantive case. On appeal, Mr. Lynch seeks a new trial and sentencing hearing. *See* Dkt. No. 37. The government cross-appeals, asking the Court to affirm Mr. Lynch's conviction and remand with instructions for the district court to impose a five-year sentence. *See* Dkt. No. 79. None of the potential outcomes of this litigation—a new trial, new sentencing hearing, or affirmance of the original conviction and sentence—can happen without participation and spending by the U.S. Attorney's Office, U.S. Marshals Service, or Bureau of Prisons, which are all DOJ agencies. *See* DOJ Agency Chart, https://www.justice.gov/agencies/chart.

In addition, if the government's continued spending on this case is unlawful, the Court should not ignore that fact and allow further expenditures on appeal. The concern is not solely unauthorized waste of taxpayer funds—although that interest is weighty. The government's failure to comply with Congress's directive violates the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, and the Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq.*, 1511 *et seq.*, implicating constitutional rights and potential criminal liability for the government. *See McIntosh*, 833 F.3d at 1175 ("[I]f DOJ were spending money in violation of § 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause."); 31 U.S.C. § 1341(a)(1)(A) (making it a felony for federal employees to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"); *see also id.* §§ 1350, 1517(a), 1519.

Although a motions panel of this Court tabled consideration of Mr. Lynch's original Section 542 motion, the panel did so before the Court held in *McIntosh* that the appropriations rider does, in fact, bar the DOJ from spending funds on medical marijuana prosecutions. Indeed, *McIntosh* went further, explaining that Congress's decision to prohibit these expenditures imposes a duty on federal courts "to enforce [that decision] when enforcement is sought." *McIntosh*, 833 F.3d at 1172 (internal quotation marks omitted); *see id.* ("A court sitting in equity cannot

ignore the judgment of Congress, deliberately expressed in legislation." (internal quotation marks omitted)).

Because the government necessarily will spend further unauthorized funds on the cross-appeals absent an order prohibiting it from doing so, this Court should resolve the Section 542 issue separate from and prior to moving forward with the substantive case.

B. If This Court Remands for a Hearing, It Should Provide the Legal Guidance the District Court Requested

The district court specifically and repeatedly asked this Court to provide guidance on preliminary questions of law before remanding Mr. Lynch's case for a *McIntosh* hearing. The court explained that failure to do so would be inefficient and delay resolution of the Section 542 issue. *See* Ex. E at 29-32, 37-38, 46-48.

This Court indisputably has the authority to decide these precursory legal questions, which involve interpretation of federal laws and are necessary to resolve an actual case or controversy properly brought before the Court. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Particularly here, where Mr. Lynch's motion concerns continuing unlawful expenditures of federal funds, it is prudent to resolve these matters, each discussed below, prior to remand.

1. Section 542 Limits DOJ Expenditures, Whether on Direct Appeal or in District Court

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

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

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

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

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

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

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

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

Ex. F (Preliminary Instructions) at 5. The court repeated this instruction at the close of evidence. *See* Ex. G (Jury Instructions) at 2. When the government prosecutes a state-authorized individual in these circumstances, "it has prevented

the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct," in violation of the appropriations rider. *McIntosh*, 833 F.3d at 1177.

And so, this Court need not even decide whether the rider applies to all post-trial defendants—although it surely does. For here, the government seeks a five-fold increase in punishment by way of a cross-appeal, and does so in a case where California was prevented from giving practical effect to its non-prosecution laws at trial. The government's continued actions to affirm the judgment and enhance the sentence fall squarely within the ambit of the rider as interpreted in *McIntosh*.

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

Kentucky, 479 U.S. 314, 321 n.6 (1987) (holding conviction final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally decided").

Precedent thus controls this first question, and the Court can and should so instruct the district court.

2. *McIntosh* Requires Compliance with State Laws in Effect at the Time of Defendant's Conduct

Precedent also resolves the second question: Whether the district court may consider state medical marijuana laws that postdate Mr. Lynch's operation the CCCC. For in *McIntosh*, this Court tasked district courts with deciding in each case whether the defendant's "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." *McIntosh*, 833 F.3d at 1179 (emphases added). Conditions imposed after a defendant has ceased using, distributing, possessing, or cultivating medical marijuana simply are not *relevant* to whether his conduct *was* authorized by state law. Were the opposite true, a defendant would be deprived of the opportunity to conform his conduct to newly enacted laws. *McIntosh* requires compliance, not prescience.

The only relevant conditions imposed by state law at the time of Mr. Lynch's conduct in 2006 to 2007, were those set forth in the Compassionate Use Act ("CUA") and Medical Marijuana Program Act ("MMPA"), Cal. Health & Safety Code §§ 11362.5, 11326.7 *et seq*. Those rules specifically permitted collective and cooperative cultivation and distribution of marijuana, including through storefront dispensaries, so long as the distribution was not for profit. *See id.* §§ 11362.765, 11362.775 (2007); *People v. Urziceanu*, 132 Cal. App. 4th 747, 782-86 (2005); *see also People v. Anderson*, 232 Cal. App. 4th 1259 (2015); *People v. London*, 228 Cal. App. 4th 544 (2014); *People v. Colvin*, 203 Cal. App. 4th 1029 (2012); *People v. Hochanadel*, 176 Cal. App. 4th 997 (2009).

The government's citation in district court to nonbinding guidelines issued by the California Attorney General in 2008, *see* Ex. H (Atty. Gen. Guidelines), is superfluous. For the district court must decide whether Mr. Lynch complied with state law in 2006 to 2007, not whether he met a later-articulated standard.

Moreover, the 2008 guidelines do not have the force of law. Instead, "the Attorney General's views," as expressed in the guidelines, are "persuasive" but not "bind[ing]" authority. *Hochanadel*, 176 Cal. App. 4th at 1011, 1018; *see Colvin*, 203 Cal. App. 4th at 1040-41 & n.11. The guidelines themselves recognize as much, demanding only "substantial[] compl[iance]" with their own terms. Ex. H at 25. Accordingly, a defendant's diversion from the guidelines says nothing about

his conformity with "state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1178.

This Court can and should instruct the district court to consider only California *laws* regarding medical marijuana use, distribution, possession, and cultivation in force during the relevant time period.

3. The Government Bears the Burden of Proving Noncompliance Beyond a Reasonable Doubt

Congress has already decided that the DOJ should be enjoined from spending funds on medical marijuana prosecutions where a defendant's conduct was authorized by state law. The only factual question for the district court is whether Mr. Lynch's conduct was so authorized. In California, the prosecution bears the ultimate burden of proof on that point. Because the district court effectively is stepping into the state court's shoes, it should adopt the same rule.

Specifically, the California Supreme Court has held that a defendant in a state marijuana prosecution need only "raise a reasonable doubt" regarding his compliance with medical marijuana laws to benefit from the protections of the CUA and MMPA. *People v. Mower*, 28 Cal. 4th 457, 481 (2002); *see also People v. Solis*, 217 Cal. App. 4th 51, 57 (2013) ("A defendant invoking the MMP[A] as a defense bears the burden of producing evidence in support of that defense," but "need only produce evidence that raises a reasonable doubt whether his or her acts were protected under the MMP[A]."). The ultimate burden of proof is on "the

prosecution" to prove the defendant's activity was illegal beyond a reasonable doubt. *Solis*, 217 Cal. App. 4th at 57. A California trial court commits reversible error if it instructs the jury that the defendant must "prove" his compliance with state medical marijuana laws "by a preponderance of the evidence." *Mower*, 28 Cal. 4th at 484.

This standard is similar to the most closely analogous federal precedent, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). There, the Supreme Court specifically held that a party seeking to enjoin enforcement of the Controlled Substances Act bears the initial burden of presenting a colorable claim for relief, but the burden then shifts to the opposing party to justify its actions. *See id.* at 428-30; *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115-16 (9th Cir. 2011).

In sum, this Court can and should instruct the district court that once Mr. Lynch presents sufficient evidence to raise a reasonable doubt that he was in compliance with relevant state laws (as he has), the burden shifts to the government to prove otherwise beyond a reasonable doubt.

4. The District Court May Enjoin the DOJ from Spending Funds on This Prosecution, Including on Appeal

McIntosh held that upon finding a federal defendant complied with relevant state medical marijuana laws, a court should enjoin the DOJ from spending funds on the case. *McIntosh*, 833 F.3d at 1171-80 (vacating district court denials of

injunctions prohibiting DOJ from spending funds on defendants' cases and remanding for determinations whether defendants' conduct was authorized by state laws); *see also id.* at 1177 ("[A]t a minimum, § 542 prohibits DOJ 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."). Thus, if Mr. Lynch's conduct was authorized by California's medical marijuana laws, the district court and this Court plainly have the authority to enjoin the DOJ from spending funds on Mr. Lynch's federal case.

The district court questioned whether it could prevent the government from spending funds on Mr. Lynch's case in the appeals court. *See* Ex. E, at 42-43, 46. But nothing in the appropriations rider or *McIntosh* distinguishes between unauthorized expenditures of funds in district court and on appeal—or outside of court, for that matter.

Moreover, the district court has the inherent authority to regulate the practice of parties appearing before it, *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), and to prevent the unlawful practice of law within the court's jurisdiction. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which are necessary to the exercise of all others." (internal quotation marks omitted)); *id.* at 767 ("The power of a court over members of its bar is at least as great as its authority over litigants."). A district

court has the authority in certain circumstances to prohibit attorneys from litigating in *state court*. *See* 28 U.S.C. § 2283. It would be nonsensical to preclude the district court from enjoining members of its bar from litigating in the federal appeals court.

And so this Court can and should instruct the district court that it may enjoin the DOJ from spending funds on Mr. Lynch's prosecution, including on appeal.

5. The District Court Also May Order the Case Dismissed

McIntosh also left the door open to relief beyond an injunction, including dismissal of a Section 542 case in its entirety. The *McIntosh* defendants asked their respective district courts to *either* issue injunctions *or* order their cases dismissed. *See McIntosh*, 833 F.3d at 1169-71. This Court did not address the requests for dismissal directly because the procedural posture of the cases did not require it to do so. Rather, the Court exercised jurisdiction over the defendants' interlocutory appeals pursuant to its authority to review denials of injunctive relief. *See id.* at 1170-72. It resolved the meaning of Section 542 on that basis alone, and remanded the cases for further proceedings in district court. *See id.* at 1172-79.

But the Court repeatedly signaled that dismissal could be an appropriate remedy in a Section 542 case. Importantly, *McIntosh* held that defendants had standing to appeal in that case "because their potential convictions constitute concrete, particularized, and imminent injuries, which are caused by their

prosecutions *and redressable by injunction or dismissal of such prosecutions*." *Id.* at 1174 (emphasis added). *McIntosh* also referred to injunctive relief as the "minimum" relief to which qualifying defendants are entitled, *id.* at 1177, and deferred "to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate," *id.* at 1179; *see id.* at 1172 n.2.

The appropriate remedy in this case is not simply an injunction, but also an order dismissing the case. Anything less will fail to satisfy Section 542 because the government necessarily will spend funds monitoring the pending litigation. Even a de minimis expenditure of unauthorized funds violates the plain text of Section 542, the Anti-Deficiency Act, and the U.S. Constitution. There is simply no way for a court to ensure compliance with these laws short of dismissing the case in its entirety.[5]

[5] Unlike in *McIntosh*, where the defendants raised their Section 542 arguments pretrial, if the district court or this Court orders Mr. Lynch's case dismissed, it will need to vacate his conviction and sentence to fully effectuate that order. Federal courts have the authority to do so pursuant to their ancillary jurisdiction and inherent powers, *see McIntosh*, 833 F.3d at 1172 n.2 (and cases cited therein); *United States v. Ramirez*, 710 F.2d 535, 541 (9th Cir. 1983); their power to grant relief under 28 U.S.C. § 2255, *see Hensley v. Municipal Ct.*, 411 U.S. 345 (1973); or their power to grant *coram nobis* relief under the All Writs Act, 28 U.S.C. § 1651, *see United States v. Morgan*, 346 U.S. 502 (1954).

This Court can and should make clear what *McIntosh* suggested: if Section 542 applies, the district court has the authority to order Mr. Lynch's case dismissed.

C. Alternatively, Because the Government Bears the Burden of Proof and Repeatedly Represented It Has No Additional Evidence To Present, This Court May Resolve the Motion Without a Remand

Alternatively, if this Court agrees that the government bears the burden of proof at a *McIntosh* hearing, the Court may resolve the motion now. For the government has indicated that it has no additional evidence to present and welcomes a ruling by this Court on the existing record. *See* Ex. C at 8, 14-15.

Thus, the Court would be well within its authority to rule that the government has not met its burden of proving beyond a reasonable doubt that Mr. Lynch operated the CCCC for profit. The evidence demonstrates that Mr. Lynch opened the CCCC not "to make money," but "to help people." Ex. I (Lynch Decl.) at 6. In setting prices for his customers, he added a small mark-up over what he paid for the marijuana to cover the cost of his employees and expenses, and endeavored to keep his prices similar to or lower than what other dispensaries charged. *See* Ex. J (Sealed Transcript) at 224-27. Mr. Lynch also "ran a discount program for patients who did not have a lot of money." Ex. I at 8.

And while Mr. Lynch compensated himself for his hours and expenses, those actions are wholly consistent with California law, which permits

"reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana," *Urziceanu*, 132 Cal. App. 4th at 785, including reasonable expenses and salaries. *See London*, 228 Cal. App. 4th at 566 (noting legality of "reimbursement for . . . out-of-pocket expenses incurred"); *People ex rel. City of Dana Point v. Holistic Health*, 213 Cal. App. 4th 1016, 1021 (2013) ("Valid nonprofit expenditures expressly include executive compensation.").

Indeed, the government has not even shown that the CCCC was profitable. *See* Ex. A at 17. To the contrary, Mr. Lynch "never got any of [his] initial investment back in the dispensary, which [he] got from re-financing [his] house," and undisputedly lived a modest life. Ex. I at 6-7.

In short, the government has failed to meet its burden to prove that Mr. Lynch operated the CCCC as a for-profit business. *See Holistic Health*, 213 Cal. App. 4th at 1027 (citing similar evidence as indicating not-for-profit dispensary).

The only other potential evidence of noncompliance the government cited in district court was Mr. Lynch's isolated initial purchases of small quantities of marijuana from other dispensaries. *See* Ex. C at 31. But at the time Mr. Lynch operated the CCCC, doing so was entirely legal. *See Urziceanu*, 132 Cal. App. 4th at 764, 759 (holding defendant who "would sometimes buy marijuana on the black market by the pound to supply the members" had a valid MMPA defense). Although the Attorney General guidelines later opined that "[c]ollectives and

cooperatives should acquire marijuana only from their constituent members," Ex. H at 24, those guidelines are nonbinding recommendations that postdate Mr. Lynch's conduct, as discussed above. His failure to adhere to them says nothing about his conformity with "state law" in 2006 and 2007.

V. CONCLUSION

For the foregoing reasons, Mr. Lynch respectfully requests that this Court resolve the preliminary legal questions identified by the district court, and either issue a limited remand to the district court for a *McIntosh* hearing or grant relief. Mr. Lynch further requests that the Court do so separate from and prior to addressing the pending cross-appeals, because a ruling in Mr. Lynch's favor will moot the cross-appeals and prevent unlawful expenditures of taxpayer funds.

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, I electronically filed the foregoing **DEFENDANT-APPELLANT'S FRAP 12.1 NOTICE AND REQUEST FOR A *MCINTOSH* REMAND OR RELIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Gretchen Eddy
GRETCHEN EDDY

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES C. LYNCH, Defendant.	Case No. CR 07-0689-GW **SENTENCING MEMORANDUM**

I. INTRODUCTION

On August 5, 2008, defendant Charles C. Lynch was convicted by a jury of five counts of violating the federal Controlled Substance Act ("CSA"), 21 U.S.C. §§ 801 et seq. The charges arose out of his establishing and operating a medical marijuana facility - i.e. the Central Coast Compassionate Caregivers in Morro Bay, California.

In reaching the sentence in this matter, this Court has reviewed and considered inter alia the following: 1) the Indictment (Doc. No. 1)[1] and the "redacted" Indictment provided to the jury (Doc. No. 161); 2) the evidence admitted during the trial which began on July 23, 2008; 3) "Government's Sentencing Position for Defendant Charles

[1] Reference to the documents filed in this criminal case in the United States District Court, Central District of California's Case Management/Electronic Case Filing ("CM/ECF") will be to the "Document number" ("Doc. No.") indicated in the CM/ECF.

C. Lynch" (Doc. No. 232); 4) "Declaration of Special Agent Rachel Burkdoll in Support of Government's Sentencing Position; Exhibits" (Doc. No. 236); 5) "Government's Position Re: Applicability of Mandatory Minimum Sentence to Defendant Charles C. Lynch" (Doc. No. 238); 6) Notice of Lodging of Mr. Lynch's Initial Position re: Applicability of the Mandatory Minimum Sentence; Exhibits" (Doc. No. 244); 7) "Charles Lynch's Position re: Sentencing Factors; Exhibits" (Doc. No. 245); 8) "Declaration in Support of Charles Lynch's Position re: Applicability of the Mandatory Minimum Sentence" (Doc. No. 246); 9) "Government's Amended Position on Applicability of Safety Valve Provision to Defendant Charles C. Lynch" (Doc. No. 249); 10) "Government's Amended Position on Applicability of Mandatory Minimum Sentences to Defendant Charles C. Lynch" (Doc. No. 250); 11) "Government's Amended Response to Presentence Report for Defendant Charles C. Lynch" (Doc. No. 251); 12) "Government's Amended Sentencing Recommendation for Defendant Charles C. Lynch" (Doc. No. 252); 13) "Statement of Sergeant Zachary Stotz in Support of Charles C. Lynch's Position re: Sentencing Factors (Doc. No. 253); 14) "Defendant's Reply to Government's Position re: Applicability of the Mandatory Minimum Sentences (Doc. No. 254); 15) "Defendant's Reply to Government's Position re: Sentencing Factors; Declaration of Charles C. Lynch" (Doc. No. 255); 16) Letters of Jurors and Prospective Jurors (Doc. Nos. 257, 258 and 262); 17) United States Probation Office ("USPO") Presentence Investigation Report (Doc. No. 259) and Addendum to the Presentence Report (Doc. No. 260); 18) USPO Recommendation Letter initially dated November 24, 2008 (Doc. No. 314); 19) "Letters in Support of Defendant's Position re: Sentencing Factors" (Doc. No. 264); 20) "Charles Lynch's Amended Initial Position re: Applicability of the Mandatory Minimum Sentence" (Doc. No. 265); 21) "Statement in Support of Defendant's Position re: Sentencing" (Doc. No. 266); 22) "Government's Notice re Defendant Charles C. Lynch" (Doc. No. 267); 23) "Government's Response to Inquiry by the Court Regarding Sentencing" (Doc. No. 276); 24) Abram Baxter's Video-Taped "Statement

in Support of Defendant's Position re: Sentencing" (Doc. No. 277); 25) "Declaration of Joseph D. Elford in Support of Charles C. Lynch's Position re: Sentencing" (Doc. No. 279); 26) "Supplemental Letters in Support of Charles C. Lynch's Position re: Sentencing" (Doc. No. 280); 27) "Charles Lynch's Supplemental Memorandum of Points and Authorities re: Sentencing; Exhibits" (Doc. No. 285); 28) Government's Response to the Court's Inquiries During April 23, 2009 Hearing; Exhibits" (Doc. No. 286); 29) "Government's Filing re Defendant Charles C. Lynch" (Doc. No. 287); 30) "Government's Response to Defendant's Supplemental Memo of Points and Authorities re Sentencing" (Doc. No. 290); 31) "Charlie Lynch's Reply to Government's Response to Court's Inquiries During April 23, 2009 Hearing" (Doc. No. 289); 32) "Charlie Lynch's Reply to Government's Response to Supplemental Memorandum of Points and Authorities re: Sentencing" (Doc. No. 296); 33) "Supplemental Exhibit in Support of Charles Lynch's Position re Sentencing" (Doc. No. 297); 34) the other materials contained in the Court's file including previously submitted evidentiary material; 35) statements made on behalf of Lynch at the sentencing hearings on March 23, April 23 and June 11, 2009; and 36) the arguments of counsel on said dates. Pursuant to 18 U.S.C. § 3553(c), this Court issues this Sentencing Memorandum which incorporates its prior positions as stated at the sentencing hearings but also more fully delineates the bases for its imposition of the sentence on Defendant Lynch.

II. BACKGROUND

A. The Conviction

Lynch was convicted of the following five counts: 1) conspiracy - (a) to possess and distribute "at least" 100 kilograms of marijuana, "at least" 100 marijuana plants, and items containing tetrahydrocannabinol ("THC"), (b) to maintain a premises for the distribution of such controlled substances, and (c) to distribute marijuana to persons under the age of 21 years - in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(B), 856 and 859; 2 and 3) sales of more than 5 grams of marijuana to J.S., a

person under the age of 21, on June 10 and August 27, 2006 in violation of 21 U.S.C. §§ 841(a)(1) and 859(a); 4) on March 29, 2007, possession with the intent to distribute approximately 14 kilograms of material containing a detectable amount of marijuana and at least 50 but less than 100 marijuana plants in violation of 21 U.S.C. § 841(a)(6) and (b)(1)(B); and 5) between about February 22, 2006 and March 29, 2007, maintaining a premises at 780 Monterey Avenue, Suite B, Morro Bay, California under the name "Central Coast Compassionate Caregivers" ("CCCC") for the purpose of growing and distributing marijuana and THC. See the Verdict (Doc. No. 175); the redacted Indictment (Doc. No. 161).

B. The Legality of Medical Marijuana Dispensaries Under California and Federal Laws

The CSA establishes five schedules of controlled substances. 21 U.S.C. § 812(a). To fall within Schedule I, it must be found that:

> (A) The drug or other substance has a high potential for abuse.
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. § 812(b)(1). Congress has designated both marijuana and THC as Schedule I controlled substances.[2] 21 U.S.C. § 812(c) - (Schedule I)(c)(10) and (17). As noted in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425 (2006):

> Substances listed in Schedule I of the Act are subject to the most comprehensive restrictions, including an outright ban on all importation and use, except pursuant to strictly regulated research projects. See [21 U.S.C.] §§ 823, 960(a)(1). The Act authorizes the imposition of a criminal sentence for simple possession of Schedule I substances, see §

[2] The CSA allows the United States Attorney General to transfer a controlled substance designation from one schedule to another or to remove it from the schedules entirely if it no longer meets the requirements for such inclusion. 21 U.S.C. § 811(a). However, attempts to move marijuana from Schedule I (which began in 1972) have proved unsuccessful both on the administrative level, see, e.g., 66 Fed.Reg. 20038 (2001), and in the courts, see, e.g., Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994). See Gonzales v. Raich, 545 U.S. 1, 15 n.23 (2005).

> 844(a), and mandates the imposition of a criminal sentence for possession "with intent to manufacture, distribute, or dispense" such substances, see §§ 841(a), (b).

Thus, federal law prohibits the manufacture (i.e. cultivation), distribution, sale or possession (with intent to distribute) of marijuana. 21 U.S.C. § 841(a)(1).

In 1996, California voters passed Proposition 215, known as the "Compassionate Use Act of 1996" ("CUA"), which is codified in California Health & Safety Code ("Cal. H & S Code") § 11362.5. See Gonzales v. Raich, 545 U.S. 1, 5-6 (2005). The purpose of Proposition 215 was to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment" of certain conditions such as cancer, glaucoma, "or any other illness for which marijuana provides relief." Cal. H & S Code § 11362.5(b)(1)(A). A goal of Proposition 215 (which has not been achieved to date) is to "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana."[3] Id. at § 11362.5(b)(1)(C). The operative sections of the CUA provide that: 1) "no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes," and 2) "[Cal. H & S Code] Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." Id. at § 11362.5(c) and (d). The term "primary caregiver" is defined in the CUA as "the

---

[3] Not to be critical of Proposition 215 or the efforts of California legislators after its passage, it would appear rather obvious that, as a matter of federal law, - until such time as marijuana is removed or downgraded from the CSA's list of Schedule I controlled substances - there could never be any coordination or consistency between the federal and state governments in regards to allowing the use of marijuana for medicinal purposes. See infra; see also Raich, 545 U.S. at 33.

individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." Id. at § 11362.5(e).

After the passage of the CUA, the California courts recognized that, "except as specifically provided in the [CUA], neither relaxation much less evisceration of the state's marijuana laws was envisioned." People v. Trippet, 56 Cal. App. 4th 1532, 1546 (1997) ("We accordingly have no hesitation in declining appellant's rather candid invitation to interpret the statute as a sort of 'open sesame' regarding the possession, transportation and sale of marijuana in this state."). The issue of medical marijuana dispensaries under California law following the enactment of CUA was first considered in People ex rel Lungren v. Peron, 59 Cal. App. 4th 1383 (1997). Therein, just before the passage of the CUA, the trial court granted a preliminary injunction enjoining defendants from selling or furnishing marijuana at a premises known as the "Cannabis Buyers' Club." After the enactment of § 11362.5, the trial court modified the injunction to allow the defendants to possess and cultivate medical marijuana for their personal use on the recommendation of a physician or for the personal medicinal use of persons with medical authorization who designated the defendants as their primary caregivers, so long as their sales did not produce a profit. The court of appeal vacated the modification of the preliminary injunction finding that the CUA did not sanction the sale of marijuana even if it was on a non-profit basis and for medicinal purposes, and that marijuana providers such as the Cannabis Buyers' Club could not be designated as "primary caregivers" because they do not "consistently assume[] responsibility for the housing, health or safety" of their customers. Id. at 1395-97. See also People v. Galambos, 104 Cal. App. 4th 1147, 1165-69 (2002) (holding that Proposition 215 cannot be construed to extend immunity from prosecution to persons who supply marijuana to medical cannabis cooperatives).

In United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001), federal authorities brought an action to enjoin (and subsequently a contempt

motion against) a non-profit medical marijuana cooperative that had been distributing marijuana to persons with physician's authorizations under the CUA. The cooperative raised a defense of medical necessity that was rejected by the district court but accepted by the Ninth Circuit. The Supreme Court reversed the Ninth Circuit's decision because "in the Controlled Substances Act, the balance already has been struck against a medical necessity exception." Id. at 499. As explained by the Court:

> Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a "determination of values." . . . . In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana. Indeed, for purposes of the Controlled Substance Act, marijuana has "no currently accepted medical use" at all. § 811.

Id. at 491.

In 2003, the California Legislature enacted the Medical Marijuana Program Act ("MMPA") (Cal. H & S Code §§ 11362.7 to 11362.9) wherein it sought to:

> (1) Clarify the scope of the application of the [Compassionate Use Act] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. (2) Promote uniform and consistent application of the [Compassionate Use Act] among the counties within the state. (3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.

California Stats. 2003, ch. 875, § 1, subd. (B); see also People v. Urziceanu, 132 Cal. App. 4th 747, 783 (2005). Among the provisions of the MMPA are: 1) the establishment through the California Department of Health Services of a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of the MMPA, see Cal. H & S Code § 11362.71(a); 2) a bar under California law providing that "No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation,

delivery, or cultivation of medical marijuana in an amount established [in the MMPA], unless there is reasonable cause to believe that the information contained in the card is false or falsified, [or] the card has been obtained by means of fraud," see id. at § 11362.71(e); and 3) the setting of a maximum of eight ounces of dried marijuana and "no more than six mature or 12 immature marijuana plants per qualified patient," see id. at § 11362.77(a).[4] "Primary caregiver" is given substantially the same meaning in the MMPA as it has in the CUA. Compare Cal. H & S Code § 11362.5(e) with § 11362.7(d). The MMPA envisioned collective and/or cooperative cultivation of marijuana for medical purposes. See Cal. H & S Code § 11362.775 which states:

> Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or coopera-tively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions . . . .

However, Cal. H & S Code § 11362.765(a) provides that: "nothing in this section shall . . . authorize any individual or group to cultivate or distribute marijuana for profit." Nevertheless, a primary caregiver can receive "compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under [the MMPA] . . . ." Id. at § 11362.765(c).

The MMPA was observed to be "a dramatic change in the prohibitions on the

---

[4] As observed in Raich, 545 U.S. at 32 n.41, "the quantity limitations [in § 11362.77(a)] serve only as a floor . . . and cities and counties are given *carte blanche* to establish more generous limits. Indeed, several cities and counties have done just that. For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana."

Moreover, in People v. Kelly, 47 Cal. 4th 1008 (2010), the California Supreme Court held that the MMPA (enacted by the California legislature at Cal. H & S Code § 11362.77(a)) - insofar as it set amount limitations which would burden the defense to a criminal charge of possessing or cultivating marijuana under the CUA (which was enacted pursuant to the California initiative process) - impermissibly amended the CUA and, in that respect, is invalid under the California Constitution, Article II, Section 10(c). Id. at 1049. Consequently, under California law, a patient or primary caregiver may assert as a defense in state court that he or she possessed or cultivated "an amount of marijuana reasonably related to meet his or her current medical needs . . . without reference to the specific quantitative limitations specified by the MMP[A]." Id.

use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers . . . ." Urziceanu, 132 Cal. App. 4th at 785. It was viewed as contemplating "the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." Id.

In Raich, the Supreme Court addressed the issue of "whether the power vested in Congress by Article 1, § 8 of the Constitution '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law." 545 U.S. at 5. Its answer was yes. The Court vacated the Ninth Circuit's decision ordering preliminary injunctive relief which was based on a finding that the plaintiffs therein had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority." Id. at 8-9. The Court did not address certain other claims raised by the plaintiffs, but not adopted by the Ninth Circuit, and remanded the case. On remand, in Raich v. Gonzales, 500 F.3d 850 (9th Cir. 2007) ("Raich II"), the Ninth Circuit did address those remaining claims and held that: 1) while the plaintiffs might have a viable necessity defense, that defense would only protect against liability in the context of an actual criminal prosecution and would not empower a court to enjoin the "enforcement of the Controlled Substance Act as to one defendant," id. at 861; 2) there was no substantive due process violation under the Fifth or Ninth Amendments because "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering," id. at 866; and 3) the Supreme Court's decision in Raich had foreclosed plaintiffs' Tenth Amendment claim, id. at 867.

On August 25, 2008, pursuant to Cal. H & S Code § 11362.81(d), the California Attorney General issued "Guidelines for the Security and Non-Diversion of Marijuana

Grown for Medical Use" ("Cal. AG Guidelines"). See Exhibit 15 to Declaration of Special Agent Rachel Burkdoll ("Burkdoll Decl.") (Doc. No. 236); see also People v. Hochanadel, 176 Cal. App. 4th 997, 1009-11 (2009). Those guidelines recognize that "a properly organized and operated collective or cooperation that dispenses medical marijuana through a storefront may be lawful under California law" provided that it complies with the restrictions set forth in the statutes and the guidelines. See Cal. AG Guidelines at page 11, Exhibit 15 to Burkdoll Decl. The Cal. AG Guidelines also state that:

> The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego* v. *San Diego NORML* (July 31, 2008) ___ Ca1.Rptr.3d ___, 2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition.
>
> In light of California's decision to remove the use and cultivation of physician-recommended marijuana from the scope of the state's drug laws, this Office recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws.

Id. at page 3.[5]

In November 2008, the California Supreme Court in People v. Mentch, 45 Cal. 4th 274 (2008), addressed the issue of who may qualify as a "primary caregiver" under

[5] The Cal. AG Guidelines' language that "no legal conflict exists" is somewhat misleading. While no such conflict existed as to California law vis-a-vis "physician recommended marijuana," there certainly remained a definite conflict between federal and California laws as to the legality and enforcement of criminal statutes concerning the cultivation, possession and distribution of marijuana for medicinal purposes.

the CUA and the MMPA. Defendant Mentch grew marijuana for his own use and for five other persons. Both he and the other five had authorizations from physicians for medical marijuana. He testified that he sold the marijuana "for less than street value" and did not make a profit from the sales. At his trial, Mentch sought to argue that he was a primary caregiver when he provided medical marijuana to the other five persons who had a doctor's recommendation. The California Supreme Court rejected that argument observing that the statutory definition of a "primary caregiver" was delineated as an individual "who has consistently assumed responsibility for the housing, health or safety" of that patient. Id. at 283; see also Cal. H & S Code § 11362.5(d). Therefore, the mere fact that an individual supplies a patient with medical marijuana pursuant to a physician's authorization does not transform that individual into a primary caregiver because he or she will not have necessarily and previously and consistently assumed responsibility for the patient's housing, health and/or safety. Id. at 284-85. The fact that the individual is the "consistent" or exclusive source of the medical marijuana for the patient makes no difference. Id. at 284-86. Likewise, "[a] person purchasing marijuana for medicinal purposes cannot simply designate seriatim, and on an ad hoc basis, . . . sales centers such as the Cannabis Buyers' Club as the patient's 'primary caregiver.'" Id. at 284 (quoting Peron, 59 Cal. App. 4th at 1396).

During a press conference on February 24, 2009, in response to a question whether raids on medical marijuana clubs established under state law represented federal policy going forward, United States Attorney General Eric Holder reportedly stated, "No, what the president said during the campaign, you'll be surprised to know, will be consistent with what we'll be doing in law enforcement. He was my boss during the campaign. He is formally and technically and by law my boss now. What he said during the campaign is now American Policy."[6] See United States v. Stacy,

[6] In November of 2008 during his campaign, Senator (now President) Barack Obama is reported to have stated that:

> . . . his mother had died of cancer and said he saw no difference between

No. 09cr3695, 2010 U.S. Dist. LEXIS 18467 at *12 (S.D. Cal. 2010). On March 19, 2009, Holder explained that the Justice Department had no plans to prosecute pot dispensaries that were operating legally under state laws.[7] Id.

C. Nature and Circumstances of Defendant's Criminal Conduct

As characterized and stated by USPO in its November 24, 2008 Sentencing Recommendation Letter ("Sent. Rec. Let.") (Doc. No. 314), with which this Court agrees:

> [T]his case is not like that of a common drug dealer buying and selling drugs without regulation, government oversight, and with no other concern other than making profits. In this case, the defendant opened a marijuana dispensary under the guidelines set forth by the State of California . . . . His purpose for opening the dispensary was to provide marijuana to those who, under California law, [were] qualified to receive it for medical reasons.

> doctor-prescribed morphine and marijuana as pain relievers. He said he would be open to allowing medical use of marijuana, if scientists and doctors concluded it was effective, but only under "strict guidelines," because he was "concerned about folks just kind of growing their own and saying it's for medicinal purposes."

See, Bob Egelko, "Next President Might Be Gentler on Pot Clubs," San Francisco Chronicle (May 12, 2008). The same article quoted Ben LaBolt, Obama's campaign spokesman, as saying:

> "Voters and legislators in the states . . . have decided to provide their residents suffering from chronic diseases and serious illnesses like AIDS and cancer with medical marijuana to relieve their pain and suffering. Obama supports the rights of states and local governments to make this choice - through he believes medical marijuana should be subject to (U.S. Food and Drug Administration) regulations like other drugs." LaBolt also indicated that Obama would end U.S. Drug Enforcement Administration raids on medical marijuana suppliers in states with their own laws.

However, morphine - as a designated Schedule II controlled substance - is recognized by federal statute as having "a currently accepted medical use in treatment in the United States," see 21 U.S.C. § 812(b)(2), and hence can be prescribed by physicians as a pain reliever. Marijuana cannot - because it is classified under federal law as a Schedule I substance and hence "has no currently accepted medical use." See 21 U.S.C. § 812(b)(1).

[7] In response to this Court's inquiry regarding Attorney General Holder's statements, the Government submitted a letter from H. Marshall Jarrett, Director of the Executive Office for United States Attorneys, United States Department of Justice, which indicated that the Office of the Deputy Attorney General had reviewed the facts of Lynch's case and concurred "that the investigation, prosecution, and conviction of Mr. Lynch are entirely consistent with Department policies as well as public statements made by the Attorney General." See Doc. No. 276.

Sent. Rec. Let. at page 4.

In 2005, Lynch obtained a prescription for medical marijuana to treat his headaches. See Presentence Investigation Report ("PSR") ¶ 101 at page 20 (Doc. No. 259).[8] In order to obtain "medical grade" marijuana, he drove to various marijuana dispensaries operating publicly in Santa Cruz and Santa Barbara. Id.; see also Sent. Rec. Let. at page 6. Noting the dearth of such dispensaries in San Luis Obispo County where he resided, Lynch investigated opening such an enterprise. He researched the law on medical marijuana distribution. See paragraphs 2-3 of Declaration of Charles Lynch ("Lynch Dec.") (Doc. No. 246). By January 2006, he opened a medical marijuana dispensary in Atascadero, California. That venture was "short lived" because the city officials used zoning restrictions to close his shop. Sent. Rec. Let. at page 4 (Doc. No. 314); PSR at ¶ 10 (Doc. No. 259).

Prior to opening the CCCC in Morro Bay, Lynch took a variety of steps. They included, inter alia: 1) calling an office of the Drug Enforcement Agency ("DEA") where, according to Lynch, he inquired regarding the legality of medical marijuana dispensaries;[9] 2) hiring a lawyer (Lou Koory) and seeking advice in regards to his

---

[8] As stated in the Government's Sentencing Position for Defendant Charles C. Lynch (Doc. No. 232) at page 1, "[t]he government adopts the factual findings in the PSR, including the summary of offense conduct and relevant conduct."

[9] At the trial, Lynch testified as to having telephoned a DEA branch office to inquire about the legality of medical marijuana dispensaries. He also placed into evidence a copy of his phone records which showed that contact was made between his telephone and the DEA's branch office for a number of minutes. However, Lynch did not have any record as to the identity of the purported DEA employee to whom he spoke or what exactly was said by the employee.

Lynch raised the telephone conversation as the basis for an "entrapment by estoppel" defense. See generally United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004). Given the verdict, it is clear that the jury found that Lynch had failed to meet his burden of establishing that defense. In so deciding, the jury did not necessarily find that Lynch had lied in regards to having phoned the DEA, talking to a DEA official, and/or (as a result of that discussion) concluding that his operating a medical marijuana facility would not violate federal or state law. This is because the jury was instructed in regards to the entrapment by estoppel defense that the defendant bore the burden of proving by a preponderance of the evidence each of the following five elements:

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

operations (see Lynch Decl. at ¶ 4, Doc. No. 246); 3) applying to the City for a business license to operate a medical marijuana dispensary, which he obtained (id. at ¶ 7); and 4) meeting with the City of Morro Bay's Mayor (Janice Peters), city council members, the City Attorney (Rob Schultz) and the City Planner (Mike Prater) (id. at ¶ 8). The aforementioned city officials did not raise any objections to Lynch's plans. However, the City's Police Chief issued a February 28, 2006 memorandum as to Lynch's business license application indicating that, while the medical marijuana dispensary might be legal under California law, federal law would still prohibit such an operation and "California law will not protect a person from prosecution under federal law."[10] Trial Exhibit No. 179; see also Trial Exhibit No. 180.

The CCCC was not operated as a clandestine business. It was located on the second floor of an office building with signage in the downtown commercial area. See Declaration of Janice Peters at ¶ 4 (Doc. No. 246). An opening ceremony and tour of the facilities were conducted where the attendees included the city's Mayor and members of the city council. Id. Both the Mayor and Lynch separately passed out their business cards to proprietors of commercial establishments within the immediate vicinity of the CCCC who were told that, should they have any concerns or complaints about the CCCC's activities, they should notify either the Mayor or Lynch. Id. at ¶ 5; see also Lynch Decl. at ¶ 6 (Doc. No. 246). No one ever contacted either the Mayor

---

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.

See Jury Instruction No. 34 (Doc. No. 172). The jury was also instructed that "mere ignorance of the law or a good faith belief in the legality of one's conduct is no excuse to the crimes charged in the Indictment." Id.

[10] In response to the Police Chief's memorandum, on March 13, 2006, the City Attorney for Morro Bay issued a legal opinion and justification to approve and issue a business license for CCCC, even though "under federal law the distribution of marijuana even for medical purposes and in accordance with the CUA could still lead to criminal prosecution." See Exhibit 9 to Notice of Lodging of Mr. Lynch's Initial Position Re: Applicability of the Mandatory Minimum Sentence (Doc. No. 244).

or Lynch to make a complaint. Id.

Lynch employed approximately ten people to help him run CCCC as security guards, marijuana growers, and sales staff. See PSR at ¶ 9. He worked at the store most days. Id. He ran background checks on prospective employees and did not hire anyone with a felony record or who was an "illegal alien."[11] See Lynch Decl. at ¶¶ 15, and 22 (Doc. No. 246). Employees signed in and out via an electronic clock and Lynch ran payroll through "Intuit Quickbooks." Id. at ¶¶ 22-23. Employees had to execute a "CCCC Employee Agreement" which contained various disclosures and restrictions.[12] See Exhibit 11 to Burkdoll Decl. (Doc. No. 236).

Lynch installed a security system which included video recording of sales transactions within the facility. Lynch Decl. at ¶ 17; see also PSR at ¶ 9. The CCCC kept "detailed business records" of its purchases and sources of the marijuana. See PSR at ¶¶ 37-38. It likewise had extensive records as to its sales, including copies of the customers' medical marijuana authorizations and driver's licenses. See Redacted Indictment ¶ B-4 of Count One on page 3 (Doc. No. 161). No one under 18 was permitted to enter unless accompanied by a parent or legal guardian. Lynch Decl. at ¶ 17. Entrance to the CCCC was limited to law enforcement/government officials, patients, caregivers and parents/legal guardians. Id. at 29.

Before being allowed to purchase any marijuana product, a customer had to provide both medical authorization from a physician and valid identification. Id. at ¶ 27; see also PSR at ¶ 21. The status of the doctors listed on the medical authorization forms were also checked with the California Medical Board website. Lynch Decl. at ¶ 25. CCCC also had a list of physicians who could re-issue expired

---

[11] Three of these employees (Justin St. John, Chad Harris and Michael Kelly) were 19 years old when hired. See Trial Exhibits. 117-18 and 123-24.

[12] The CCCC Employment Agreement included the following language: "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 [sic]."

medical authorization cards.[13] A customer would have to sign a "Membership Agreement Form" wherein the buyer had to agree to the listed conditions which included, inter alia: not opening the marijuana container within 1000 feet of the CCCC, using the marijuana for medical purposes only, abiding by the California laws regarding medical marijuana, etc. See Exhibit 10 to Burkdoll Decl. In addition, the customer had to execute a CCCC "Designation of Primary Caregiver" form wherein the buyer: 1) certified that he or she had one or more of the medical conditions which provide a basis for marijuana use under the CUA, and 2) named the CCCC as his or her "designated primary caregiver" in accordance with Cal. H & S Code § 11362.5(d) and (e). Id. at Exhibit 9. Evidence presented at trial showed that the CCCC not only sold the marijuana but also advised customers on which varieties to use for their ailments and on how to cultivate any purchased marijuana plants at their homes.

Nearly all of the persons who supplied the marijuana products to the CCCC (referenced as "vendors") were themselves members/customers of the CCCC. See Report of Investigation at ¶ 3, Exhibit 1 to Burkdoll Decl. Lynch documented "the weight, type, and price of marijuana that he purchased from "vendors." Id. Between CCCC's opening in April of 2006 to its closing in about April of 2007, CCCC paid vendors over $1.3 million for marijuana products. Id. at ¶ 4. During that period, the top ten suppliers were paid between $150,097.50 and $30,567.50. Id. Lynch was

[13] The original indictment included a second defendant, Dr. Armond Tollotte, Jr., who was charged with, inter alia, writing up physician's statements authorizing marijuana for customers to use at CCCC and other locations for cash payments but without first determining any medical needs of the customers. See Indictment at pages 3-6 (Doc. No. 1). Prior to Lynch's trial, Tollette pled guilty to the Count One conspiracy charge. See Tollette Plea Agreement at page 4-6 (Doc. No. 96). Part of the "Factual Basis" for the plea was an admission that "On November 11, 2006, defendant received and read a facsimile from the Morro Bay store warning defendant that [Confidential Source 1] was working for law enforcement." Id. at page 5. However, Tollette never stated or admitted that he conspired with Lynch, or whether Lynch knew or should have been aware of his illegal activity. The Government did not call Tollette as a prosecution witness at trial. Lynch has stated that he "never met Dr. Tollette until I was arrested." Lynch Decl. at ¶ 11. As stated on page 6 of the Sent. Rec. Let., "there is no dedicated [sic] connection between the defendant and Tollette such that Tollette was the only doctor referring customers to the CCCC and the CCCC, in turn, was sending potential customers only to Tollette."

CCCC's third largest provider and received $122,565. Id. The second highest supplier was John Candelaria II, who was a CCCC employee during part of the relevant time. Id.

Lynch maintains that he did not open CCCC to make money and that he never got his initial investment back. See Lynch Decl. at ¶ 24. The DEA claims that, based upon CCCC's records between April 2006 and March 2007, CCCC had sales of $2.1 million. See ¶ 2 of Exhibit 1 to Burkdoll Decl. However, neither side has provided an actual/reliable accounting to this Court as to CCCC's business records to determine to what extent, if any, CCCC was a profitable venture.[14]

As noted in the Sent. Rec. Let. at page 5, Lynch hired certain employees "who, by their conduct and association to the CCCC, undermined the defendant's well-intended purpose of helping those in need of medical marijuana." For example, one employee (Abraham Baxter) sold $3,2000 worth of marijuana from the CCCC to an undercover agent away from the premises without the prerequisite production of any medical authorization. Id. However, there was "nothing to indicate that the defendant knew of Baxter's extracurricular activities other than defendant's own meticulous accounting should have alerted him of unexplained inventory reductions." Id. at page 6.[15] Baxter has submitted a videotaped statement that Lynch was unaware of Baxter's improper sales. See Doc. No. 277. Likewise, there is evidence of observations by San Luis Obispo County Sheriffs of two CCCC employees (i.e. John Candelaria and Ryan Doherty) distributing bags and packages to persons immediately outside of the CCCC

---

[14] The Government has submitted a July 15, 2008 expert designation letter from Lynch's counsel which stated that Defendant's expert (i.e. Carl Knudsen) would be expected to testify that the $2.1 million sales figure is incorrect and that "Lynch made less than $100 thousand from his enterprise." See page 1of Exhibit B to Kowal Declaration attached to Government's Opposition to Defendant's Second Motion for New Trial (Doc. No. 201). However, Knudsen did not testify and no report or other evidence was received from him or admitted at trial.

[15] There was evidence at trial that certain quantities of the processed marijuana were not pre-packaged. Hence, one may question whether it is reasonable to expect Lynch to have been aware of isolated instances of pilferage by employees.

premises or exiting the CCCC with such bags/packages and thereafter driving off in their respective vehicles. PSR at ¶¶ 26-27.[16] The Sent. Rec. Let. at page 5 states:

> While the defendant and the CCCC may have sold marijuana to some people with a legitimate need for alternative medical treatment, it is obvious that the CCCC was also providing marijuana to people with no medical need but an authorization in hand. Undercover officers observed customers walking in to [sic] the store and leaving the store on rolling shoes. A total of 277 customers were under age 21 which makes it unlikely that they would suffer from disease. And so it appears that the defendant and his CCCC employees knowingly provided marijuana to anyone holding an authorization and did very little to confirm the customer's true justification for holding the authorization.

The USPO's above-stated conclusions are highly questionable. First, if the CCCC checked the status of the doctors who issued the medical marijuana authorization and found them to be in good standing with the California Medical Board (as Lynch claimed - see Lynch Decl. at ¶ 25 - and the Government did not rebut), on what other basis would the CCCC determine whether or not the customer had a legitimate need for the marijuana? There was no physician stationed at the facility to conduct medical exams. Second, the fact that certain customers were able to walk into the store and leave "on rolling shoes" does not preclude them from having certain conditions specified in the CUA such as cancer, AIDS or migraines. Likewise, the USPO's assumption that persons under age 21 are unlikely to "suffer from disease" is unfounded in the context of persons who have gone to doctors and obtained medical authorizations for medicinal marijuana. While it might be argued (based on speculation) that persons who are physically able to leave the store on "rolling shoes" or are under the age of 21 might be more likely to have obtained their medical authorization by fraud or through unscrupulous physicians such as Dr. Tollette, that

[16] There is no evidence that all of the bags/packages contained marijuana products or that any purported marijuana therein came from the CCCC. As noted above, Candelaria on his own cultivated marijuana for sale to purchasers. Likewise, the transportation of marijuana by a primary caregiver would not have been in violation of the CUA or MMPA. Also, except for uncorroborated hearsay purportedly from Doherty (see pages 7-10 of Exhibit 18 to Burkdoll Decl., Doc. No. 236), there is no evidence that Lynch was aware of those incidents.

argument/supposition would be insufficient to establish fault on the part of a marijuana dispensary such as the CCCC which has checked the standing of the issuing physicians.

On March 29, 2007, DEA agents executed a search warrant at the CCCC and Lynch's home. PSR at ¶ 29. Processed marijuana, marijuana plants, hashish and other marijuana products were seized along with CCCC's business records. Id. at ¶¶ 29-34. The agents did not shut the facility down at that time and Lynch continued to operate the CCCC for another five weeks. Id. at ¶ 30.

As calculated by the USPO, the total amount of marijuana involved in this case is:

Actual Marijuana Recovered and Tested by DEA	5.617 kilograms
Marijuana Determined by Extrapolation of Business Records	.496.200 kilograms
THC recovered and tested by DEA (marijuana conversion: 277.9 grams of THC is the equivalent of 1,389.5 grams of marijuana	1.389 kilograms
Total	503.206 kilograms

Id. at ¶ 52 (footnote omitted).

III. SENTENCING GUIDELINES

A. Offense Level Computation

Given Lynch's conviction on multiple counts, initially it must be determined whether there are groups of closely related counts as per §§ 3D1.1(a) and 3D1.2 of the United States Sentencing Commission, Guidelines Manual (Nov. 2009) ("USSG" or "Guidelines").[17] Counts One (conspiracy to distribute marijuana), Four (possession with intent to distribute marijuana) and Five (maintaining a premises for the distribution of marijuana) can be grouped together (henceforth collectively "Counts

[17] The November 2009 Edition of the Guidelines Manual was issued after Lynch's conviction. Typically, clarifying but not substantive amendments to the Guidelines are applied retroactively, unless the retroactive application would disadvantage the defendant and give rise to an ex post facto clause violation. See United States v. Lopez-Solis, 447 F.3d 1201, 1204 (9th Cir. 2006). In this case, the November 2009 Edition does not materially alter any Guidelines provision which is applicable in this case.

1/4/5") under USSG § 3D1.2(b) as they involve the same victim ("societal interest")[18] and actions which are part of a common plan. See PSR at ¶¶ 47-48. Counts Two and Three (distribution of more than 5 grams of marijuana to a person under the age of 21) are grouped together (henceforth collectively "Counts 2/3") under USSG § 3D1.2(b) because they involve the same victim (Justin St. John - the underage recipient) and connected transactions. However, Counts 2/3 are not grouped with Counts 1/4/5 because they involve separate victims/harms. See PSR at ¶ 49.

1. Counts 1/4/5

When calculating the offense level for a group of counts, one uses the most serious (i.e. highest offense level) of the individual counts. USSG § 3D1.3(a). As to Counts One, Four and Five (as alleged and proven at trial), Count One is the most serious. For a conspiracy charge under 21 U.S.C. § 846, the base offense level is determined pursuant to the Drug Quantity Table set forth in USSG § 2D1.1(c). Here, there is sufficient evidence that the amount of marijuana and related marijuana products involved as to Count One was between 400 and 700 equivalent kilograms of marijuana-containing substances (see PSR at ¶ 52) which would fall within USSG § 2D1.1(c)(6) for a base offense level of 28 as to Counts 1/4/5.

In the PSR at ¶ 55, the Probation Office proposed an additional 4 level increase pursuant to USSG § 3B1.1(a) which provides: "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive . . . ." The Government proposes increasing the base number not only pursuant to USSG § 3B1.1(a) but also by an additional level under USSG 2D1.2(a)(2) for "sales to minors." See Government's Amended Response to Presentence Report at page 1 (Doc. No. 251). For the reasons stated below in its discussion of the safety valve element in 18 U.S.C. § 3553(f)(4), this Court would not find Lynch to be an

---

[18] As stated in USSG § 3D1.2, comment (n.2): "For offenses in which there are no identifiable victims (e.g. drug . . . offenses, when society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed."

"organizer/leader" for purposes of enhancing his criminal sentence. As to the Government's citation to USSG § 2D1.2(a)(2), the Court would find it to be literally applicable.

In sum, the offense level for Counts 1/4/5 would be 29.

2. Counts 2/3

Counts Two and Three involve the distributions of marijuana in amounts over 5 grams to Justin St. John who was between 19 and 21 years, in violation of 21 U.S.C. § 859. The applicable guideline for the crime is USSG § 2D1.2. The USPO in the PSR attempts to utilize § 2D1.2(a)(1) which provides for "2 plus the offense level from 2D1.1 applicable to the quantity of controlled substance directly involving . . . an underage . . . individual . . . ." The evidence at trial was that St. John (an employee at the CCCC who had a medical marijuana authorization) was given 17.5 and 14 grams of marijuana on two separate occasions. See PSR at ¶ 59. The Probation Office then notes that, based upon CCCC's records, there were 277 underage customers and that, if one were to take the average amount of marijuana which St. John had received on those dates (i.e. 15.75 grams) and multiplied it by 277, the resulting amount would be 4.363 kilograms. That amount of drugs, under USSG § 2D1.1(c)(14), would give a base offense level of 12, which plus 2 under § 2D1.2(a)(1) would equal 14. Id.

However, this Court would find USPO's methodology to be based on pure speculation - that the average of the amounts which St. John (a CCCC employee) received on the two aforementioned occasions should be used as a multiplier for the 277 underage customers.[19] Instead, this Court would select the 13 offense level in USSG § 2D1.2(a)(4) which is utilized where the other subsections are not applicable.

3. Total Offense Level

[19] For example, it is noted that in the Redacted Indictment provided to the jury (Doc. No. 161) in paragraphs 5 and 6 on page 4, there is reference to six distributions of marijuana to Justin St. John, one of which was only 3 grams. Further, St. John cannot be considered a typical or average CCCC customer since he was one of its employees and at least one of the distributions was supposedly a birthday gift.

Because the offense level for the Counts 2/3 group is more than 9 levels below the Counts 1/4/5 group, no additional enhancement for an "adjusted combined offense level" is added to the Counts 1/4/5 group total of 29 pursuant to USSG § 3D1.4.

In light of the above, the total offense level in Lynch's case is 29.

B. Lynch's Criminal History and Resulting Guidelines Range

According to the PSR, Lynch does not have any prior arrests or convictions which would be applied in determining his criminal history category. See PSR at ¶¶ 76-79. Therefore, he falls within category I. The Sentencing Guidelines range for an offense level of 29 and a criminal history category I would be 87 to 108 months.

C. Mandatory Minimum Sentences

The convictions of the crimes in Counts One, Two and Three provide for statutory minimum sentences unless some exception can be found to avoid their application.

In Count One, the jury found Lynch guilty of violating 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), 846, 856 and 859, including a specific finding that the crime involved "at least 100 kilograms of a mixture or substance containing a detectable amount of marijuana" and "at least 100 marijuana plants . . . ." See Verdict at pages 2-3 (Doc. No. 175). 21 U.S.C. § 841(b)(1)(B)(vii) provides that such amounts require that the defendant "shall be sentenced to a term of imprisonment which may not be less than 5 years . . . ."

The jury convicted Lynch of Counts Two and Three charging him with distribution of marijuana to persons under the age of 21 in violation of 21 U.S.C. §§ 841(a)(1) and 859(a). In doing so, the jury specifically found that the amounts involved in such count exceeded 5 grams. See Verdict at pages 4-5. Under 21 U.S.C. § 859(a), the "term of imprisonment under this subsection shall not be less than one year."

D. Sentencing Positions

Using an offense level of 32 and the criminal history category I which resulted

in a guidelines sentencing range of 121 to 151 months, the USPO's recommendation was to utilize the mandatory minimum sentence of 60 months and four-year period of supervised release as to Count One. The USPO stated:

> It is the undersigned officer's position that a sentencing range of 121 to 151 is excessive and that the nature and circumstances of the offense as well as the defendant's history and characteristics provide ample reasons to justify a sentence below this guideline range. The defendant has no prior convictions. Prior arrests were either dismissed or rejected for prosecution. He is a college graduate with skills in computer programming. He owns and operates a computer business which he expects will earn income in the future. His family and friends are very supportive of him and do not believe that he should be the victim of his conflict in federal and state laws. The defendant is now on the verge of losing his home. His credit card accounts are high as he shifts debt from one account to another to make ends meet.

See Sent. Rec. Let. at page 6.

Using an offense level of 33 and criminal history category I which resulted in a guidelines sentencing range of 135 to 168 months, the Government also concurred that 60 months incarceration followed by four years of supervised release was an appropriate sentence. See Government's Amended Sentencing Recommendation for Defendant Charles C. Lynch at page 1 (Doc. No. 252). As stated by the Government:

> As explained below, while a sentence well below the Guidelines is appropriate, a significant period of incarceration is warranted given: (1) defendant's sales to numerous minors, (2) the fact that defendant always knew he was violating federal law, (3) the fact that defendant's business violated state law, and was pervaded by transactions and behavior far from the contemplation of even a generous interpretation of California law, and (4) other factors set forth in § 3553(a).

Id.

Defendant seeks a "time-served sentence to be followed by a one-year term of supervised release" assuming that the mandatory minimum sentences as to Counts One, Two and Three can be circumvented. See Defendant's Reply to Government's Position re: Applicability of the Mandatory Minimum Sentences at page 17 (Doc. No. 254). Alternatively, Defendant argues that "if the Court holds that a term of

imprisonment must be imposed [i.e. if either of the mandatory minimum sentences cannot be avoided], Mr. Lynch should be ordered to serve that term of imprisonment in his home." See Charlie Lynch's Supplemental Memorandum of Points and Authorities Re: Sentencing at page 14 (Doc. No. 285).

IV. DISCUSSION

A. Applicable Law

The Ninth Circuit in its en banc decision in United States v. Carty, 520 F.3d 984, 990 (9th Cir.), cert. denied, 553 U.S. 1061 (2008), delineated the "basic framework . . . for the district courts' task . . . [in sentencing] under the Booker remedial regime in which the Guidelines are no longer mandatory but are only advisory." As stated therein:

> The overarching statutory charge for a district court is to "impose a sentence sufficient, but not greater than necessary" to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a) and (a)(2).
>
> All sentencing proceedings are to begin by determining the applicable Guidelines range. The range must be calculated correctly. In this sense, the Guidelines are "the 'starting point and the initial benchmark,'" Kimbrough, 128 S.Ct. at 574 (quoting Gall, 128 S.Ct. at 596), and are to be kept in mind throughout the process, Gall, 128 S.Ct. at 596-97 n. 6.
>
> The parties must be given a chance to argue for a sentence they believe is appropriate.
>
> The district court should then consider the § 3553(a) factors to decide if they support the sentence suggested by the parties, i.e., it should consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed; the kinds of sentences available; the kinds of sentence and the sentencing range established in the Guidelines; any pertinent policy statement issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims. 18 U.S.C. § 3553(a)(1)-(7); Gall, 128 S.Ct. at 596-97 n.6.
>
> The district court may not presume that the Guidelines range is reasonable. Rita, 127 S.Ct. at 2465 (citing Booker, 543 U.S. at 259-60, 125 S.Ct. 738; Gall, 128

> S.Ct. at 596-97. Nor should the Guidelines factor be given more or less weight than any other. While the Guidelines are to be respectfully considered, they are one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence. Kimbrough, 128 S.Ct. at 570; Gall, 128 S.Ct. at 594, 596-97, 602.
>
> The district court must make an individualized determination based on the facts. However, the district judge is not obliged to raise every possibly relevant issue sua sponte. Gall, 128 S.Ct. at 597, 599.
>
> If a district judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." Id. at 597. This does not mean that the district court's discretion is constrained by distance alone. Rather, the extent of the difference is simply a relevant consideration. At the same time, as the Court put it, "[w]e find it uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Id.* This conclusion finds natural support in the structure of § 3553(a), for the greater the variance, the more persuasive the justification will likely be because other values reflected in § 3553(a) -- such as, for example, unwarranted disparity -- may figure more heavily in the balance.
>
> Once the sentence is selected, the district court must explain it sufficiently to permit meaningful appellate review. A statement of reasons is required by statute, § 3553(c), and furthers the proper administration of justice. See Rita, 127 S.Ct. at 2468 (stating that "[c]onfidence in a judge's use of reason underlies the public's trust in the judicial institution"). An explanation communicates that the parties' arguments have been heard, and that a reasoned decision has been made. It is most helpful for this to come from the bench, but adequate explanation in some cases may also be inferred from the PSR or the record as a whole.
>
> What constitutes a sufficient explanation will necessarily vary depending upon the complexity of the particular case, whether the sentence chosen is inside or outside the Guidelines, and the strength and seriousness of the proffered reasons for imposing a sentence that differs from the Guidelines range. ****
>
> The district court need not tick off each of the § 3553(a) factors to show that it has considered them. We assume that district judges know the law and understand their obligation to consider all of the § 3553(a) factors, not just the Guidelines. See Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) ("Trial judges are presumed to know the law and to apply it in making their decisions."), *overruled on other grounds* by Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

520 F.3d at 991-92 (footnote omitted).

B. The Court Will Sentence Lynch Outside the Advisory Guideline System

Even before the sea change as to federal sentencing law in the wake of United States v. Booker, 543 U.S. 220 (2005), the Supreme Court observed in Koon v. United States, 518 U.S. 81, 94 (1996), that "each Guideline [was formulated] to apply to a heartland of typical cases. Atypical cases were not 'adequately taken into consideration' and factors that may make a case atypical provide potential bases for departure." More recently, the Supreme Court has observed that "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." Nelson v. United States, ___ U.S. ___, 129 S.Ct. 890, 892 (2009) (per curiam). The Court has also rejected a "rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range." Gall v. United States, 552 U.S. 38, 47 (2007); see also. United states v. Autery, 555 F.3d 864, 872 (9th Cir. 2009) (a sentence outside of the Guidelines is not presumed to be unreasonable).

Here, there can be no doubt that the present case falls outside of the heartland of typical marijuana distribution cases for a number of very obvious reasons including, but not limited to: 1) the passage of California's CUA and MMPA which decriminalized the cultivation, possession and distribution of marijuana under state law to the extent and for the purposes described in those laws; 2) the objective of the distribution here was (at least in primary part, if not in total) to provide the marijuana for therapeutic reasons to persons with diagnosed medical needs pursuant to California state laws; 3) the Defendant's notifying governmental authorities (including certain law enforcement agencies) of his plans/activities prior to engaging in them; 4) the Defendant's operating publicly in an obvious and known location; 5) the extensive steps which Defendant took to minimize the criminal aspects of the CCCC (e.g. by getting a business license for the marijuana distribution from the City of Morro Bay); and 6) the Defendant's maintaining copious records which completely delineated the details and extent of CCCC's operations, including the names and addresses of its vendors and customers, the amounts of marijuana purchased/distributed, etc.

Indeed, none of the parties (nor the USPO) herein have relied upon or are arguing for the application of a regular Guidelines sentence as to Lynch. Additionally, as discussed below, this Court finds that the factors under 18 U.S.C. § 3553(a) warrant proceeding outside of the Guidelines system.

C. The Application/Non-application of Mandatory Minimum Sentences

1. Mandatory Minimum Sentences

Based on the findings of the jury herein, Lynch's convictions on Counts One, Two and Three raise the issue of the application of statutory mandatory minimum sentences. Unlike the Guidelines which are only advisory, a sentencing court cannot simply decide in its discretion to refuse to impose a minimum sentence required by a statute. See generally United States v. Harris, 154 F.3d 1082, 1084 (9th Cir. 1998).

Congress enacted the statutory penalties commonly called "mandatory minimums" in 1984 with the aim of providing "a meaningful floor" in sentences for certain "serious" federal controlled substance offenses. See H.R. Rep. No. 460, 103rd Cong. 2nd Sess. at 3-4, 1994 WL 107571 (Leg. Hist.). "With respect to drug trafficking, the Anti-Drug Abuse Act of 1986 [Pub. L. No. 99-570, 100 Stat. 3207] established two basic tiers of mandatory minimums for drug-trafficking -- a five-year and ten-year imprisonment penalty." Id. Those minimum penalties were triggered exclusively by the type and amount of the controlled substance involved based upon the expectation that the designated drug quantities would target "kingpin" traffickers (with the 10 year minimum penalty) and "middle-level" traffickers (with the 5 year penalty). Id.

2. Sentencing Manipulation

Lynch has raised an argument regarding "sentencing entrapment/imperfect entrapment" which appears to be what has been labeled in cases as the "sentencing manipulation" defense. Sentencing manipulation "focuses on the government's conduct," and arises when the government engages in actions which allow "prosecutors to gerrymander the district court's sentencing options and thus [the] defendant's

sentences."[20] United States v. Sanchez, 138 F.3d 1410, 1414 (11th Cir. 1998). Sentencing manipulation, if present, raises a question as to whether there is a due process violation. United States v. Torres, 563 F.3d 731, 734 (8th Cir. 2009). The availability and applicability of the sentencing manipulation defense is the subject of considerable disagreement among the federal courts of appeal. See United States v. Oliveras, 2010 U.S. App. LEXIS 393, *9-11 & n. 5 (2d Cir. Jan. 8, 2010). The Sanchez decision does note that, as of 1998, "[n]o court of appeals has overturned a conviction or departed downward on the basis of a sentencing manipulation claim." 138 F.3d at 1414.

In United States v. Baker, 63 F.3d 1478, 1499-1500 (9th Cir. 1995), the Ninth Circuit rejected sentencing manipulation as a "bar to prosecution" where the defendant claimed that the Government unnecessarily prolonged its investigation of the contraband cigarette trafficking scheme for the sole purpose of increasing the defendants' sentencing exposure. The court explained its reasoning as follows:

> The viability of sentencing manipulation as a valid doctrine is uncertain. No court has held, however, that sentencing manipulation can serve as a complete bar to prosecution. In United States v. Jones, on which [defendant] relies, the Fourth Circuit, in suggesting outrageous government conduct can serve as a valid defense to a crime, warned that "as a practical matter, only those claims alleging violation of particular constitutional guarantees are likely to succeed." Jones, 18 F.3d at 1154. There is no such allegation in this case.
>
> * * * *
>
> [Defendant] asserts only that the government stretched out its investigation after it had sufficient evidence to indict. This may be true, but we decline to adopt a rule that, in effect, would find "sentencing manipulation" whenever the government, even though it has enough evidence to indict, opts instead to wait in favor of continuing its investigation. See Jones, 18 F.3d at 1155.
>
> Such a rule "would unnecessarily and unfairly restrict the discretion and judgment of investigators and prosecutors."

[20] Sentencing manipulation is different than sentencing entrapment. The latter occurs when "a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to a greater punishment." Sanchez, 138 F.3d at 1414; see also United States v. Si, 343 F.3d 1116, 1128 (9th Cir. 2003).

> Id. at 1145. "Police . . . must be given leeway to probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace . . . deeper into the distribution hierarchy." United States v. Calva, 979 F.2d 119, 123 (8th Cir. 1992).

Id. at 1500. The question here is not whether sentencing manipulation can serve as a bar to prosecution or as a basis for reversal of a conviction, but whether it can be utilized to avoid the statutory mandatory minimum sentence which is applicable because the predicate amount has been met over time.

This Court would find that, in the appropriate situation, improper conduct by Government agents can give rise to the sentencing manipulation defense which, in turn, could justify a decision not to impose a statutory minimum sentence. However, Defendant herein has not presented sufficient evidentiary material to warrant that result.

For sentencing manipulation to be found, the defendant must show some high degree of outrageous or improper conduct to justify the non-application of the statutory minimum sentence. In the cases cited by Defendant such as United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993), and United States v. Takai, 941 F.2d 738 (9th Cir. 1991), the courts were merely dealing with conduct which they found would support a downward departure under the Guidelines. Here, Lynch is seeking much more, but has presented much less. Lynch has not proffered even evidence of any "aggressive encouragement of wrongdoing" (as was found in Garza-Juarez, 992 F.2d at 912) or any intentional decision on the part of federal law enforcement to delay arresting him for the purpose of allowing his enterprise to eventually accumulate sufficient sales/distributions of marijuana in order to ratchet his sentence to a statutory mandatory minimum level.[21]

---

[21] This Court would, however, agree with Lynch that, unlike the law enforcement officers in Baker (63 F.3d at 1500) who needed "leeway to probe the depth and extent of the criminal enterprise," CCCC's operations were conducted not in stealth but publicly and prominently. Indeed, the vast majority of the evidence presented to the jury was obtained from Lynch's and CCCC's records and premises which could have been acquired at any point pursuant to a search warrant which, in turn, could have been procured at any

3. Application of the Safety Valve

18 U.S.C. § 3553(f) provides a "safety valve" whereby a court need not apply the statutory minimum sentence to certain designated drug crimes where the defendant by a preponderance of the evidence establishes the five conditions set out in that subsection. See United States v. Alba-Flores, 577 F.3d 1104, 1107 (9th Cir. 2009). That provision would come into play for violations of 21 U.S.C. §§ 841 and 846 (which are involved as to Count One), but could not be utilized for convictions under 21 U.S.C. § 859 (which is the basis for Counts Two and Three). Therefore, the one year mandatory minimum sentence in 21 U.S.C. § 859 must be imposed as to Counts Two and Three.[22] See generally United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir. 2000).

As to the safety valve's application to Count One, the Government has indicated its position that Lynch has satisfied all of the conditions in 18 U.S.C. § 3553(f) except for the fourth one. See Government's Amended Position on Applicability of Safety Valve Provision to Defendant Charles C. Lynch at page 2 (Doc. No. 249), and Government's Notice Re Defendant Charles C. Lynch at page 1 (Doc. No. 267). The Section 3553(f)(4) condition is:

> the 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 section 408 of the Controlled Substances Act [21 USCS § 848].

---

time after CCCC began its operations, since there has never been any dispute that CCCC was openly possessing and distributing marijuana at its store in downtown Morro Bay.

[22] 18 U.S.C. § 3553(e) also allows a court to not apply the statutory minimum sentence in cases where the Government files a motion making such a request on the basis that the defendant has provided "substantial assistance in the investigation or prosecution of another person who has committed an offense." See generally Wade v. United States, 504 U.S. 181, 184-86 (1992). Here, Section 3553(e) is not applicable since the Government has not filed any motion under that provision nor has Lynch claimed to have provided substantial assistance in the investigation or prosecution of some other person.

Thus, the question which must be resolved herein[23] is whether Lynch was an "organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines."[24] Id. (emphasis added).

The Sentencing Guidelines' parallel provision to 18 U.S.C. § 3553(f) is USSG § 5C1.2 which contains the identical five conditions. The Commentary - Application Notes to Section 5C1.2 state:

> "Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under § 3B1.1 (Aggravating Role).

USSG § 5C1.2, comment. (n.5). USSG § 3B1.1 provides for increases to a defendant's offense level where the defendant is an "organizer, leader, manager or supervisor" in "criminal activity." As explained in the Background Commentary to USSG § 3B1.1:

> This section provides a range of adjustments to increase the offense level based upon 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 Commis-sion's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility. [Emphasis added.]

USSG § 3B1.1, comment. (backg'd.).

---

[23] Lynch was not charged in the Indictment with (nor was the jury asked to make findings on the elements of) "engag[ing] in a continuing criminal enterprise as defined in [21 U.S.C. § 848]." Nor has the Government raised or argued any application of Section 848. See, e.g., page 5 of Government's Amended Position on Applicability of Safety Valve Provision to Defendant Charles C. Lynch (Doc. No. 249); Government's Amended Position on Applicability of Mandatory Minimum Sentences to Defendant Charles C. Lynch (Doc. No. 250).

[24] Two aspects of 18 U.S.C. § 3553(f)(4) should be noted. First is that the statute delegates the authority to determine/define who falls within the terms "organizer, leader, manager, or supervisor" to the United States Sentencing Commission through the latter's promulgation of its Sentencing Guidelines. Second, Section 3553(f) was enacted prior to the Supreme Court's decision in Koon which held that "atypical" cases (because they are not adequately taken into consideration in the formulation of the specific Guidelines) provide a "basis for departure." 518 U.S. at 94.

Initially, a question arises regarding the application herein of the Supreme Court's holding in Koon that each Guideline was formulated to apply to a heartland of typical cases and, because atypical cases were not adequately taken into consideration, factors that make a case atypical provide a basis for departure. Should the undeniable atypicality of the present case (versus the usual/normal marijuana distribution prosecution involving more than 100 kilograms of marijuana) 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" of the offense? This Court believes that the answer to that question would be "yes." However, even putting aside the Koon decision, it is clear that Lynch can be found to be outside of USSG § 3B1.1 under the stated Commentary and rationales of the applicable Guidelines themselves.

"The safety valve provision was enacted to ensure that mandatory minimum sentences are targeted toward relatively more serious conduct." United States v. Thompson, 81 F.3d 877, 879 (9th Cir. 1996); see also, United States v. Acosta, 287 F.3d 1034, 1038 (11th Cir. 2002). As determined in the Sentencing Guidelines, the reason why USSG § 3B1.1 provides for an upward adjustment for "organizers, leaders, managers and supervisors" is the belief that such persons "present a greater danger to the public and/or are more likely to recidivate." USSG § 3B1.1, comment. (backg'd.). As stated in the Commentary - Application Notes to USSG § 3B1.1, "To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager or supervisor of one or more participants." USSG § 3B1.1, comment. (n.2). Consequently, merely being such an organizer/leader over another participant simply qualifies a defendant for an adjustment; it does not require it. Thus, when 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.

Normally, the amount of the illegal drugs involved in a case will be sufficiently related to lawlessness, danger to the community and culpability such that the triggering of the application of a mandatory minimum upon a pre-set benchmark amount is rational and entirely appropriate. See generally Chapman v. United States, 500 U.S. 453, 464-65 (1991) (quantity-based mandatory minimum sentencing scheme does not violate due process or equal protection). However, in the present situation, Lynch's activities do not demonstrate an increase of lawlessness, danger to the public or culpability which warrants the application of the mandatory minimum based upon the amount of marijuana involved in his case or the increase in offense level under USSG § 3B1.1. In fact, it is just the opposite.

First, as noted above, the purpose of the CCCC's distribution of marijuana was not for recipients to "get high" or for recreational enjoyment. Rather, it was pursuant to the CUA's goal of providing marijuana to Californians for medical uses as prescribed by their treating physicians. It is recognized herein that the Supreme Court has previously pointed out that Congress has already made a "determination of value" and has found that marijuana (as a Schedule I controlled substance) has no medical benefits worthy of an exception to the application of the CSA. See Oakland Cannabis Buyers' Cooperative, 532 U.S. at 491. However, it was also noted that 21 U.S.C. § 811(a) allows the Attorney General, by rule, to transfer a controlled substance between the schedules or to remove it entirely in the appropriate situation. Here, both President Obama and Attorney General Holder have indicated the current administration's position that possession and distribution of medical marijuana in conformity with state law will not be subject to federal enforcement/interdiction.[25] While the latter will not

[25] The Government correctly argues that the CCCC was not operated in conformity with California state law because, as held by the California Supreme Court in Mentch, 45 Cal. 4th at 283-87, medical marijuana distribution operations (such as the CCCC) cannot show that they fall within the CUA's or MMPA's definition of a "primary caregiver." As stated in Mentch, a "primary caregiver . . . must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana." Id. at 283.

serve to legitimize Lynch's activities vis-a-vis federal law, it does relate to the issues of the degree of lawlessness, danger to the public and level of culpability in regards to his conduct. While the Government has cited to certain instances where some of the CCCC's marijuana may have been obtained by persons through fraudulent medical authorizations or may have been diverted by a few employees to unlawful recipients, there is no evidence that the vast majority of the marijuana was so improperly distributed or that Lynch himself was aware of and/or participated in that misfeasance.

Second, as to the amounts of the controlled substances involved herein, the evidence demonstrates that the CCCC was generally distributing the marijuana products within the portions specified in Cal. H & S Code § 11362.77(a) (i.e. "No more than eight ounces of dried marijuana per qualified patient" or "six mature or 12 immature marijuana plants"). Thus, Lynch was not involved in the large bulk transactions which characterize "kingpin" or even middle-level traffickers. While obviously that total amount of marijuana possessed and/or distributed by the CCCC did exceed the quantity for the application of the mandatory minimum, this was over the passage of time.

Third, Lynch on his own took steps to reduce/eliminate the criminal aspects and/or potential harmful consequences of CCCC's operation (aside from the essential

---

However, the Mentch case was decided in November of 2008, years after Lynch opened the CCCC in 2006. Admittedly, there were several pre-2006 California appellate court cases which foreshadowed the holdings in Mentch. See e.g., Peron, 59 Cal. App. 4th at 1395-97 (holding that a medical marijuana club cannot be designated by a patient as his or her primary caregiver because it has not consistently assumed the responsibility for the patient's housing, health or safety); Urziceanu, 132 Cal. App. 4th at 773 ("A cooperative where two people grow, stockpile, and distribute marijuana to hundreds of qualified patients or their primary caregivers, while receiving reimbursements for these expenses, does not fall within the scope of the language of the Compassionate Use Act or the cases that construe it."). Nevertheless, until the California Supreme Court issued its ruling in Mentch, the law in this area was still somewhat unsettled. For example, in Mentch itself, the court of appeals had reversed the trial court's refusal to allow the defendant (who had cultivated marijuana for the medical use of himself, five other authorized persons, and also on occasion for medical marijuana clubs) to raise the primary caregiver defense in his criminal case. See People v. Mentch, 143 Cal. App. 4th 1461, 1475-84 (2006). Consequently, prior to the California Supreme Court's decision in Mentch, Lynch could have reasonably believed that the CCCC's operations complied with California law because it was acting in the capacity of a primary caregiver.

function of distributing marijuana to authorized recipients for medical reasons). As noted above, before opening the CCCC, he notified governmental authorities including the City of Morro Bay's mayor and city council plus various local law enforcement entities such as the county sheriffs and (according to Lynch) the DEA. Consequently, should any governmental authority have believed that some public safety issue or other societal interest warranted the prevention of any commencement of CCCC's operations, that authority could have sought to enjoin the CCCC from opening. None did. Likewise, Lynch took steps to have CCCC comply with applicable laws such as by obtaining a business license, following federal and state labor statutes, etc. Further, Lynch attempted to regulate the conduct of CCCC's employees by not hiring felons and requiring workers to sign an Employee Agreement which included promises to abide by CCCC's conduct standards and the "Conditions for Issuance of Business License" issued by the City of Morro Bay. CCCC's customers had to execute a "Membership Agreement" wherein they consented to obey "the laws of the State of California regarding medical cannabis," CCCC's rules barring the use of marijuana at certain locations and during certain activities, etc. The CCCC did business in a prominent location with appropriate signage such that its operations were not clandestine but were, in fact, subject to apparent scrutiny by law enforcement. There was no evidence that anyone ever suffered any injury of any sort as a result of Lynch's running the CCCC. Lynch kept detailed records of all purchases, sales and other relevant activities of the CCCC (including the identities and other background information as to its suppliers and customers). As a result, his prosecution was greatly facilitated by his own scrupulous record-keeping.

In sum, although Lynch did put together CCCC's operations which had about ten employees, given the way he ran the CCCC, Lynch did not present any great danger to the public and certainly no greater danger than any of his fellow participants in the CCCC. Indeed, because of Lynch, the operations of the CCCC could have been stopped at any time by law enforcement (certainly before it had involved itself with an

amount of marijuana which would have given rise to the statutory mandatory minimum sentence). For the above reasons, this Court finds that Lynch does not fall within USSG § 3B1.1. Hence, the Court will not increase his offense level of 29 due to an aggravating role as per section 3B1.1. Further, the Court would find that Defendant has shown that the safety valve factors in 18 U.S.C. § 3553(f) and USSG § 5C1.2 are present. Therefore, the five year mandatory minimum sentence in 21 U.S.C. § 841(b)(1)(B) will not be applied to Count One of Lynch's case. Finally, his offense level will be reduced by two points as per USSG § 2D1.1(b)(11) and would equal 27. Thus, the Guidelines range for Lynch is 70-87 months.

D. The Sentence

As noted above, Lynch will be sentenced outside of the Sentencing Guidelines system as his case is clearly outside of the heartland for his crimes. The Court orders Lynch to serve the term of one year and one day as to Counts One, Two and Three (with those sentences to run concurrently) and to "time served" as to Counts Four and Five. Pursuant to USSG § 5GI.2(c), the Court finds that the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment. In addition, upon completion of that incarceration, Lynch is to be placed on supervised release for a period of four years as to Counts One through Four and a period of three years as to Count Five, with those terms to run concurrently.[26]

E. Reasons for the Sentence/ 18 U.S.C. § 3553(a) Factors

As stated by the Supreme Court in Gall, 552 U.S. at 50 n.6:

> Section 3553(a) lists seven factors that a sentencing court must consider. The first factor is a broad command to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The second factor requires the consideration of the general purposes of sentencing, including: "the need for the sentence imposed -- (A) to reflect the seriousness of

[26] As to Count One, see 21 U.S.C. § 841(b)(1)(B). As to Counts Two and Three, see 21 U.S.C. §§ 859(a) and 841(b)(1)(D). As to Count Four, see 21 U.S.C. § 841(b)(1)(C). As to Count Five, see 21 U.S.C. § 3583(b)(2).

> the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." § 3553(a)(2). The third factor pertains to "the kinds of sentences available," § 3553(a)(3); the fourth to the Sentencing Guidelines; the fifth to any relevant policy statement issued by the Sentencing Commission; the sixth to "the need to avoid unwarranted sentence disparities," § 3553(a)(6); and the seventh to "the need to provide restitution to any victim," § 3553(a)(7). Preceding this list is a general directive to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing described in the second factor. § 3553(a) (2000 ed., Supp. V).

1. Nature and Circumstances of the Offense

This Court has described the nature and circumstances of the offense above. Lynch's case is entirely atypical of "heartland" marijuana distribution schemes. As observed by the USPO, his conduct greatly reduced the lawlessness and danger to the public that normally would be associated with violations of 21 U.S.C. § 841(a) and (b)(1)(B)(vii). See Sent. Rec. Let. at page 4. Thus, the present situation warrants a sentence outside the advisory Guidelines system.

2. History and Characteristics of the Defendant

Lynch has no prior criminal convictions. While he has been arrested on four prior occasions (three of which were related to use or possession of marijuana), all of those cases were apparently dropped for lack of evidence or dismissed in the interests of justice. See PRS at ¶¶ 82-86.

Lynch is a 1987 college graduate with a degree in computer science. Id. at ¶ 111. Between 1987 and 2006, he worked as a computer programmer, technician, software developer and software engineer for four different companies. Id. at ¶¶ 116-17. He also started his own business in 2000 performing information technology and website development work as an independent contractor. Id. at ¶ 114. As a result of the present criminal matter, he is "on the verge of losing his home" and has encountered other financial difficulties. See Sent. Rec. Let. at page 6.

Lynch is single with no children and is presently 47 years old. He has the support of his family (his mother and many siblings) and friends.[27]

There is nothing in Lynch's background which indicates a propensity toward criminal or anti-social behavior. Indeed, but for the passage of the CUA and MMPA, it is apparent that he would not have opened the CCCC or been involved in any substantial distribution of marijuana. Further, as recognized by the USPO, Lynch's purpose in engaging in the subject conduct "was to provide marijuana to those who, under California law, [were] qualified to receive it for medical reasons." See Sent. Rec. Let. at page 4. He was not "a common drug dealer buying and selling drugs without regulation, government oversight, and with no other concern than making profits." Id.

Thus, Lynch's history and characteristics indicate that the appropriate sentence is one outside of (and substantially below) the Guidelines.

3. The Need for the Sentence Imposed

The seriousness of the Count One violation of 21 U.S.C. § 841(a) and (b)(1)(B)(vii) and Lynch's efforts to reduce the lawlessness and danger to public of that offense have already been discussed above. This Court does not believe that an extended period of incarceration in Lynch's case is needed to promote respect for the law or to provide a just punishment for the offense. Indeed, arguably Lynch displayed his respect for the law herein by notifying governmental authorities and law enforcement entities of his planned activities prior to engaging in them. Were all

[27] While simple popularity is not a factor to be considered, the Court notes that it has received more letters in support of Lynch in this matter than in any other case in the undersigned judicial officer's 16 years on the federal and state benches. That correspondence is from persons who are or were: Lynch's family members and friends, his former employers, customers of the CCCC, prospective and selected jurors in this criminal case, a CCCC employee who had been accused of criminal activity in regards to the incidents in this case (Abraham Baxter), a defendant in another medical marijuana case litigated in this federal district court (Judy Osborn), California physicians and health care therapists interested in the medical marijuana issue, various members of this country's armed forces, law enforcement officers, etc. See Exhibits attached to Charles Lynch's Position Re: Sentencing Factors (Doc. No. 245) and Letters in Support of Defendant's Position Re: Sentencing Factors (Doc. No. 264).

purported criminals so accommodating, this country would be a much safer and law-abiding place. Consequently, this Court would find that a sentence of one year and one day suitable to afford adequate deterrence to the criminal conduct engaged in by Lynch as to Counts One, Four and Five.

As to the violations of 21 U.S.C. § 859(a) in Counts Two and Three, normally the sales of marijuana to persons under the age of 21 is a serious and all-too-common offense. However, here the sales of marijuana by the CCCC: 1) to persons under 21 were executed pursuant to a physician's written authorization, and 2) to a minor under the age of 18 were made in the presence of an accompanying parent or legal guardian. Thus, the seriousness of the offense is tempered to a great degree. While the government and the USPO argue that Lynch turned a blind eye to the fact that many apparently healthy looking persons between the ages of 18 and 21 made purchases of marijuana at the CCCC with doctors' written authorizations, there is insufficient evidence to establish that Lynch was (or should have been) aware that those medical authorizations (or a substantial portion of them) were fraudulent or obtained by means of fraud. Furthermore, here, the Court will be imposing the statutory mandatory minimum sentence as to the 21 U.S.C. § 859(a) violations.

There is no indication that Lynch needs any incarceration time to deter him from any future crimes. Nevertheless, as already noted, this court will be sentencing Lynch to prison. Because he has never experienced any extended detention, the period of one year and one day is more than adequate punishment in his case.

Finally, given Defendant's education, work experience and health, incarceration is not necessary to provide him with "needed educational or vocational training, medical care, or other correctional treatment."

4. The Kinds of Sentences Available, the Guidelines Sentencing Range and Policy Statements Issued by the Sentencing Commission

The Court has reviewed the sentencing options discussed in the PSR at pages 26 through 28, including custody in prison, supervised release, probation, fines, and

restitution. The Court has also gone through the Guidelines Sentencing factors both as delineated in the PSR and independently. The Court did not find, nor did the parties or USPO reference, any relevant policy statements issued by the Sentencing Commission.

5. Unwarranted Sentence Disparities

Neither party has cited to the Court any evidence or data that its sentence in this case would constitute or create an unwarranted sentence disparity. Lynch's (and his conduct's) dissimilarity to other persons engaged in the distribution of marijuana warrants a different sentence.[28] See Autery, 555 F.3d at 876.

6. Restitution

As observed by the USPO in the PSR at ¶ 157, "Restitution is not an issue in this case."

V. CONCLUSION

For the reasons stated above and at the sentencing hearings herein, this Court in the exercise of its discretion will sentence Lynch outside of the Guidelines system and impose a sentence of one year and one day as to Counts One, Two and Three (all to run concurrently) and to "time served" as to Counts Four and Five, plus a period of supervised release of four years with concomitant provisions as to Counts One through Four and three years as to Count Five (all to run concurrently).

In closing, this Court would quote from the Supreme Court's Raich decision and make one last comment.

> Marijuana itself was not significantly regulated by

---

[28] Both the Government and Lynch have cited to cases wherein the respective defendants have received sentences ranging from one day to 262 months. See e.g. footnote 5 and accompanying text in Government's Amended Sentencing Recommendation for Defendant Charles C. Lynch (Doc. No. 252). The problem, however, is that neither side has provided a sufficiently detailed exposition of the facts in those cases to allow this Court to determine the similarity of the circumstances. For example, did any of the defendants in those cases notify governmental and law enforcement entities of the operation of the medical marijuana dispensaries before engaging in the conduct; did they obtain business licenses for their operations and attempt to comply with local regulations in regards to such operations; did they check on the status of the physicians named in the medical authorizations supplied by their customers; etc.

> the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act, Pub. L. 75-238, 50 Stat. 551 (repealed 1970). Like the Harrison Act, the Marihuana Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands. Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with rather burdensome administrative requirements. Noncompliance exposed traffickers to severe federal [monetary] penalties, whereas compliance would often subject them to prosecution under state law. Thus, while the Marihuana Tax Act did not declare the drug illegal *per se*, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade.

Raich, 545 U.S. at 11 (footnotes omitted). Currently, the situation is somewhat reversed with certain states (including California) seeking to allow the prescribing of marijuana for medical purposes and the Federal Government having the option of prosecuting persons who seek to act under the States' imprimatur. Individuals such as Lynch are caught in the middle of the shifting positions of governmental authorities. Much of the problems could be ameliorated - as suggested in Raich, id. at 33 - by the reclassification of marijuana from Schedule I.

DATED: This 29th day of April, 2010

GEORGE H. WU
United States District Court Judge

EXHIBIT B

HILARY POTASHNER (Bar No. 167060)
Federal Public Defender
ALEXANDRA W. YATES (Bar No. 250442)
JOHN LITTRELL (Bar No. 221601)
(E-Mail: Alexandra_Yates@fd.org)
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5059
Facsimile: (213) 894-0081

Attorneys for Defendant
CHARLES C. LYNCH

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES C. LYNCH,

Defendant.

Case No. 07-689-GW

NOTICE OF MOTION AND MOTION FOR WRITTEN INDICATION THAT THE COURT WOULD GRANT OR ENTERTAIN A MOTION FOR *MCINTOSH* RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

TO THE HONORABLE GEORGE H. WU, UNITED STATES DISTRICT JUDGE, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 9, 2017, at 8:00 a.m., or as soon thereafter as the matter may be heard, Defendant Charles C. Lynch will and hereby does move the Court for a written indication that it would grant or entertain this motion for injunctive relief, dismissal, or a hearing pursuant to *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), and Federal Rule of Appellate Procedure 12.1.

This motion is based upon this notice, the accompanying memorandum of points and authorities, all files and records in the case, and any other information the Court may request.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: December 12, 2016

By */s/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender
Attorneys for CHARLES C. LYNCH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes, Rules, and Acts

TABLE OF AUTHORITIES

Page(s)

Federal Statutes, Rules, and Acts

State Cases

State Statutes

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2008, this Court presided over a trial at which the jury convicted Defendant Charles C. Lynch of federal marijuana charges. The parties' cross-appeals of the conviction and sentence remain pending in the Ninth Circuit.

At sentencing, the Court explained that Mr. Lynch, who operated a medical marijuana dispensary under California law, was "caught in the middle" between State decriminalization of medical marijuana and federal enforcement of the Controlled Substances Act. Dkt. 327 (Sentencing Memorandum) at 41.[1] The Court suggested justice might be better served if the federal government took steps to eliminate this tension. *See id.* at 40-41.

In December 2014, Congress attempted to do just that by enacting an appropriations rider that prohibits the Department of Justice ("DOJ") from spending funds that interfere with States' medical marijuana laws. The rider has been included in each subsequent spending bill, including the most recent act funding the government through April 28, 2017.

In August 2016, the Ninth Circuit held that the rider prevents DOJ expenditures on any federal marijuana prosecution where the defendant's conduct was authorized by State medical marijuana laws. The appeals court directed defendants covered by the rider to move in district court for, at a minimum, orders enjoining the DOJ from spending funds on their cases. The court strongly suggested that district courts could order further relief, including dismissal, where appropriate.

Because this Court already has determined that Mr. Lynch's conduct was authorized by California law, he seeks an injunction and dismissal of his case.

[1] All citations are to the ECF docket heading pagination, not the internal pagination of the documents themselves.

II. BACKGROUND

A. Mr. Lynch Operated a Medical Marijuana Dispensary in California

From approximately April 2006 through March 2007, Mr. Lynch operated the Central Coast Compassionate Caregivers ("CCCC") medical marijuana dispensary in Morro Bay, California. As this Court has explained, "the purpose of the CCCC's distribution of marijuana was not for recipients to 'get high' or for recreational enjoyment. Rather, it was pursuant to the CUA's [Compassionate Use Act] goal of providing marijuana to Californians for medical uses as prescribed by their treating physicians." *Id*. at 33. Mr. Lynch operated the CCCC "under the guidelines set forth by the State of California," in order "to provide marijuana to those who, under California law, were qualified to receive it for medical reasons." *Id*. at 12 (alterations and internal quotation marks omitted).

B. The Government Charged and Tried Mr. Lynch for Violations of Federal Drug Laws

In March 2007, the Drug Enforcement Agency raided the CCCC and Mr. Lynch's home, pursuant to a federal search warrant. On July 13, 2007, the federal government filed an indictment charging Mr. Lynch with conspiracy to manufacture, possess with intent to distribute, and distribute marijuana; distribution of marijuana to a person under the age of twenty-one; possession with intent to distribute marijuana; and maintaining a drug-involved premises, in violation of 21 U.S.C. §§ 841, 846, 856, and 859, as well as 18 U.S.C. § 2 (aiding and abetting or causing an act to be done). Federal authorities arrested Mr. Lynch. Two days later, a magistrate judge ordered him released on bond. Mr. Lynch has been under the supervision of U.S. Probation and Pretrial Services ever since.

Following a ten-day trial, at which the jury was instructed that California medical marijuana laws were irrelevant to the case, a jury found Mr. Lynch guilty of all five federal drug counts. The Court sentenced Mr. Lynch to one year and one day in prison, followed by four years of supervised release.

C. The Parties Cross-Appealed Mr. Lynch's Conviction and Sentence

Mr. Lynch appealed his conviction and sentence, and the government cross-appealed the sentence, seeking a five-year prison term. Mr. Lynch filed the First Cross-Appeal Brief in July 2012. Two groups of amici curiae filed briefs in support of Mr. Lynch. The government filed the Second Cross-Appeal Brief in April 2014.[2]

D. Congress Enacted Legislation That Prohibits the Department of Justice from Using Funds To Prevent States from Implementing Their Medical Marijuana Laws

In December 2014, Congress enacted and the President signed into law a 2015 appropriations bill; it contained a rider prohibiting the DOJ from spending funds to prevent States from implementing their medical marijuana laws. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Congress has included the rider in every subsequent appropriations bill and short-term extension. *See United States v. McIntosh*, 833 F.3d 1163, 1169-70 (9th Cir. 2016); Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, Pub. L. No. 114-223, Div. C, § 101(a)(2), 130 Stat. 857, 908 (2016). The rider currently governs the DOJ's expenditure of funds through April 28, 2017. *See* Further and Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-___, Div. A, § 101, ___ Stat. ___, ___ (2016), 2015 CONG US HR 2028 (Westlaw).

Colloquially known as "Section 542" or the "Rohrabacher-Farr Amendment," after its coauthors, the rider in its current form states:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the

---

[2] Mr. Lynch's Third Cross-Appeal Brief is due on February 13, 2017. The government's optional reply brief is due seventeen days later.

> States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

E. Mr. Lynch Moved in the Ninth Circuit To Enforce the Rider in His Case, but the Court Tabled Consideration of His Arguments

In February 2015, Mr. Lynch moved in the Ninth Circuit to enjoin the DOJ from spending funds on his case, in violation of the rider. A motions panel denied relief in a brief order, without deciding the merits and without prejudice to Mr. Lynch renewing the request in his Third Cross-Appeal Brief or in Rule 12.1 proceedings in district court. Ex. A (Order). Mr. Lynch sought en banc review of the motions panel's decision, and two new amici curiae, including the authors and lead sponsors of the rider, filed briefs in support. The Ninth Circuit denied review in June 2015.

F. The Ninth Circuit Subsequently Held That the Rider Prevents the DOJ from Spending Funds Prosecuting Individuals Who Engaged in Conduct Authorized by State Medical Marijuana Laws

In August 2016, the Ninth Circuit issued a published decision, *United States v. McIntosh*, holding that "§ 542 prohibits DOJ from spending money on actions

that prevent Medical Marijuana States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana," including "prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws." *McIntosh*, 833 F.3d at 1176. "[A]t a minimum," the court wrote, "§ 542 prohibits DOJ 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.* at 1177.

McIntosh specifically delegated to district courts the authority for determining whether a defendant's "conduct was completely authorized by state law," i.e., whether the defendant "strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana." *Id.* at 1179. The Ninth Circuit left it "to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate," *id.*, but made clear that an injunction prohibiting the DOJ from spending funds on the case was one possibility, *see id.* at 1172-73.

III. JURISDICTION

Notwithstanding the fact that jurisdiction over Mr. Lynch's case has been transferred to the Ninth Circuit, this Court has the authority to issue an indicative ruling "stat[ing] that it would grant th[is] motion or that the motion raises a substantial issue," which would allow the Court of Appeals to "remand for further proceedings" on the motion, but retain jurisdiction over the appeal. Fed. R. App. P. 12.1(b); *see also Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976), *partially superseded on other grounds by* Fed. R. App. P. 4.

IV. ARGUMENT

A. Based on the Existing Record, this Court Can and Should Find That Section 542 Applies to Mr. Lynch's Case

The existing factual record is sufficiently well developed to support an injunction or dismissal in Mr. Lynch's case. Indeed, based on the existing record, the authors of Section 542 and the principal coauthor of California's governing medical marijuana statute all urge relief in this case.

1. This Court Already Has Found Mr. Lynch Complied with State Law

After presiding over Mr. Lynch's trial and receiving exhaustive briefing from both parties at sentencing, this Court made extensive factual findings regarding Mr. Lynch's strict compliance with state law. Specifically, this Court found as follows:

> [T]he defendant opened a marijuana dispensary under the guidelines set forth by the State of California. His purpose for opening the dispensary was to provide marijuana to those who, under California law, were qualified to receive it for medical reasons.

Dkt. 327 at 12 (alterations and internal quotation marks omitted).

> [T]he purpose of the CCCC's distribution of marijuana was not for recipients to "get high" or for recreational enjoyment. Rather, it was pursuant to the CUA's goal of providing marijuana to Californians for medical uses as prescribed by their treating physicians.

Id. at 33.

> Lynch took steps to have CCCC comply with applicable laws such as by obtaining a business license, following federal and state labor statutes, etc. Further, Lynch attempted to regulate the conduct of CCCC's employees by not hiring felons and

> requiring workers to sign an Employee Agreement which included promises to abide by CCCC's conduct standards and the "Conditions for Issuance of Business License" issued by the City of Morro Bay. CCCC's customers had to execute a "Membership Agreement" wherein they consented to obey "the laws of the State of California regarding medical cannabis," CCCC's rules barring the use of marijuana at certain locations and during certain activities, etc.

Id. at 35.

> Before being allowed to purchase any marijuana product, a customer had to provide both medical authorization from a physician and valid identification. The status of the doctors listed on the medical authorization forms were also checked with the California Medical Board website. CCCC also had a list of physicians who could re-issue expired medical authorization cards. A customer would have to sign a "Membership Agreement Form" wherein the buyer had to agree to the listed conditions which included, *inter alia*: not opening the marijuana container within 1000 feet of the CCCC, using the marijuana for medical purposes only, abiding by the California laws regarding medical marijuana, etc. In addition, the customer had to execute a CCCC "Designation of Primary Caregiver" form wherein the buyer: 1) certified that he or she had one or more of the medical conditions which provide a basis for marijuana use under the CUA, and 2) named the CCCC as his or her "designated primary caregiver" in accordance with Cal. H & S Code § 11362.5(d) and (e). Evidence presented at trial showed that

> the CCCC not only sold the marijuana but also advised customers on which varieties to use for their ailments and on how to cultivate any purchased marijuana plants at their homes.

Id. at 15-16 (citations and footnote omitted).

The Court made additional findings on Mr. Lynch's overall efforts to operate the CCCC in a law-abiding manner:

> Prior to opening the CCCC in Morro Bay, Lynch took a variety of steps. They included, inter alia: 1) calling an office of the Drug Enforcement Agency ("DEA") where, according to Lynch, he inquired regarding the legality of medical marijuana dispensaries; 2) hiring a lawyer (Lou Koory) and seeking advice in regards to his operations; 3) applying to the City for a business license to operate a medical marijuana dispensary, which he obtained; and 4) meeting with the City of Morro Bay's Mayor (Janice Peters), city council members, the City Attorney (Rob Schultz) and the City Planner (Mike Prater). The aforementioned city officials did not raise any objections to Lynch's plans. However, the City's Police Chief issued a February 28, 2006 memorandum as to Lynch's business license application indicating that, while the medical marijuana dispensary might be legal under California law, federal law would still prohibit such an operation and "California law will not protect a person from prosecution under federal law."
>
> The CCCC was not operated as a clandestine business. It was located on the second floor of an office building with signage in the downtown commercial area. An opening

> ceremony and tour of the facilities were conducted where the attendees included the city's Mayor and members of the city council. Both the Mayor and Lynch separately passed out their business cards to proprietors of commercial establishments within the immediate vicinity of the CCCC who were told that, should they have any concerns or complaints about the CCCC's activities, they should notify either the Mayor or Lynch. No one ever contacted either the Mayor or Lynch to make a complaint.

Id. at 13-15 (citations and footnotes omitted).

> Lynch employed approximately ten people to help him run CCCC as security guards, marijuana growers, and sales staff. He worked at the store most days. He ran background checks on prospective employees and did not hire anyone with a felony record or who was an "illegal alien." Employees signed in and out via an electronic clock and Lynch ran payroll through "Intuit Quickbooks." Employees had to execute a "CCCC Employee Agreement" which contained various disclosures and restrictions.
>
> Lynch installed a security system which included video recording of sales transactions within the facility. The CCCC kept detailed business records of its purchases and sources of the marijuana. It likewise had extensive records as to its sales, including copies of the customers' medical marijuana authorizations and driver's licenses. No one under 18 was permitted to enter unless accompanied by a parent or legal guardian. Entrance to the CCCC was limited to law

> enforcement/government officials, patients, caregivers and parents/legal guardians.

Id. at 15 (citations and footnotes omitted).

> Lynch on his own took steps to reduce/eliminate the criminal aspects and/or potential harmful consequences of CCCC's operation (aside from the essential function of distributing marijuana to authorized recipients for medical reasons). . . . *[B]efore* opening the CCCC, he notified governmental authorities including the City of Morro Bay's mayor and city council plus various local law enforcement entities such as the county sheriffs and (according to Lynch) the DEA.

Id. at 34-35.

> [H]is conduct greatly reduced the lawlessness and danger to the public that normally would be associated with violations of 21 U.S.C. § 841(a) and (b)(1)(B)(vii).

Id. at 37.

> Lynch displayed his respect for the law herein by notifying governmental authorities and law enforcement entities of his planned activities prior to engaging in them. Were all purported criminals so accommodating, this country would be a much safer and law-abiding place.

Id. at 38-39.

The Court's findings are consistent with those of the U.S. Probation Office, which wrote that Mr. Lynch was "in compliance with California law." Dkt. 314 (Recommendation Letter) at 4; *see also id.* ("And so, believing he was operating a legal marijuana dispensary, the defendant carried on with his business."). They also are consistent with the analysis set forth by an amicus curiae to Mr. Lynch's Ninth Circuit case, detailing how and why Mr. Lynch was in strict compliance with State medical

marijuana laws. *See* Ex. B (Amicus Curiae Br. of Americans for Safe Access) at 8-17 & nn.1-4. The government did not argue in its Second Cross-Appeal Brief that the amicus curiae's analysis is incorrect, thereby waiving any such argument.

Indeed, the Court's findings are consistent with the government's own description on appeal of "the overwhelming, undisputed evidence of defendant's compliance with the rules of his city and county." Ex. C (Second Cross-Appeal Br.) at 88; *see also id.* at 81 ("Defendant offered ample evidence on the undisputed issue of his compliance with local law."); *id.* at 84 (referring to "this undisputed and overwhelming evidence on the topic"). As the government recognizes, those rules required Mr. Lynch to "comply with all provisions of the Health and Safety Code"—i.e., State medical marijuana law. Dkt. 244-4 (Conditions for Issuance of Business License) at 4; *see* Ex. C at 82 (conceding "undisputed" evidence, including that Mr. Lynch "[c]omplied with all eight provisions for obtaining Morro Bay's business license, including . . . complying with the California Health and Safety Code").

And they are consistent with California law enforcement's refusal to arrest Mr. Lynch for or charge him with any violations of State law, despite a year-long stakeout and undercover infiltration of the CCCC by the San Luis Obispo County Sheriff's Department. *See* Dkt. 244-6 (Affidavit for Search Warrant) at 47-50, 53, 56-58, 60-67; Dkt. 354 (Transcript of July 30, 2008) at 45-52, 140; *see also* Dkt. 327 at 35 ("The CCCC did business in a prominent location with appropriate signage such that its operations were not clandestine but were, in fact, subject to apparent scrutiny by law enforcement.").

Although some of Mr. Lynch's employees may have engaged in illicit marijuana sales outside of the CCCC, and Codefendant Tollette wrote sham marijuana prescriptions, this Court made clear factual findings about Mr. Lynch's lack of knowledge of and culpability for those acts. *See* Dkt. 327 at 34 ("While the Government has cited to certain instances where some of the CCCC's marijuana may have been obtained by persons through fraudulent medical authorizations or may have

been diverted by a few employees to unlawful recipients, there is no evidence . . . that Lynch himself was aware of and/or participated in that misfeasance."); *see also id.* at 16 n.13, 17-19 & nn.15-16, 39 (making similar findings).

And although the government presented evidence that the "CCCC had sales of $2.1 million," *id*. at 17, there was no evidence the CCCC violated State rules prohibiting for-profit marijuana dispensaries, once "reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana," *People v. Urziceanu*, 132 Cal. App. 4th 747, 785 (2005), including reasonable expenses and salaries, are accounted for. *See generally* Dkt. 327 at 17 & n.14. To the contrary, the CCCC "ran a discount program for patients who did not have a lot of money," Dkt. 246-2 (Decls. in Support of Charles Lynch's Pos'n Re: Applicability of the Mandatory Minimum Sentence) at 8, and Mr. Lynch never recouped his initial investment in the dispensary, *see id.* at 6-7.

Mr. Lynch recognizes that this Court stated, in a footnote to its Sentencing Memorandum, that "the CCCC was not operated in conformity with California state law because, as held by the California Supreme Court in [*People v. Mentch*, 45 Cal. 4th 274, 283-87 (2008)], medical marijuana distribution operations (such as the CCCC) cannot show that they fall within the CUA's or MMPA's [Medical Marijuana Program Act] definition of a 'primary caregiver.'" Dkt. 327 at 33-34 n.25. However, as an amicus curiae explained in the Ninth Circuit, the Court "conflate[d] the 'primary caregiver' provision of the CUA, Cal. Health & Safety Code § 11362.5(e), which is not at issue here, with the collective/cooperative provision of the MMPA, Cal. Health & Safety Code § 11362.775, which is." Ex. B at 10 n.1. Retail medical marijuana dispensaries such as the CCCC are legal under the MMPA, and were at the time Mr. Lynch operated the CCCC. *See id.* at 8-17; *see also People v. Anderson*, 232 Cal. App. 4th 1259 (2015); *People v. London*, 228 Cal. App. 4th 544 (2014); *People v. Colvin*,

203 Cal. App. 4th 1029 (2012); *People v. Hochanadel*, 176 Cal. App. 4th 997 (2009); *People v. Urziceanu*, 132 Cal. App. 4th 747 (2005).[3]

In sum, this Court already has found that Mr. Lynch's "conduct was completely authorized by state law," i.e., "that [he] strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1179. This finding entitles him to relief under Section 542. *See id.* at 1177.

2. The Authors of the Rider and the Principal Coauthor of the MMPA Support Enforcing the Rider in Mr. Lynch's Case

The authors of Section 542 also have explained that the rider was intended to apply to cases like this one—*and to Mr. Lynch's case in particular*. In an amicus brief in support of Mr. Lynch filed in the Ninth Circuit, U.S. Representatives Dana Rohrabacher (R-CA) and Sam Farr (D-CA) wrote that the purpose of their amendment was stopping federal prosecutions "like the one pending . . . against Charles Lynch." Ex. D (Br. of Members of Congress Rohrabacher and Farr as Amici in Support of Charles C. Lynch's Mot. for Reh'g En Banc) at 8. Referring specifically to Mr. Lynch's case, the Congressmen explained that "[p]ermitting the DOJ to spend more federal funds to prosecute *one of the very cases* Congress intended for the DOJ to *cease* prosecuting defeats the purpose of the Rohrabacher-Farr Amendment *entirely*." *Id.* at 11 (second and third alterations in original).

In addition, State Senator Mark Leno, the principal coauthor of California's MMPA, has expressed his view that Mr. Lynch's operation of the CCCC complied with State law, and urged enforcement of Section 542 in this case. *See* Ex. E (Br. of Senator

[3] This Court also found that because "the *Mentch* case was decided in November of 2008, years after Lynch opened the CCCC in 2006 . . . Lynch could have reasonably believed that the CCCC's operations complied with California law because it was acting in the capacity of a primary caregiver," Dkt. 327 at 34 n.25.

Mark Leno, Senator Mike McGuire, and Former Senator Darrell Steinberg as Amici Curiae in Support of Charles C. Lynch's Mot. for Reh'g En Banc) at 7-21.

While perhaps not dispositive, these statements support Mr. Lynch's position that the appropriations rider applies to his case.

B. The Appropriate Remedy Is for the Court To Issue an Injunction and Order the Case Dismissed

At a minimum, *McIntosh* compels an order enjoining the DOJ from spending funds on any case covered by Section 542. *McIntosh* also expressly endorsed the possibility of an order dismissing such a case. The appropriate remedy in Mr. Lynch's case is both an injunction and dismissal.

1. Under *McIntosh*, this Court Should Enjoin the Department of Justice from Spending Funds on Mr. Lynch's Case

In *McIntosh*, the Ninth Circuit held that, once a district court finds a federal defendant complied with his State's medical marijuana laws, the court should enjoin the DOJ from spending funds on the case. *McIntosh*, 833 F.3d at 1171-80 (vacating district court denials of injunctions prohibiting DOJ from spending funds on defendants' cases and remanding for determinations whether defendants' conduct was authorized by state law). As the court explained, "at a minimum, § 542 prohibits DOJ 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.* at 1177. The court cited "ancillary jurisdiction, which is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction over a cause under review," as the basis for district courts' power to issue such injunctions. *Id.* at 1172 n.2 (internal quotation marks omitted).

2. The Court Also Should Issue an Order Dismissing Mr. Lynch's Case

The Ninth Circuit also left the door open to additional relief beyond an injunction, including dismissal of a Section 542 case in its entirety. The *McIntosh* defendants asked their respective district courts to *either* issue injunctions *or* order their cases dismissed. *See id.* at 1169-71. The Ninth Circuit did not address the requests for dismissal directly because the procedural posture of the cases did not require it to do so. Rather, the court exercised jurisdiction over the defendants' interlocutory appeals pursuant to its authority to review denials of injunctive relief. *See id.* at 1170-72. It resolved the meaning of Section 542 on that basis alone, and remanded the cases for further proceedings in district court. *See id.* at 1172-79.

But the Court of Appeals repeatedly signaled that dismissal could be an appropriate remedy in a Section 542 case. Importantly, the court held that defendants had standing to appeal in *McIntosh* "because their potential convictions constitute concrete, particularized, and imminent injuries, which are caused by their prosecutions *and redressable by injunction or dismissal of such prosecutions*." *Id.* at 1174 (emphasis added). The court also referred to injunctive relief as the "minimum" relief to which qualifying defendants are entitled, *id.* at 1177, and deferred "to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate," *id.* at 1179; *see id.* at 1172 n.2.

The appropriate remedy in this case is not simply an injunction, but also an order dismissing the case.[4] Anything less will fail to satisfy Section 542 because the government necessarily will spend funds monitoring the pending litigation.

---

[4] Unlike in *McIntosh*, where the defendants raised their Section 542 arguments pretrial, if this Court orders Mr. Lynch's case dismissed, it will need to vacate his conviction and sentence to fully effectuate that order. The Court has authority to do so pursuant to its ancillary jurisdiction and inherent powers, *see McIntosh*, 833 F.3d at 1172 n.2 (and cases cited therein); *United States v. Ramirez*, 710 F.2d 535, 541 (9th Cir. 1983); its power to grant relief under 28 U.S.C. § 2255, *see Hensley v. Municipal*

Even a de minimis expenditure of unauthorized funds violates the plain text of Section 542 and the Anti-Deficiency Act, which makes it a felony for federal employees to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A); *see id.* §§ 1350, 1517(a), 1519. It is a violation of constitutional magnitude. *See McIntosh*, 833 F.3d at 1175 ("[I]f DOJ were spending money in violation of § 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause."). There is simply no way for this Court to ensure compliance with Section 542, the Anti-Deficiency Act, and the U.S. Constitution short of dismissing the case in its entirety.

Moreover, although *McIntosh* did not consider legislative intent in construing Section 542, *see id.* at 1178-79, Congress plainly intended the rider to effect a cessation, rather than temporary stay, of federal medical marijuana prosecutions, *see* Ex. D at 17-23. Anything short of an order dismissing Mr. Lynch's case will violate the spirit of Section 542.

C. At a Minimum, the Court Should Order a *McIntosh* Hearing on Mr. Lynch's Compliance with State Law

To the extent the Court desires further factual development before resolving this motion, Mr. Lynch requests a *McIntosh* hearing on the discrete issue of his compliance with State law. However, Mr. Lynch notes that such a hearing would require the DOJ to expend significant funds, in violation of Section 542, the Anti-Deficiency Act, and the U.S. Constitution—a factor which cautions against evidentiary proceedings in this already well-developed case.

Ct., 411 U.S. 345 (1973); or its power to grant *coram nobis* relief under the All Writs Act, 28 U.S.C. § 1651, *see United States v. Morgan*, 346 U.S. 502 (1954).

V. CONCLUSION

For the foregoing reasons, Mr. Lynch respectfully asks the Court to issue a written indication that it would grant or entertain a motion for injunctive relief, dismissal, or a *McIntosh* hearing.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: December 12, 2016

By */s/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender
Attorneys for CHARLES C. LYNCH

EXHIBIT C

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)

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.

EXHIBIT D

HILARY POTASHNER (Bar No. 167060)
Federal Public Defender
ALEXANDRA W. YATES (Bar No. 250442)
JOHN LITTRELL (Bar No. 221601)
(E-Mail: Alexandra_Yates@fd.org)
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5059
Facsimile: (213) 894-0081

Attorneys for Defendant
CHARLES C. LYNCH

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES C. LYNCH,

Defendant.

Case No. 07-689-GW

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Constitutional Provisions, Statutes, and Acts

TABLE OF AUTHORITIES

Page(s)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

Mr. Lynch asks this Court to grant relief.

II. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Government Bears the Burden of Proving Noncompliance

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

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

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

3. The Government Has Failed To Prove Noncompliance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Dismissal Is an Available and Appropriate Remedy

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: January 27, 2017

By */s/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender
Attorneys for CHARLES C. LYNCH

EXHIBIT E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

- - -

United States of America, PLAINTIFF,	)	
VS.	)	NO. CR 07-689 GW
Charles Lynch, DEFENDANT,	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, FEBRUARY 2, 2017

KATIE E. THIBODEAUX, CSR 9858
U.S. Official Court Reporter
312 North Spring Street, #436
Los Angeles, California 90012

APPEARANCES OF COUNSEL:

APPEARANCES OF COUNSEL:

ON BEHALF OF THE PLAINTIFF, UNITED STATES OF AMERICA:

U.S. DEPARTMENT OF JUSTICE
U.S. ATTORNEY'S OFFICE
BY: DAVID KOWAL, AUSA
312 North Spring Street
Twelfth Floor
Los Angeles, CA 90012

ON BEHALF OF THE DEFENDANT:

FEDERAL PUBLIC DEFENDER'S OFFICE
BY: ALEXANDRA YATES, DFPD
-and- JOHN LITTRELL, DFPD
321 East 2nd Street
Los Angeles, CA 90012-4202

LOS ANGELES, CALIFORNIA; MONDAY, FEBRUARY 2, 2017

10:28 A.M.

- - - - -

THE COURT: All right. Let me call the matter of United States versus Lynch.

Let me have appearances.

MR. KOWAL: David Kowal for the United States, your Honor.

THE COURT: All right.

MS. YATES: Good morning, your Honor. Deputy Federal Public Defender Alexandra Yates and John Littrell on behalf of Mr. Lynch who is present on bond.

THE COURT: All right. We are here for this motion. Let me ask a couple of questions.

First question I have is this case is very strange in the sense that this appeal has been pending for more than six years now. I have never heard of a criminal appeal lasting this long. Why has it been taking so long? Just out of curiosity.

MS. YATES: Yes, your Honor. I am the appellate attorney. So I will answer that.

A significant amount of the time when this case initially started in the appeals court was ongoing

attempts at negotiations. And we have gone back to the table several times since. So there was a long delay for that.

As the court is aware, the proceedings in this case were very lengthy. There were a number of --

THE COURT: Not that lengthy.

MS. YATES: It was a 10-day trial with four sentencing hearings and a number of pretrial issues raised.

So, in any event, getting up to speed on the record and sorting through those issues once attempted negotiations had concluded took some time. We filed an 80-page opening brief.

The government then took over -- we took significant time in doing that. The government then took over a year in filing what ultimately was 150-page answering brief. And that is where we are at now.

THE COURT: All right. That is more or less irrelevant to the present motion, but I was just curious.

All right. These are some additional questions. The basic motion here is for the court to decide whether or not it will either entertain a motion that I guess is made pursuant to the Ninth Circuit's decision in McIntosh.

Let me just ask this question: Has any

district court in California actually held a McIntosh evidentiary hearing?

MS. YATES: Would the court like me to approach the lecturn?

THE COURT: As long as you speak into the microphone, doesn't make any difference. And if so, what was the result?

MS. YATES: There is no result. To the best of my knowledge, your Honor, there is no court that has ruled one way or the other post McIntosh.

THE COURT: No. That is not my question. My question was has any court held a hearing pursuant to McIntosh to make a determination that is suggested in the closing portion of the McIntosh decision.

MS. YATES: No, your Honor. To the best of my knowledge, all of the post McIntosh defendants have hearings that are upcoming. Two of them are set for May. Another one has a hearing on some preliminary questions set for later this month. But the substantive hearing has not yet been set, and I am not aware of any other cases that are pending in district court.

THE COURT: All right. Has any district court in the United States held or basically granted a motion to enjoin the government the way that the defendant is here? I know of three cases where the motions were denied but

those were pre McIntosh.

Has there been, since McIntosh, any decision of any district court in any jurisdiction which granted a defendant's request that is similar to the one that is requested here.

MS. YATES: Not that I am aware of, your Honor, but, also, two points. I am not aware of any district court decision denying a similar request either. I simply don't believe there has been a district court decision. And the court is perhaps familiar with Judge Breyer's decision in the Northern District in the Marin Alliance Medical Marijuana case that predates McIntosh but did grant an injunction. It was in a civil context but similar to what we are asking.

THE COURT: Yes. But if that were the response, I would refer to the Ninth Circuit's decision in Olive versus Commissioner of Internal Revenue Service which was like a civil context as well where that request was denied.

MS. YATES: Yes, your Honor. But in Olive, if I recall, the specific question was whether imposing a tax interfered with the statement's implementation of its medical marijuana laws.

THE COURT: I don't know if it necessarily was imposing a tax. I thought that, in Olive, the question

was whether or not an owner of a medical marijuana facility could take business deductions when the bar in 26, U.S.C., Section 280(e) precluded such deductions for any trade or business consisting of trafficking in controlled substances.

MS. YATES: That's right, your Honor. And the ultimate holding in Olive was not in some way confined to what McIntosh had to say in the criminal context.

THE COURT: Well, that is the question since McIntosh doesn't reference Olive. I don't know whether or not the court in McIntosh considered its prior decision in Olive.

MS. YATES: Well, I would suspect, I think we should expect that the court was aware of the decision.

THE COURT: Not really. I don't expect anything of the circuit unless the circuit court tells me. But if they don't indicate that they are referring to one of their prior decisions that deals with the issue, I don't know if they have considered it.

MS. YATES: Well, your Honor, I guess two-points. One is Olive on its face, to the extent that we are considering it relevant at all, and, again, it is pre McIntosh, and it is the civil context.

THE COURT: No, no. I don't know if McIntosh -- let me see. Maybe it was McIntosh, but it was a Ninth

Circuit decision. And you are right, it is pre McIntosh. It is a 2015 case.

MS. YATES: On its merits, your Honor, the decision was only that the federal government was -- it was acceptable for the federal government to disallow these tax exemptions because the taxes in no way interfered with the state's implementation of its medical marijuana laws. People could still distribute, use. Now, we may agree or disagree with that, but that was what --

THE COURT: I would think that one of the primary facets of an operation of a medical marijuana operation is financial. And, therefore, if the government's action is depriving these businesses of these deductions, it would run these businesses out of business because if they have no money or if their money is greatly reduced, that would affect them much more so it seems than other things that one can consider.

MS. YATES: Well, I don't know what the underlying factual record was in Olive, and I think, based on what the Ninth Circuit had to say, it must have been such that the medical marijuana dispensary in that case did not show facts indicating that it would have gone out of business because what the Ninth Circuit, I think, quite clearly said was this additional tax -- inability to

exempt these taxes doesn't interfere with your ability to do these things under state law.

Then, we have McIntosh which is squarely on point and very clearly says that federal prosecutions where a defendant was authorized by state law does interfere. So the court, I think, needs to in some way reconcile these two precedents, and McIntosh is clearly the one that is squarely on point.

THE COURT: Well, let's put it this way, it is a question.

Let me hear from the government. Does the government have any citations to any district court decisions that have granted the relief that the plaintiff -- sorry -- the defendant is seeking here?

MR. KOWAL: No, your Honor.

THE COURT: Okay.

MR. KOWAL: Our information is that all the post McIntosh remands are still pending.

THE COURT: Okay. Addressing the motion itself and the government's response to the motion, I disagree with the government on one point. The government raises an objection based on Rule 37 of the Federal Rules of Criminal Procedure. I wouldn't agree with those objections.

The court would initially note that the

defendant filed the motion, his motion to enforce the provisions of -- it is either Section 538 or 542 depending upon the use so I will just refer to it as 538 since that was the initial one -- of the continuing appropriations bill. He initially filed that in February, February 24th of 2015.

And that was denied by the circuit court in an order on April 13th of 2015 which also denied the defendant's request for -- sorry -- and the Ninth Circuit also denied the defendant's request for hearing en banc in June of 2015. But in the April 14th order, the Ninth Circuit stated that it was denying the defendant's request to enjoin the Department of Justice from continuing to expend funds in the case but without prejudice for the defendant's raising the matter in his third cross-appeal brief.

And so, therefore, I don't think that the circuit was indicating there was any problem with raising the argument, but, in addition, the circuit court in the April 13th order also stated that the defendant's alternative request for a limited remand to the district court was denied without prejudice for renewal. If after presentation to the district court, the district court stated that it would grant the motion or stated that the motion raises a substantial question.

And the circuit court cited to Federal Rules of Appellate Procedure, Rule 12.1, not Rule 37. But the language in Rule 12.1A, subpart A, parallels the language of the Federal Rules of Criminal Procedure 37(a)(3). So the government's contention that the present motion is somehow improper, I would reject.

The government also makes a concomitant contention that the defendant's present motion is untimely. However, neither the Federal Rules of Appellate Procedure 12.1 nor Federal Rule of Criminal Procedure 37(a) defines what untimely means. And while the government does cite to the case of United States versus Amado, 841 F.3d 867, at Page 871, which is a Tenth Circuit 2016 case, that case merely holds for the proposition as cited by the government that, quote, the substance of the motion not its former label controls its disposition, end of quote. That, I obviously would agree with, but I don't know how much that goes towards resolving the issue of whether or not this present motion is somehow untimely.

The government also argues that the best source for the analogous time restraints would be under 28, U.S.C., Section 2255 which has a one-year limitations period. Again, the court would disagree. I don't think that 2255 is similar to this type of motion. That motion

is entirely different. This motion is primarily based on an affirmative request based upon the congressional enactments in the continuing appropriations that has a provision in it. So, therefore, I don't think that it is in any way, shape or form similar to a 2255. And so I would find that the motion itself is either barred or untimely under the rules.

Does anybody want to argue that point any further?

MR. KOWAL: Two points, your Honor.

THE COURT: Sure.

MR. KOWAL: First, on the Rule 37 applicability, one of the key parts is what is Rule 37 for?

THE COURT: I am not saying that it is inapplicable. I am just saying even if you apply Rule 37, this motion, I don't think, would be barred.

MR. KOWAL: And we would argue it is. And I guess what I would point out to you is the point of Rule 37 was for motions where there is a need for further factual development in the record.

All the examples and the advisory committee notes are cases in which there is material or factual material on which the court of appeals would not have access.

THE COURT: Well, but the problem is that I think

in this particular situation, first of all, Rule 37 language also is adopted under the Federal Rule of Appellate Procedure 12.1. There is virtually identical language in, as I cited, as in 12.1 as with Rule 37. It seems to me that and the fact that the Ninth Circuit referenced to 12.1 in its discussion as to the defendant potentially going to this court and seeking this court's decision on the 12.1 process, I don't think that this Rule 37 would bar what the defendant is now doing.

MR. KOWAL: I guess I would just say if the Ninth Circuit knew that they were going back on a motion asking for no further factual development and essentially asking the court to reconsider a prior legal ruling, then it would have likely --

THE COURT: Well, no.

MR. KOWAL: It did not prejudge whether Rule 37 would be appropriate or what the motion would be. Here, they have admitted factual development is not appropriate. I have cited to the court Ninth Circuit case law which says that remand is not appropriate when either there is a set factual record or a purely legal issue.

THE COURT: Well, no, but there is, you know, I think that the language of both -- well, the language of 12.1 clearly refers to a substantial issue. So it

doesn't necessarily have to be a factual issue per se. It might simply be a situation where the circuit wants to give the district court the opportunity if the district court feels there is a substantial issue that could be developed better for the court, circuit court, to rule on.

I mean, it is various things. But I think in terms of just the procedural argument, I am rejecting the procedural argument. I think the government makes another argument which is more interesting which I want both sides to discuss. And I will get to that in a moment. But in terms of just a straight procedural argument, I am rejecting because I don't think I agree with the government in this regard.

MR. KOWAL: The last point I would make in terms of the 2255 analysis, I didn't point this out in our papers, but the defense cited to Rule 2255 as the source of its power to dismiss the case.

THE COURT: Well, that --

MR. KOWAL: That is pretty good evidence that it is a good analogy. When that is what they are trying to do is dismiss a preestablished conviction.

THE COURT: Well, I think that is an interesting argument because it does segue into this question that I have which I want the parties. It is the fundamental

question, I think, at this point in time. But insofar as the procedural aspect of it is concerned, I will disagree with the government in that regard and go to the next issue.

And the issue is that, given this motion, the court has three potential responses to the motions. First of all, it can defer consideration of this motion although, frankly, I never understood what that means because, actually, I am considering this motion so I can't defer it. I can defer a decision on it, but actually deferring consideration of the motion, I never understood that portion because it is nonsensical. I have considered it because it has been made to me, and if I didn't consider it, I couldn't rule one way or the other even to defer.

So I don't understand that portion of it, but I do understand that what may have been the intent is not to render a ruling at this point in time for various reasons. So that is how I kind of view that first option.

The second option is I can give an indication as to whether or not the court would grant or deny the motion. And the third is that I can make the request for the circuit court to remand the matter back to this court for further proceedings and to hold a hearing.

And, frankly, I think that was kind of the intent of the McIntosh court, not necessarily the Ninth Circuit in this case, but of the McIntosh because the McIntosh case, in that case, the circuit held that the appropriations did create a bar, but that bar had to meet certain, you know, requirements one of which is that there will be a, I guess the word that the circuit utilized was, that the conduct had to be completely authorized by state law. And so the issue was whether or not the defendant's conduct was completely authorized by state law.

So that was the basis upon which I think a lot of the other cases are referencing this matter back to the district court. And the district court's -- I guess, well, let me just ask, in the cases where the district courts -- are the district courts -- well, the district courts are holding a hearing, but they have all agreed to hold hearings. Has any district court not agreed to hold a hearing after McIntosh?

MR. KOWAL: No, your Honor. And, remember, the different procedural postures.

THE COURT: I agree. We will get to that in a second.

MR. KOWAL: It is an interlocutory appeal.

MS. YATES: I am not aware of another case.

THE COURT: Okay. All right. Then, I guess this is the problem that I have with the defendant's motion at this point in time, and this is what I want the parties to address primarily.

You know, at this point in time, it seems to the court that there really -- the issues that are outstanding are really issues of law which need to be resolved, and I don't see why this court would resolve those issues of law especially since if I resolve those issues of law myself at this point in time, the Ninth Circuit simply does a de novo anyway. So it more or less doesn't matter, I suppose I can throw in my hat and say, well, I think this or that.

There is a question that I don't even know how I would rule now. And that is as follows: As pointed out by the government, this case is fundamentally different from the other McIntosh types of cases because in those cases, the McIntosh cases and I presume all the others that have been arising, the defendants have not been convicted. They have been indicted perhaps, or there have been some other actions taken by the government, for example, to post some forfeitures and things of that sort.

But there is no case that I am aware of where the defendant has actually been convicted, in other

words, gone to trial and been convicted by a jury. So, therefore, that, to my mind, is a fundamental and big difference because I don't understand even if I were to order the government not to cease spending any money on this case, I don't think that means that the defendant gets a dismissal.

Or if it does, I think that is an issue that is so important it really should be addressed by the appellate court first. And it can decide that based on what it has now. It doesn't need to do anything else to make that decision. It can decide that for itself, and if it decides that that can be a result, then I would say, okay, I can understand. But I don't see why if I order the government not to spend any more money, that a dismissal is the result.

Now, I do understand that, as a practical matter, what that may mean is that the government is no longer allowed to argue anything. But does that mean that the argument that the government forfeits its position in this case because of the fact that it is not allowed to spend the money? McIntosh doesn't address that.

And it seems to me that unless something happens, the defendant is still convicted. And so, in other words, I don't see a basis for setting aside the

conviction due to the fact that the government can't spend any money on the case because if that were the case, for example, it seems to me that there are a lot of people probably in prisons now that have been convicted for medical marijuana type of offenses. Can they make a motion now and say I want to be released because, you know, this prosecution effects medical marijuana. And do all those people -- and the government can't oppose which obviously if the position of McIntosh is correct it can't oppose, do those people get to go free as well? And if the answer is yes, that is fine and dandy, I suppose, but it is really not a decision for me to make at this point in time. I think it is a decision for the circuit court to make, and it is one that they can make on the basis of the present record.

So that is kind of my position. Somebody want to talk about that?

MS. YATES: I would be happy to, your Honor.

THE COURT: She beat you to it.

MS. YATES: Your Honor, McIntosh at Page 1172 says, once Congress has enacted legislation deciding on its priorities, for example, by issuing an appropriations rider, quote, it is for the courts to enforce them when enforcement is sought, and, quote, courts can not ignore that determination.

A bipartisan Congress has passed Section 542, Section 538 repeatedly.

THE COURT: Let me stop. This is all kind of like water under the bridge because Congress did not decriminalize. Congress did not take marijuana from a Schedule 1 to something else which is frankly what it should do if it wants what it is -- I mean, you don't use an appropriations bill to change a Schedule 1 drug last time I looked. You can do it much easier. It is either up to Congress or the executive branch, neither of which has done that.

MS. YATES: I agree, your Honor, but what Congress was plainly trying to do here was protect people like Mr. Lynch. And, in fact, the drafters have singled him out as someone that they were interested in protecting from prosecution, from the government wasting taxpayer dollars going after someone like Mr. Lynch who is the poster child for medical marijuana. That was the entire purpose of Section 542.

This court needs to read the appropriations rider to have some effect. And if it doesn't apply in a case like this, I am not sure where it does.

THE COURT: It certainly has an effect, I think, insofar as unconvicted defendants because, I mean, that was McIntosh. And, then, therefore, the circuit court

said, well, you have to make sure that they have complied with all -- completely complied with all the provisions of the state's medical marijuana enactments.

But that is not what we have here. It is a different situation.

MS. YATES: Yes, your Honor. But I am just going to go straight to the language of the rider itself. None of the funds made available in this action to the DOJ may be used to prevent any of the various states including California from implementing their own laws that authorize the use, distribution, possession or cultivation of medical marijuana.

THE COURT: Let me just stop you. I understand the arguments. It is not a question of my not understanding the arguments or appreciating the arguments, but the question is whether or not in this situation, I should -- in other words, I don't have to issue a decision on this.

As I said, I can defer it, making a ruling, because I think this matter should really be addressed by the circuit court because, again, and why should I, at this point in time, say one thing or the other since the circuit has already indicated that the defendant can raise this issue on appeal, and it is supposed to raise it in, I guess, their cross-appeal brief or whatever.

Why would I address it when it is an issue of law to my mind. It is not an issue of fact. And very well-versed. And so why should I address this?

MS. YATES: A few answers.

First of all, McIntosh specifically directed district courts to be the one to address this in the first instance, and that is why we have brought this.

THE COURT: If there is a factual issue.

MS. YATES: Well, if the court is saying there is no factual issue here, we would ask the court to make a specific finding that Mr. Lynch was fully authorized by state law in the way that McIntosh contemplates. So that my concern is that if we end up back in the Ninth Circuit, the government is going to raise all sorts of fact-based arguments about compliance and the Ninth Circuit it going to say we need to send this back down for a factual finding on compliance.

THE COURT: That is fine. Then they can send it back down at this point in time, but, hopefully, they will address the more important legal issue. I mean, which they should be prepared to rule because that is the issue at this point in time. So if they want to ignore the legal issue -- the issue of law that is the elephant in the room and send it back to me, then I will do this. I will entertain whatever they want me to entertain.

But, again, it is an issue of law, not an issue of fact.

MS. YATES: Well, with respect, although not perhaps as directly as the court may like. I would suggest that McIntosh did address the legal issue. The language that I was quoting from the rider, McIntosh then interpreted to mean that when -- when the federal government interferes with the state by prosecuting and seeking to punish a defendant who would otherwise be able to benefit from the state's non prosecution laws, that is something that Congress has said you cannot spend funds on.

So that is the language that McIntosh used and Mr. Lynch squarely falls within that. What the government would continue to do here is plainly seeking to punish Mr. Lynch, someone who would have benefited from the state's non prosecution laws.

So I think McIntosh, although it wasn't dealing with the case in its procedural posture, makes very clear based on its interpretation of the rider that it applies in this particular case, and my concern is that we keep, that we delay this issue, and the government keeps spending funds, unauthorized, as a constitutional violation that is a criminal law issue under the Antideficiency Act, and it gets up the Ninth Circuit.

THE COURT: Let me stop. If the Ninth Circuit was really worried by it, it would have made a ruling earlier.

MS. YATES: Well, that was pre McIntosh. When we raised it, it was pre McIntosh. We have not brought this in the Ninth Circuit post McIntosh. Once it has been clear that the rider does apply in criminal cases. That wasn't an open issue pre McIntosh. Now that that is clear, we brought the motion here first because --

THE COURT: Well, no. You first brought it in the Ninth Circuit. The Ninth Circuit entertained it. Even though it was -- I mean, the panel prior to McIntosh could have addressed the issue.

MS. YATES: Absolutely, your Honor. At that point in time, however, no court has held that Section 542 or then Section 538 applied in the criminal context. So the court's decision to say, we can table this a little, I think takes a different shape than would we have gone to the Ninth Circuit post McIntosh.

Now, saying, yes, Congress has said the Department of Justice is violating the law if they are spending funds on these types of cases, and is it emphatically the province of the courts, they say Marbury versus Madison, to enforce the law. We don't have anything from the Ninth Circuit in our case after that.

THE COURT: Again, so why shouldn't the Ninth Circuit be the first to address the issue as to whether or not the appropriations section should have this effect on cases which are where the defendant has already been convicted. In other words, to go and, again, because the appropriations language is the language, and, frankly, the court in McIntosh said don't look at the prior legislative history in this regard, look at just the language. It specifically said don't look at the history of it. So I can't really look at the history of it in considering it.

So I just look at the language, but I don't know what the effect is in this particular situation because, again, the circuit hasn't indicated to me how it can affect it, and it is an issue of law.

MS. YATES: Your Honor, there is certainly nothing novel about bringing a question of law to the district court appropriately to rule on in the first instance, and, then, that can be raised in the Ninth Circuit.

THE COURT: Not when I don't have to because, again, this is 37 and the 12.1 are discretionary. There was no obligation on my part to do it, and so, therefore, why would I do it in this particular situation when again, it would be subject to a de novo review. I don't need at this point in time to develop any other record to

make a decision. I mean, it is what it is.

MS. YATES: Your Honor, unless we have a factual finding that Mr. Lynch was in compliance, then the court, the Ninth Circuit when it inevitably reads McIntosh and says, yes, we said if it is interfering by attempting to punish individuals who could have benefited from non prosecution, Section 542 applies, but we don't have a factual finding on compliance, it will send the case back down. At that point, we have spent additional funds. Congress was trying to --

THE COURT: The thing I don't understand, though, is, again, if that were the case, the Ninth Circuit panel in and of itself should have made that decision already.

MS. YATES: I agree, your Honor, but, at the time, the argument we were presenting pre McIntosh and that we still believe is the correct argument but McIntosh was coming on was that this was a purely legal issue because anybody with a colorable claim. So there was no reason for the Ninth Circuit to think that factual development would have been beneficial at that point in time. Now, we have McIntosh which says we need hearings on this, or in a fully developed record like this, I would argue, we simply need a factual finding.

I do want to address the point about legislative history because I think what McIntosh said

about that is a little bit more nuanced. McIntosh did at one point earlier in the decision say that the text is not a model of clarity, but, then, when it got to actually interpreting the text of the rider, it used ordinary dictionary definitions and came to a conclusion based on that without any indication of ambiguity.

The court then says we don't need to look to legislative history, it cannot alter the plain text of the statute. And it cites a number of Supreme Court cases which have held that when the text of an appropriations rider or an appropriations provision is clear, then whatever the legislatures may or may not have wanted cannot alter that. But some of those Supreme Court cases or at least one of them that McIntosh cited actually do look at legislative history when there is ambiguity. So I don't think McIntosh is saying you can't consider --

THE COURT: The problem with that is that the Ninth Circuit in Olive takes a rather entirely different position than you are arguing in talking about how the mere fact that a subsequent Congress adopts an earlier appropriations provision. You can't infer the intent from the earlier one. I mean, again, the language that the Ninth Circuit uses at times is somewhat inconsistent.

And, so, I understand your argument, but,

again, it is kind of almost like it is standing at this point. In other words, if he can't get the relief that he wants because of this issue, shouldn't that issue be resolved first if it is an issue of law. And if it is an issue of law, the circuit can resolve the issue itself.

MS. YATES: He clearly has standing, your Honor. He has a harm, the imminent possibility of going to prison, that an order from this court either issuing an injunction or a dismissal can --

THE COURT: Nothing will happen because no matter what I do the issue is still going to go to the appellate court. You think the government, if I make a ruling, is going to say, oh, we are going to lay down our tools and walk away. No. They are going to continue with the appeal. It is already on appeal.

MS. YATES: Well, I think they should if this court makes a ruling. And I don't know that we know what the government would do in that situation. I also don't think that we know if this court made a ruling that the government was unlawfully spending funds on this case, aside from dismissal, purely effectuated Section 542 saying this falls within the ambit of it and you can't spend funds on this case. It is not clear to me how --

THE COURT: Let's put it this way, I could never find that the government was unlawfully spending funds

unless I resolved the legal issue as to whether or not in this context, it -- how the decision is rendered as to whether or not my barring the government from spending money in this matter will or can result in a dismissal of the verdict, the jury verdict, against the defendant. You know, and, frankly, the government has a right to appeal that issue because it is a substantial issue.

And so the government is always going to proceed until such time as the position is made by the appellate court not by me. So, therefore, I don't understand -- it just seems to me it is faster to just let the thing go to the circuit court which now has the issue because they can decide, you know, that if they decide that it can affect the reversal, then you are dead in the water. And if they say that it can, then, okay, it can.

MS. YATES: I respectfully disagree, your Honor. If the court did rule in our favor, to the extent the government chose to appeal and was permitted to spend funds appealing, I don't think it is clear that the Ninth Circuit would rack that up with cross-appeals. The court's ruling in some ways could moot the cross-appeals or certainly government's ability to participate in those. It seems like a preliminary question that needs to be addressed.

THE COURT: I presume that even if the government does not participate, I don't know what the answer is. In other words, if the government was not allowed to say anything more in this appeal, will that result and should that result in a reversal of the jury verdict?

MS. YATES: That question is something that the Ninth Circuit would properly need to --

THE COURT: Exactly.

MS. YATES: But the preliminary question of whether Mr. Lynch was in compliance and whether Section 542 applies to him is something that we believe is surely appropriate for this court to answer.

THE COURT: But in the long run, it will take more time and effort because if I entertain this hearing, in other words, the case would be remanded to me because, again, the government is making arguments as to whether or not he fully complied. And one of the questions, for example, is that compliance determined at the time that he initially opened it during the entire period of time that he operated it, is it determined under the new provisions of the current law in the State of California as to what it takes to operate a medical marijuana facility?

There are a lot of questions that have to be answered. So, in other words, this is not a situation

where I would say, even today, I would give you an answer because if I had -- the thing is sent back to me, it is going to be sent back to me, and there are issues of both fact and law that have to be resolved, and that is going to take some time.

So the appeal would be stayed, I presume, while I am doing all this. Once I make my decision, if I said, yes, that he did sufficiently comply with all of the requirements, the government still -- my order, if I order the government not to spend any more money on this matter, the government is going to appeal my order. And they would have a right to do so. And I think there is a substantial issue as to what the effect of my order would be.

So, therefore, it is going to be in front of the circuit court anyway. And so, I think it is faster, it would be faster to let the proceedings go forward in front of the Ninth Circuit for the circuit to say, on this important issue, what is the effect. And at that point in time, if it is one that they say, yes, it can potentially result in the application of a dismissal, then I will hold a hearing at that point in time.

But there are a lot of questions that, in other words, it is not going to be faster for the defendant to go the route that you want. It is going to

be faster for him to stay this thing get to the appellate court and have the appellate court deal with this fundamental issue.

Yes.

From the government.

MR. KOWAL: We agree.

THE COURT: Oh, gosh. That is unusual. That is the first time I think you ever said that in this case to the court.

MR. KOWAL: I don't think that is true. Of course, the whole point of this is to slow things down. It has been three years to get them to file their appellate brief. If they wanted --

THE COURT: Let me stop you, Mr. Kowal. Both sides have not acted that swift in processing this appeal. I am not saying that I am blaming either side because I understand there is a lot of things in consideration, but I am not going to put the blame and say that one side is attempting to stall this matter.

MR. KOWAL: Let me put it this way, your Honor said this is a question of law. The defense have said there is no further factual development needed. The Ninth Circuit has said when you have an issue of law or an application of law to fact, no further factual development is needed. The circuit court is the

appropriate --

THE COURT: Let me stop. I think the reason the defendant said that was the defendant made the argument that the court had already concluded that I found the defendant had met all the terms that were required by the medical marijuana laws, et cetera. I don't think I made that specific finding.

Now, I did say to that to a large extent that the defendant had decriminalized his conduct, but that is different than saying that he met all of the requirements of the statute that were in existence because I don't know what all the terms of those statutes were during that point in time.

MR. KOWAL: Well, your Honor, again, that is a legal question that you don't need a district court to decide. The key issue is not that further complication. The key issue is are we doing anything evidentially here. And they are saying, no, the record is fully developed.

THE COURT: No. That is not quite -- I disagree with that.

If I were to say that he did not meet all the terms, they would insist on an evidentiary hearing, and they would be entitled to an evidentiary hearing if I were to conclude that. But the problem is I can't conclude one or the other without holding an evidentiary

hearing on all these things.

But, again, I do agree with the government that in the end, it would be faster for the appeal to address the issue especially since the government is -- especially since the circuit court already indicated that it was entirely appropriate for the issue to be raised and decided on the -- on the, you know, the issue of the appropriations.

And the mere fact that McIntosh has come down doesn't necessarily mean that they cannot decide this fundamental issue which I think controls this particular portion of this case.

MR. KOWAL: Well, that's right, your Honor. The court did allow this issue to be addressed. It is an issue that they can fully resolve. And if you look at Rule 37, the point of the deferring the ruling, meaning I am not going to rule one way or the other, is the appeal is going to narrow, change or change the circumstances so much that there is no reason for me to rule and go through this whole process now.

And, again, we have also raised the issue the court of appeals may remand it back to you for further findings. It may reassign the case to another judge. These are all issues that have to be decided by the Court of Appeals.

THE COURT: Don't raise my hopes. I suppose I shouldn't say thing things like that because the Ninth Circuit has a tendency to read any sort of jest in the record as being a position that was taken by the court.

MR. KOWAL: It is just the point is that you are right, your Honor, that the Ninth Circuit will either narrow, obviate or handle all these things if it feels that the record needs more development, it can say so and, meanwhile, it can resolve everything else and we have a full context.

And last point, McIntosh was remanded because it was preconviction, an interlocutory appeal, of course, the record wasn't developed at all, and the Rule 37 indicative procedure is a narrowly tailored unusual procedure. And there is no reason to delay this Ninth Circuit proceedings further by further proceedings here until the Ninth Circuit rules.

THE COURT: All right. Anything else from the defense?

MS. YATES: Yes, your Honor.

Faster does not necessarily mean fairer, your Honor. We are asking the court to exercise its discretion to entertain this motion.

THE COURT: That last argument that you made is actually strange because I thought that the normal

phrasing of it is that -- I think you have to rephrase that.

MS. YATES: Let me rephrase. We want to have this happen as quickly as possibly. The cross-appeals have taken some time, but we have always moved quickly on a Section 542 litigation. Our goal is to get a ruling on that as quickly as possible. It is my sincere belief that the fastest way to accomplish that is to have this court rule on Mr. Lynch's compliance. Mr. Lynch and Congress, quite frankly, are also entitled to a ruling on that.

THE COURT: Who knows what Congress is going to do next?

MS. YATES: Well, they have, in a bipartisan fashion -- one of the only things they seem to be able to do in a bipartisan fashion, they keep reenacting this. I don't think we have any reason to think it won't continue.

And I would just encourage the court once more to look to the language of McIntosh which I do think squarely addresses the main issue that the court has. McIntosh is very clear that when the government is taking an action, DOJ is taking an action that seeks to punish somebody who would not be punished in state court for medical marijuana use, distribution, et cetera, that

interferes with the state's implementation.

There are no parameters on that that say it must apply to people who are pretrial, and, of course, an appeal is an integral part of a criminal case. His case is not final. This is very different from somebody who is already in prison who may well have a Section 542 claim, but we don't need to go there. His case is still not final. So I really do think McIntosh has already squarely addressed the legal issue. And so sending it up to the Ninth Circuit so that they can consider a legal issue that they have already considered and, then, of course, say, yes, under McIntosh, this can apply to him but we need to know if he was in compliance, we are sending it back down is going to be justice delayed.

THE COURT: Not since, again, whether or not I -- again, you are asking me to make a finding, a legal finding, and I don't know what the answer would necessarily be in the matter because I don't necessarily agree that a failure to appropriate funds for a prosecution necessarily results in a reversal of a conviction.

MS. YATES: Well, that is a separate issue, your Honor. And if the court is going to go along with us to the point of compliance with Section 542 --

THE COURT: Once the circuit says, yes, it does,

then, I could say, okay, let me go through the evidentiary process, et cetera, et cetera. But why should I engage in an evidentiary hearing which is going to take considerable amount of time and the court's efforts and basically stop the appeal process that can address that very issue. I mean, why would I do that if at some point in time, I presume in the near future, because I guess even the Ninth Circuit will get tired of briefing in this case, they are going to address that issue?

MS. YATES: Couple of reasons.

One, your Honor, that in the meantime, we believe the government is unlawfully spending funds I won't beat that dead horse, but there are serious issues there. And I think it is the obligation of the federal courts to enforce Congress' legislation.

I don't think that we need to be concerned about some extensive evidentiary hearing here. Yes, if the court thinks the burden is on us to show compliance that we haven't met that burden --

THE COURT: Clearly, it would be on the defendant to bear the burden because the defendant is the one who wants injunctive relief.

MS. YATES: I disagree, your Honor. This isn't a typical injunction. This is a bit more sui generis.

Congress has already made the determination to enjoin the DOJ. The question is just whether that injunction, so to speak, should apply to this case.

THE COURT: Let me ask, then, why does the McIntosh decision say if the DOJ wishes to continue these prosecution, appellants --

MS. YATES: To continue spending funds.

THE COURT: Well, no. It says if wishes to continue prosecution, appellants are entitled to evidentiary hearings to determine whether their conduct is completely authorized by state law.

MS. YATES: McIntosh makes very clear that it is talking about enjoining spending. It doesn't reach the issue of whether a dismissal should then follow. So this isn't your typical enjoining a criminal prosecution although we have argued that if the court enjoins the Department of Justice from spending funds on this case, it necessarily should also dismiss the case because there is no other way to effectuate that order.

But we are not asking for your typical injunction. This isn't like a civil injunction where you have a balancing of irreparable harm and whatnot and the plaintiff has to meet a certain standard. Congress has already made the determination of that there should be an injunction. The question under McIntosh is just whether

it applies to this case.

And if you look to Gonzalez versus O Centro which is the closest case we have. Again, this is sui generis. But the Supreme Court in that case said when someone is seeking to enjoin enforcement of the Controlled Substances Act, they need to make a colorable claim to relief and the burden then shifts to the opposing party to justify its actions. That is consistent with what we have in state court.

And, of course, a McIntosh-type hearing, the court is stepping into the state court's shoes, effectively, in state court. The cases are very clear. This is the Mower case and the Solis case that are cited in the briefs. That to present an affirmative defense under the Medical Marijuana Program Act, or the CUA, in California, the defendant has the initial burden of producing enough evidence to raise a reasonable doubt, but the ultimate burden is on the government, or the state there, is on the prosecution to prove beyond a reasonable doubt that the affirmative defense doesn't apply.

So our position is that the ultimate burden of persuasion is on the government. The government has said we don't have any additional evidence that we need to present, and based on the record, they have not met that

burden. And we think that is a finding that this court can easily make without an evidentiary hearing.

The only really relevant factual question which we, again, think is sCUArely resolved by the current record is the non profit issue. These other issues that deal with the 2008 guidelines post date Mr. Lynch's conduct. McIntosh says defendant had to be strictly compliant with all relevant state laws. Non binding advisory guidelines that came down after Mr. Lynch closed his dispensary are in no way relevant to whether he strictly complied with state law at the time he had his dispensary. State law, at the time, was the CUA and the MMPA. And the MMPA does allow store-front dispensaries so long as they are not for profit.

So I really think the evidentiary question to the extent there is any is a bounded one about non profit, and, again, the record, even if the burden is on us, I think we have met it. But the burden is on the government. They say they have no further evidence to present, and I think that the court could very well make a factual finding that Mr. Lynch operated a not-for-profit organization.

THE COURT: Anything else from the government?

MR. KOWAL: Just as the court has correctly ruled, the Ninth Circuit has to decide whether a binding final

judgment by this court or the jurisdiction of the Court of Appeals after the filing of notice of appeals and the filing of briefs, whether there would be a remedy there for defendant in that case either to prevent the government from further arguing or unwinding a past transaction that is clearly a past conviction.

Those are clearly legal issues as the court resolve -- the Ninth Circuit has to resolve those first. It should resolve them. I have other things to say about that argument, but I think since that is the real threshold question here, there is no reason for this court to rule.

THE COURT: Also, one of the differences, because this case, he has been convicted, he is on appeal, the matter is really with the Court of Appeals. It is not -- I mean, it is not in front of me in the sense that the litigation is in front of me. He has taken an appeal.

Even after I order the government insofar as would I be ordering the government not to show up anywhere and spend any money? I don't know. And if the government is in front of the appellate court and not me, really shouldn't it be the appellate court? In other words, I can say, now, I can bar -- I can do things so I can bar attorneys from showing up in the appellate court and doing things in the appellate court.

If I have that power, I would like the circuit to tell me because I will use it. And I will do things that are, let's say, okay, I don't like what this attorney has done, I am going to bar, I am not going to allow him to go to the circuit court. Do I have that power? I mean, it is interesting. I suppose I could justify it in my twisted mind.

But, no, I think, really, again, it is a serious issue. I don't think that either side is arguing on the basis of some bad faith. I think both sides have good arguments. But I don't think that there is an obvious answer that is not -- other than a pure issue of law and the matter is already geared up and the appellate court can make that decision.

MS. YATES: Your Honor, there is no reason that the cross-appeals need to necessarily be stayed while this court handles this matter. This is an ancillary proceeding, and the jurisdiction --

THE COURT: Let me stop you. I am not going to make the appeal more complicated than it already is, and to say that I am asking the circuit court to stay some things and not stay others, again, I don't think I have the authority to do any of that sort of thing insofar as the appellate court is concerned. There, you simply you have made the motion because you can make the motion. I

am not obligated at this point in time under either 37 or 12.1.

You know, you have made a good shot. I told you why I am not going to do it. And it is discretionary. Now, if the appellate court tells me I have abused my discretion and they want me to hold evidentiary hearings, I am always perfectly willing to follow what they say despite what the government may say. I am always perfectly willing to do that. So if that is what they want, then I will do that. But, again, I think that this is an important issue.

There is a fundamental issue that I would need for -- for the circuit court to tell me about. And it has already been geared up for them, and it is one that, really, I think should be addressed even before I hold the evidentiary hearing because, again, in part, the evidentiary hearing the court says I am supposed to consider the available remedies and things of that sort. Well, I don't know what the available remedies are because I have a question as to whether or not one of the available remedies would be that, in effect, I would order the case -- the convictions overturned because I don't know whether or not that is, you know, I am allowed basically even allowed to do that.

MS. YATES: I'm sorry. Your Honor, I don't want

to beat a dead horse. I do want to let the court know the court does have the authority. I believe Roadway Express, Inc. versus Piper, 447 U.S. 752, at 767, says the power of a court over members of its bar is at least as great as its authority over litigants. That is in the context of a discussion about talking about the inherent powers of federal courts that are necessary to exercise of all others. So the court does the authority to tell the members of the Department of Justice who are members of the bar practicing in this court, that Congress has said, they cannot spend funds on this case.

What the Ninth Circuit then says that means for the Ninth Circuit case is a separate question that this court could opine on but does not need to. All we are asking this court to do is find that Section 542 applies to Mr. Lynch and that the government is enjoined from spending funds. The practical implications of that can be sorted out after the fact.

And just as a final point, your Honor, the court does have the discretion not to entertain this motion, but in the interests of justice, we would really ask the court to entertain this.

THE COURT: Well, no. I already entertained it so it is not a question of I am not entertaining it. But I have a problem with granting the injunctive relief that

the defendant wants because, again, I do not know whether or not I can lawfully for all intents and purposes because I can order certain things but if the ultimate effect is something that it would be unlawful, I don't know whether or not I can do that.

And I want the circuit court to tell me can I basically order the government to drop this case such that the underlying conviction is overturned. That is what I want them to tell me. Because if the answer is no, then why am I doing this stuff? Why am I holding an evidentiary hearing which I would have to hold. I have already indicated that. And so if they tell me it is a possibility that I can order that, that the conviction would be overturned, set aside, okay. That is fine.

But I want them to tell me. Because one of the things, for example, McIntosh talks about is the courts must appreciate the temporal nature of these appropriations because they can change at any point in time.

So, again, that is the thing, that, again, that is the reason why I think it is faster to get the initial answer from the circuit court and that will affect what happens and what I will do because if they tell me that it will have no effect because I -- I cannot overturn the conviction because of an appropriations bill

that isn't specifically addressed to it, then, okay, your client is going to lose. If they say that I can, then I will hold the evidentiary hearing to make sure that all the I's are dotted, make sure that he has complied with all the requirements, but, again, you know, there was a period, extended period of time, well, not that extended, but there was a period of time that he operated, and I do not know whether all the requirements were always the same.

And, conversely, I also don't know that if, in fact, those requirements have been changed and been lessened, whether or not he should get the benefit of that or not, things of that sort, which all would have to be litigated. And so rather than doing that, I will let the circuit court to answer the question that I think is the elephant in the room insofar as how to proceed in this matter.

MS. YATES: Very well.

THE COURT: Anything else from either side?

MR. KOWAL: No, your Honor.

THE COURT: Okay. So I will deny the motion without prejudice for, in essence, I will be saying that I am deferring ruling on the motion because I think there was a legal question that I think is properly addressed to the circuit court and that it should address which

would assist me in deciding what I do would do next.

All right. And is there anything else I need do in this matter?

MS. YATES: May I confer, your Honor?

THE COURT: Sure.

MS. YATES: No, your Honor. Thank you.

THE COURT: All right. Thank you. Defendant is currently out on what, OR, bond?

MS. YATES: Effectively. He still has reporting requirements.

THE COURT: So I will leave him out under all same terms and conditions.

Thank you. Have a very nice day.

(Proceedings concluded.)

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: February 10, 2017

/s/ Katie Thibodeaux, CSR No. 9858, RPR, CRR

W

wouldn't [1] 9/23
WU [1] 1/3

Y

YATES [2] 2/11 3/13
year [2] 4/16 11/23
years [2] 3/19 32/12
yes [14] 3/22 6/15 6/20 19/11 21/6 24/20 26/5 31/8 31/20 32/4 35/20 37/12 37/25 38/18
yet [1] 5/20
you [50]
your [43]

EXHIBIT F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

PRELIMINARY JURY INSTRUCTIONS

1.1 DUTY OF JURY

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

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be. These instructions are preliminary and the instructions I will give at the end of the case will control.

1.2 THE CHARGE—PRESUMPTION OF INNOCENCE

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

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

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

1.3 WHAT IS EVIDENCE

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

(1) the sworn testimony of any witness;

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

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

1.4 WHAT IS NOT EVIDENCE

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

1. statements and arguments of the attorneys;

2. questions and objections of the attorneys;

3. testimony that I instruct you to disregard; and

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

1.5 EVIDENCE FOR LIMITED PURPOSE

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

1.6 DIRECT AND CIRCUMSTANTIAL EVIDENCE

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

1.7 RULING ON OBJECTIONS

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

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

1.8 CREDIBILITY OF WITNESSES

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

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

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

2. the witness's memory;

3. the witness's manner while testifying;

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

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

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

7. any other factors that bear on believability.

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

1.9 CONDUCT OF THE JURY

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

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

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

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

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

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

1.10 NO TRANSCRIPT AVAILABLE TO JURY

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

1.11 TAKING NOTES

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

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

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

1.12 OUTLINE OF TRIAL

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

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

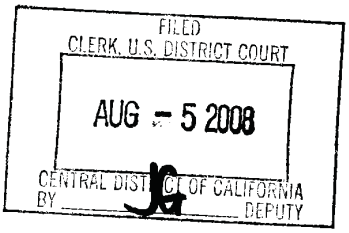
After all of the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

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

1.13 FEDERAL CRIMINAL CASE

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

EXHIBIT G



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

INTRODUCTION

INSTRUCTION NO. 1

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

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

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

INSTRUCTION NO. 2

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

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

INSTRUCTION NO. 3

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

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

INSTRUCTION NO. 4

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

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

INSTRUCTION NO. 5

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

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

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

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

INSTRUCTION NO. 6

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

(1) the sworn testimony of any witness;

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

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

INSTRUCTION NO. 7

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

INSTRUCTION NO. 8

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

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

lawyers state them, your memory of them controls.

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

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

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

INSTRUCTION NO. 9

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

INSTRUCTION NO. 10

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

INSTRUCTION NO. 11

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

INSTRUCTION NO. 12

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

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

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

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

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

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

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

INSTRUCTION NO. 13

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

INSTRUCTION NO. 14

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

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

INSTRUCTION NO. 15

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

INSTRUCTION NO. 16

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

INSTRUCTION NO. 17

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

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

INSTRUCTION NO. 18

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

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

INSTRUCTION NO. 19

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

COUNT ONE - CONSPIRACY

INSTRUCTION NO. 20

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

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

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

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

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

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

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

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

INSTRUCTION NO. 21

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

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

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

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

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

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

INSTRUCTION NO. 22

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

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

INSTRUCTION NO. 23

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

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

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

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

INSTRUCTION NO. 24

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

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

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

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

INSTRUCTION NO. 25

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

INSTRUCTION NO. 26

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

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

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

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

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

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

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

ALTERNATE BASES OF LIABILITY FOR COUNTS TWO THROUGH FIVE

INSTRUCTION NO. 27

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

INSTRUCTION NO. 28

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

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

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

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

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

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

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

INSTRUCTION NO. 29

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

First, the crime was committed by someone;

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

Third, the Defendant acted before the crime was completed.

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

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

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

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

INSTRUCTION NO. 30

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

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

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

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

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

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

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

COUNT FOUR – POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

INSTRUCTION NO. 31

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

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

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

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

COUNT FIVE – MAINTAINING A DRUG PREMISE

INSTRUCTION NO. 32

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

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

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

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

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

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

QUANTITY OF DRUGS

INSTRUCTION NO. 33

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

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

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

You may determine your answer based on:

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

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

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

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

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

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

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

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

DEFENSE – ENTRAPMENT BY ESTOPPEL

INSTRUCTION NO. 34

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

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

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

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

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

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

CONCLUDING INSTRUCTIONS

INSTRUCTION NO. 35

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

INSTRUCTION NO. 36

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

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

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

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

INSTRUCTION NO. 37

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

INSTRUCTION NO. 38

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

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

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

INSTRUCTION NO. 39

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

INSTRUCTION NO. 40

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

INSTRUCTION NO. 41

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

EXHIBIT H

EDMUND G. BROWN JR.
Attorney General

DEPARTMENT OF JUSTICE
State of California

GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE

August 2008

In 1996, California voters approved an initiative that exempted certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana. In 2003, the Legislature enacted additional legislation relating to medical marijuana. One of those statutes requires the Attorney General to adopt "guidelines to ensure the security and nondiversion of marijuana grown for medical use." (Health & Saf. Code, § 11362.81(d).[1]) To fulfill this mandate, this Office is issuing the following guidelines to (1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law.

I. SUMMARY OF APPLICABLE LAW

A. California Penal Provisions Relating to Marijuana.

The possession, sale, cultivation, or transportation of marijuana is ordinarily a crime under California law. (See, e.g., § 11357 [possession of marijuana is a misdemeanor]; § 11358 [cultivation of marijuana is a felony]; Veh. Code, § 23222 [possession of less than 1 oz. of marijuana while driving is a misdemeanor]; § 11359 [possession with intent to sell any amount of marijuana is a felony]; § 11360 [transporting, selling, or giving away marijuana in California is a felony; under 28.5 grams is a misdemeanor]; § 11361 [selling or distributing marijuana to minors, or using a minor to transport, sell, or give away marijuana, is a felony].)

B. Proposition 215 - The Compassionate Use Act of 1996.

On November 5, 1996, California voters passed Proposition 215, which decriminalized the cultivation and use of marijuana by seriously ill individuals upon a physician's recommendation. (§ 11362.5.) Proposition 215 was enacted to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana," and to "ensure that patients and their primary caregivers who obtain and use marijuana for

[1] Unless otherwise noted, all statutory references are to the Health & Safety Code.

medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (§ 11362.5(b)(1)(A)-(B).)

The Act further states that "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or verbal recommendation or approval of a physician." (§ 11362.5(d).) Courts have found an implied defense to the transportation of medical marijuana when the "quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1551.)

C. Senate Bill 420 - The Medical Marijuana Program Act.

On January 1, 2004, Senate Bill 420, the Medical Marijuana Program Act (MMP), became law. (§§ 11362.7-11362.83.) The MMP, among other things, requires the California Department of Public Health (DPH) to establish and maintain a program for the voluntary registration of qualified medical marijuana patients and their primary caregivers through a statewide identification card system. Medical marijuana identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, possess, and transport certain amounts of marijuana without being subject to arrest under specific conditions. (§§ 11362.71(e), 11362.78.)

It is mandatory that all counties participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) maintaining certain records; (d) following state implementation protocols; and (e) issuing DPH identification cards to approved applicants and designated primary caregivers. (§ 11362.71(b).)

Participation by patients and primary caregivers in the identification card program is voluntary. However, because identification cards offer the holder protection from arrest, are issued only after verification of the cardholder's status as a qualified patient or primary caregiver, and are immediately verifiable online or via telephone, they represent one of the best ways to ensure the security and non-diversion of marijuana grown for medical use.

In addition to establishing the identification card program, the MMP also defines certain terms, sets possession guidelines for cardholders, and recognizes a qualified right to collective and cooperative cultivation of medical marijuana. (§§ 11362.7, 11362.77, 11362.775.)

D. Taxability of Medical Marijuana Transactions.

In February 2007, the California State Board of Equalization (BOE) issued a Special Notice confirming its policy of taxing medical marijuana transactions, as well as its requirement that businesses engaging in such transactions hold a Seller's Permit. (http://www.boe.ca.gov/news/pdf/medseller2007.pdf.) According to the Notice, having a Seller's Permit does not allow individuals to make unlawful sales, but instead merely provides a way to remit any sales and use taxes due. BOE further clarified its policy in a

June 2007 Special Notice that addressed several frequently asked questions concerning taxation of medical marijuana transactions. (http://www.boe.ca.gov/news/pdf/173.pdf.)

E. Medical Board of California.

The Medical Board of California licenses, investigates, and disciplines California physicians. (Bus. & Prof. Code, § 2000, et seq.) Although state law prohibits punishing a physician simply for recommending marijuana for treatment of a serious medical condition (§ 11362.5(c)), the Medical Board can and does take disciplinary action against physicians who fail to comply with accepted medical standards when recommending marijuana. In a May 13, 2004 press release, the Medical Board clarified that these accepted standards are the same ones that a reasonable and prudent physician would follow when recommending or approving any medication. They include the following:

1. Taking a history and conducting a good faith examination of the patient;
2. Developing a treatment plan with objectives;
3. Providing informed consent, including discussion of side effects;
4. Periodically reviewing the treatment's efficacy;
5. Consultations, as necessary; and
6. Keeping proper records supporting the decision to recommend the use of medical marijuana.

(http://www.mbc.ca.gov/board/media/releases_2004_05-13_marijuana.html.)

Complaints about physicians should be addressed to the Medical Board (1-800-633-2322 or www.mbc.ca.gov), which investigates and prosecutes alleged licensing violations in conjunction with the Attorney General's Office.

F. The Federal Controlled Substances Act.

Adopted in 1970, the Controlled Substances Act (CSA) established a federal regulatory system designed to combat recreational drug abuse by making it unlawful to manufacture, distribute, dispense, or possess any controlled substance. (21 U.S.C. § 801, et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) The CSA reflects the federal government's view that marijuana is a drug with "no currently accepted medical use." (21 U.S.C. § 812(b)(1).) Accordingly, the manufacture, distribution, or possession of marijuana is a federal criminal offense. (*Id.* at §§ 841(a)(1), 844(a).)

The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego v. San Diego NORML* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 371-373, 381-382.)

In light of California's decision to remove the use and cultivation of physician-recommended marijuana from the scope of the state's drug laws, this Office recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws.

II. DEFINITIONS

A. **Physician's Recommendation:** Physicians may not prescribe marijuana because the federal Food and Drug Administration regulates prescription drugs and, under the CSA, marijuana is a Schedule I drug, meaning that it has no recognized medical use. Physicians may, however, lawfully issue a verbal or written recommendation under California law indicating that marijuana would be a beneficial treatment for a serious medical condition. (§ 11362.5(d); *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 632.)

B. **Primary Caregiver:** A primary caregiver is a person who is designated by a qualified patient and "has consistently assumed responsibility for the housing, health, or safety" of the patient. (§ 11362.5(e).) California courts have emphasized the consistency element of the patient-caregiver relationship. Although a "primary caregiver who consistently grows and supplies . . . medicinal marijuana for a section 11362.5 patient is serving a health need of the patient," someone who merely maintains a source of marijuana does not automatically become the party "who has consistently assumed responsibility for the housing, health, or safety" of that purchaser. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, 1400.) A person may serve as primary caregiver to "more than one" patient, provided that the patients and caregiver all reside in the same city or county. (§ 11362.7(d)(2).) Primary caregivers also may receive certain compensation for their services. (§ 11362.765(c) ["A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided . . . to enable [a patient] to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, . . . shall not, on the sole basis of that fact, be subject to prosecution" for possessing or transporting marijuana].)

C. **Qualified Patient:** A qualified patient is a person whose physician has recommended the use of marijuana to treat a serious illness, including cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (§ 11362.5(b)(1)(A).)

D. **Recommending Physician:** A recommending physician is a person who (1) possesses a license in good standing to practice medicine in California; (2) has taken responsibility for some aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient; and (3) has complied with accepted medical standards (as described by the Medical Board of California in its May 13, 2004 press release) that a reasonable and prudent physician would follow when recommending or approving medical marijuana for the treatment of his or her patient.

III. GUIDELINES REGARDING INDIVIDUAL QUALIFIED PATIENTS AND PRIMARY CAREGIVERS

A. State Law Compliance Guidelines.

1. **Physician Recommendation**: Patients must have a written or verbal recommendation for medical marijuana from a licensed physician. (§ 11362.5(d).)

2. **State of California Medical Marijuana Identification Card**: Under the MMP, qualified patients and their primary caregivers may voluntarily apply for a card issued by DPH identifying them as a person who is authorized to use, possess, or transport marijuana grown for medical purposes. To help law enforcement officers verify the cardholder's identity, each card bears a unique identification number, and a verification database is available online (www.calmmp.ca.gov). In addition, the cards contain the name of the county health department that approved the application, a 24-hour verification telephone number, and an expiration date. (§§ 11362.71(a); 11362.735(a)(3)-(4); 11362.745.)

3. **Proof of Qualified Patient Status**: Although verbal recommendations are technically permitted under Proposition 215, patients should obtain and carry written proof of their physician recommendations to help them avoid arrest. A state identification card is the best form of proof, because it is easily verifiable and provides immunity from arrest if certain conditions are met (see section III.B.4, below). The next best forms of proof are a city- or county-issued patient identification card, or a written recommendation from a physician.

4. **Possession Guidelines**:

a) **MMP**:[2] Qualified patients and primary caregivers who possess a state-issued identification card may possess 8 oz. of dried marijuana, and may maintain no more than 6 mature or 12 immature plants per qualified patient. (§ 11362.77(a).) But, if "a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs." (§ 11362.77(b).) Only the dried mature processed flowers or buds of the female cannabis plant should be considered when determining allowable quantities of medical marijuana for purposes of the MMP. (§ 11362.77(d).)

b) **Local Possession Guidelines:** Counties and cities may adopt regulations that allow qualified patients or primary caregivers to possess

---

[2] On May 22, 2008, California's Second District Court of Appeal severed Health & Safety Code § 11362.77 from the MMP on the ground that the statute's possession guidelines were an unconstitutional amendment of Proposition 215, which does not quantify the marijuana a patient may possess. (See *People v. Kelly* (2008) 163 Cal.App.4th 124, 77 Cal.Rptr.3d 390.) The Third District Court of Appeal recently reached a similar conclusion in *People v. Phomphakdy* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2931369. The California Supreme Court has granted review in *Kelly* and the Attorney General intends to seek review in *Phomphakdy*.

medical marijuana in amounts that exceed the MMP's possession guidelines. (§ 11362.77(c).)

c) **Proposition 215**: Qualified patients claiming protection under Proposition 215 may possess an amount of marijuana that is "reasonably related to [their] current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.)

B. **Enforcement Guidelines.**

1. **Location of Use**: Medical marijuana may not be smoked (a) where smoking is prohibited by law, (b) at or within 1000 feet of a school, recreation center, or youth center (unless the medical use occurs within a residence), (c) on a school bus, or (d) in a moving motor vehicle or boat. (§ 11362.79.)

2. **Use of Medical Marijuana in the Workplace or at Correctional Facilities:** The medical use of marijuana need not be accommodated in the workplace, during work hours, or at any jail, correctional facility, or other penal institution. (§ 11362.785(a); *Ross v. RagingWire Telecomms., Inc.* (2008) 42 Cal.4th 920, 933 [under the Fair Employment and Housing Act, an employer may terminate an employee who tests positive for marijuana use].)

3. **Criminal Defendants, Probationers, and Parolees:** Criminal defendants and probationers may request court approval to use medical marijuana while they are released on bail or probation. The court's decision and reasoning must be stated on the record and in the minutes of the court. Likewise, parolees who are eligible to use medical marijuana may request that they be allowed to continue such use during the period of parole. The written conditions of parole must reflect whether the request was granted or denied. (§ 11362.795.)

4. **State of California Medical Marijuana Identification Cardholders**: When a person invokes the protections of Proposition 215 or the MMP and he or she possesses a state medical marijuana identification card, officers should:

a) Review the identification card and verify its validity either by calling the telephone number printed on the card, or by accessing DPH's card verification website (http://www.calmmp.ca.gov); and

b) If the card is valid and not being used fraudulently, there are no other indicia of illegal activity (weapons, illicit drugs, or excessive amounts of cash), and the person is within the state or local possession guidelines, the individual should be released and the marijuana should not be seized. Under the MMP, "no person or designated primary caregiver in possession of a valid state medical marijuana identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana." (§ 11362.71(e).) Further, a "state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer

has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently." (§ 11362.78.)

5. **Non-Cardholders:** When a person claims protection under Proposition 215 or the MMP and only has a locally-issued (i.e., non-state) patient identification card, or a written (or verbal) recommendation from a licensed physician, officers should use their sound professional judgment to assess the validity of the person's medical-use claim:

a) Officers need not abandon their search or investigation. The standard search and seizure rules apply to the enforcement of marijuana-related violations. Reasonable suspicion is required for detention, while probable cause is required for search, seizure, and arrest.

b) Officers should review any written documentation for validity. It may contain the physician's name, telephone number, address, and license number.

c) If the officer reasonably believes that the medical-use claim is valid based upon the totality of the circumstances (including the quantity of marijuana, packaging for sale, the presence of weapons, illicit drugs, or large amounts of cash), and the person is within the state or local possession guidelines or has an amount consistent with their current medical needs, the person should be released and the marijuana should not be seized.

d) Alternatively, if the officer has probable cause to doubt the validity of a person's medical marijuana claim based upon the facts and circumstances, the person may be arrested and the marijuana may be seized. It will then be up to the person to establish his or her medical marijuana defense in court.

e) Officers are not obligated to accept a person's claim of having a verbal physician's recommendation that cannot be readily verified with the physician at the time of detention.

6. **Exceeding Possession Guidelines**: If a person has what appears to be valid medical marijuana documentation, but exceeds the applicable possession guidelines identified above, all marijuana may be seized.

7. **Return of Seized Medical Marijuana:** If a person whose marijuana is seized by law enforcement successfully establishes a medical marijuana defense in court, or the case is not prosecuted, he or she may file a motion for return of the marijuana. If a court grants the motion and orders the return of marijuana seized incident to an arrest, the individual or entity subject to the order must return the property. State law enforcement officers who handle controlled substances in the course of their official duties are immune from liability under the CSA. (21 U.S.C. § 885(d).) Once the marijuana is returned, federal authorities are free to exercise jurisdiction over it. (21 U.S.C. §§ 812(c)(10), 844(a); *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 369, 386, 391.)

IV. GUIDELINES REGARDING COLLECTIVES AND COOPERATIVES

Under California law, medical marijuana patients and primary caregivers may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." (§ 11362.775.) The following guidelines are meant to apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended marijuana.

A. Business Forms: Any group that is collectively or cooperatively cultivating and distributing marijuana for medical purposes should be organized and operated in a manner that ensures the security of the crop and safeguards against diversion for non-medical purposes. The following are guidelines to help cooperatives and collectives operate within the law, and to help law enforcement determine whether they are doing so.

1. **Statutory Cooperatives:** A cooperative must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. (Corp. Code, § 12201, 12300.) No business may call itself a "cooperative" (or "co-op") unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code. (*Id.* at § 12311(b).) Cooperative corporations are "democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons." (*Id.* at § 12201.) The earnings and savings of the business must be used for the general welfare of its members or equitably distributed to members in the form of cash, property, credits, or services. (*Ibid.*) Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year. (See *id.* at § 12200, et seq.) Agricultural cooperatives are likewise nonprofit corporate entities "since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers." (Food & Agric. Code, § 54033.) Agricultural cooperatives share many characteristics with consumer cooperatives. (See, e.g., *id.* at § 54002, et seq.) Cooperatives should not purchase marijuana from, or sell to, non-members; instead, they should only provide a means for facilitating or coordinating transactions between members.

2. **Collectives:** California law does not define collectives, but the dictionary defines them as "a business, farm, etc., jointly owned and operated by the members of a group." (*Random House Unabridged Dictionary*; Random House, Inc. © 2006.) Applying this definition, a collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members – including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities. The collective should not purchase marijuana from, or sell to, non-members; instead, it should only provide a means for facilitating or coordinating transactions between members.

B. **Guidelines for the Lawful Operation of a Cooperative or Collective:** Collectives and cooperatives should be organized with sufficient structure to ensure security, non-diversion of marijuana to illicit markets, and compliance with all state and local laws. The following are some suggested guidelines and practices for operating collective growing operations to help ensure lawful operation.

1. **Non-Profit Operation**: Nothing in Proposition 215 or the MMP authorizes collectives, cooperatives, or individuals to profit from the sale or distribution of marijuana. (See, e.g., § 11362.765(a) ["nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit"].

2. **Business Licenses, Sales Tax, and Seller's Permits**: The State Board of Equalization has determined that medical marijuana transactions are subject to sales tax, regardless of whether the individual or group makes a profit, and those engaging in transactions involving medical marijuana must obtain a Seller's Permit. Some cities and counties also require dispensing collectives and cooperatives to obtain business licenses.

3. **Membership Application and Verification**: When a patient or primary caregiver wishes to join a collective or cooperative, the group can help prevent the diversion of marijuana for non-medical use by having potential members complete a written membership application. The following application guidelines should be followed to help ensure that marijuana grown for medical use is not diverted to illicit markets:

a) Verify the individual's status as a qualified patient or primary caregiver. Unless he or she has a valid state medical marijuana identification card, this should involve personal contact with the recommending physician (or his or her agent), verification of the physician's identity, as well as his or her state licensing status. Verification of primary caregiver status should include contact with the qualified patient, as well as validation of the patient's recommendation. Copies should be made of the physician's recommendation or identification card, if any;

b) Have the individual agree not to distribute marijuana to non-members;

c) Have the individual agree not to use the marijuana for other than medical purposes;

d) Maintain membership records on-site or have them reasonably available;

e) Track when members' medical marijuana recommendation and/or identification cards expire; and

f) Enforce conditions of membership by excluding members whose identification card or physician recommendation are invalid or have expired, or who are caught diverting marijuana for non-medical use.

4. **Collectives Should Acquire, Possess, and Distribute Only Lawfully Cultivated Marijuana**: Collectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. (§§ 11362.765, 11362.775.) The collective or cooperative may then allocate it to other members of the group. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical markets, collectives and cooperatives should document each member's contribution of labor, resources, or money to the enterprise. They also should track and record the source of their marijuana.

5. **Distribution and Sales to Non-Members are Prohibited**: State law allows primary caregivers to be reimbursed for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or distribute marijuana to non-members. Accordingly, a collective or cooperative may not distribute medical marijuana to any person who is not a member in good standing of the organization. A dispensing collective or cooperative may credit its members for marijuana they provide to the collective, which it may then allocate to other members. (§ 11362.765(c).) Members also may reimburse the collective or cooperative for marijuana that has been allocated to them. Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses.

6. **Permissible Reimbursements and Allocations:** Marijuana grown at a collective or cooperative for medical purposes may be:

a) Provided free to qualified patients and primary caregivers who are members of the collective or cooperative;
b) Provided in exchange for services rendered to the entity;
c) Allocated based on fees that are reasonably calculated to cover overhead costs and operating expenses; or
d) Any combination of the above.

7. **Possession and Cultivation Guidelines**: If a person is acting as primary caregiver to more than one patient under section 11362.7(d)(2), he or she may aggregate the possession and cultivation limits for each patient. For example, applying the MMP's basic possession guidelines, if a caregiver is responsible for three patients, he or she may possess up to 24 oz. of marijuana (8 oz. per patient) and may grow 18 mature or 36 immature plants. Similarly, collectives and cooperatives may cultivate and transport marijuana in aggregate amounts tied to its membership numbers. Any patient or primary caregiver exceeding individual possession guidelines should have supporting records readily available when:

a) Operating a location for cultivation;
b) Transporting the group's medical marijuana; and
c) Operating a location for distribution to members of the collective or cooperative.

8. **Security**: Collectives and cooperatives should provide adequate security to ensure that patients are safe and that the surrounding homes or businesses are not negatively impacted by nuisance activity such as loitering or crime. Further, to maintain security, prevent fraud, and deter robberies, collectives and cooperatives should keep accurate records and follow accepted cash handling practices, including regular bank runs and cash drops, and maintain a general ledger of cash transactions.

C. **Enforcement Guidelines**: Depending upon the facts and circumstances, deviations from the guidelines outlined above, or other indicia that marijuana is not for medical use, may give rise to probable cause for arrest and seizure. The following are additional guidelines to help identify medical marijuana collectives and cooperatives that are operating outside of state law.

1. **Storefront Dispensaries:** Although medical marijuana "dispensaries" have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives. (§ 11362.775.) It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines set forth in sections IV(A) and (B), above, are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver – and then offering marijuana in exchange for cash "donations" – are likely unlawful. (*Peron*, *supra*, 59 Cal.App.4th at p. 1400 [cannabis club owner was not the primary caregiver to thousands of patients where he did not consistently assume responsibility for their housing, health, or safety].)

2. **Indicia of Unlawful Operation:** When investigating collectives or cooperatives, law enforcement officers should be alert for signs of mass production or illegal sales, including (a) excessive amounts of marijuana, (b) excessive amounts of cash, (c) failure to follow local and state laws applicable to similar businesses, such as maintenance of any required licenses and payment of any required taxes, including sales taxes, (d) weapons, (e) illicit drugs, (f) purchases from, or sales or distribution to, non-members, or (g) distribution outside of California.

EXHIBIT I

DECLARATION OF CHARLES LYNCH

I, Charles Lynch, hereby state and declare as follows:

1. I operated the Central Coast Compassionate Caregivers (the "CCCC" or the "dispensary"), which was located in the City of Morro Bay, California.

2. Before I opened the dispensary, I spent the summer and fall of 2005 researching the laws about medical marijuana dispensaries. I did not have a lawyer at the time.

3. I read as much as I could and thought that I understood the difference between federal and State law and how all of the dispensaries in California were legal. Among the materials I read were Prop 215, Senate Bill 420, the Tenth Amendment, and the DEA website.

4. A few months after I called the DEA but before I opened the CCCC, I hired Lou Koory to be my lawyer. I told my lawyer everything about my operations, including about the substance of my phone calls with the DEA. Every time I had a question about things, I would speak with either Mr. Koory, someone in the local government in the City of Morro Bay or the County of San Luis Obispo. I always tried to stay current with the law on the Internet, but it was confusing at times.

5. When I opened the dispensary, I was invited to join the Chamber of Commerce. I accepted the invitation, and they gave us a nice sticker for the door.

6. When I opened the CCCC, I walked around the neighborhood in downtown Morro Bay and introduced myself to my neighbors. I gave them my business card and told them to call me if they had any complaints or concerns. No one ever called to complain about things at the dispensary.

7. After I opened the dispensary, several local business publications published the address of the dispensary. The address was also readily available on the Internet.

8. During the application process, I proposed layouts of the dispensary to the City. During the process, I would speak often with Mike Prater, the City Planner, and Rob Schultz, the City Attorney.

9. One time, Mr. Schultz asked if he could bring a whole bunch of lawyers from the County Counsel Association into the dispensary. I told him that it would be okay to do that, and the lawyers all came for a tour.

10. We also gave tours to doctors who wanted to see whether the dispensary was a safe place to send their patients. Most doctors also wanted to know whether the marijuana was of a medicinal quality as opposed to street quality.

11. I never met Dr. Tollette until I was arrested. I believe that I met him in while in custody and in court at the Roybal Building.

12. We always cooperated with local law enforcement. I spoke with the City of Morro Bay's police department. Sometimes an officer would come and update the police emergency contact sheet. Sometimes I spoke with a local district attorney when he wanted to know whether a particular individual was a qualified patient. I had read the HIPAA laws before opening and believed that I was allowed to provide that sort of information to law enforcement officers. We told our patients about this, as I thought it was important for them to know.

13. I tried to comply with all of the City's conditions for the dispensary and all other laws as best that I could.

14. We displayed the City's conditions, which were attached to my business license, in several locations throughout the CCCC. We tried to put the conditions in places where people would see them.

15. I found a company that performed background checks on people who wanted to work at the dispensary. I also called the local county information line and asked about peoples criminal records with the county of San Luis Obispo. I also had employees sign an agreement form.

16. One of the persons whom I couldn't hire because of the City's conditions was my former partner, Dan Eister. Mr. Eister had a felony conviction, which I found out when I did the background checks on myself and Mr. Eister. I had to tell him that he couldn't be part of the CCCC.

17. I put a solid security system in place. I had visited other dispensaries around the State, and I copied what the other dispensaries did in terms of providing safe access to the patients. We made sure that no one under the age of 18 could get into the dispensary without their legal guardian. When we got someone's paperwork who was under 18, we would inspect both the adult and the minor's drivers' licenses in order to ensure that the adult guardian was who he or she said he or she was and to make sure that the licenses were not expired.

18. I always made sure that my employees were not consuming marijuana at the CCCC.

19. I eventually applied for, and received, a conditional use permit. CCCC never did any cultivating on site, and I told my employees and other members of the cooperative not to plant any seeds until we got the permit. Before I got the permit, I drafted the conditions for Mr. Schultz. I also drew up a second floor plan. I contracted with a company to let other businesses within 300 feet know about the plans. I worked with Mike Prater on the plans. I went to a

Commission meeting on the issue, where the plans were discussed. The Mayor, the City Attorney, the Planning Commission, the Chief of Police, and other members of the City and public were there.

20. I didn't have any experience with nurseries, so I hired a nursery manager who managed the nursery. I then posted the new conditions that I had drafted, which had been approved, onto the shelves at the nursery.

21. I drew up a plan for signage before I opened and brought it to the Planning Department. I got approval on the door signs right away. The City later gave me approval on the larger signs after I had the signs created. I never had the larger signs installed.

22. I had all employees fill out Department of Homeland Security forms. I also posted federal and state labor law posters that I got on the Internet. I tried to verify backgrounds of employees so that I could assure myself that no one was an illegal alien. We had an electronic sign in/out clock for employees, and we maintained a weekly schedule.

23. I ran payroll by using Intuit Quickbooks.

24. I heard a lot of argument at trial about how rich I got by operating the dispensary. That isn't true. I didn't open the dispensary to make money. I opened it to help people. I never got any of my initial investment back in the dispensary,

which I got from re-financing my house on Rosemary Lane. I still drive the same Murano that I drove before I opened the CCCC. I live in the same house, although I'm getting pretty close to bankruptcy. I've got a bankruptcy lawyer now, and I'm having a lot of trouble making my house payments. I did buy myself a new guitar effects pedal during the time I opened the dispensary as well as a brand new X-box system.

25. In terms of doctors, we verified all patients' authorizations. Employees would also verify that the doctors were on the California Medical Board website and in good standing.

26. We provided patients with a secure website, which explained the State laws about medical marijuana. I put links to these sites up for the patients.

27. We had patients sign membership forms, which described the rules. We also made sure that all patients were Californians and had valid identification. A few times we discovered forged ID's or doctor's recommendations, and we denied these people access.

28. Once a patient became a member, we issued an identification card. We wanted to keep our promise to all of our patients that we would never disclose their private information. It also seemed important under the HIPAA laws as well. We maintained our list in a locked part of the CCCC, where the records were

locked as well. I also instructed everyone to never disclose the identity of patients -- even on the occasion when we learned that one of the patients was cooperating with law enforcement. All patients were provided with information from the California Patient Privacy Rights.

29. No just anyone could come into the dispensary without permission. We only permitted law enforcement, patients, caregivers, parents, or city officials into the dispensary.

30. We ran a discount program for patients who did not have a lot of money.

31. We considered ourselves a primary caregiver under California law. We adhered to the State's possession guidelines, which weren't so clear, but we erred on the side of caution. We operated as a sole proprietorship, which is what my lawyer recommended.

32. My lawyer recently asked me to drive to an address where a deputy sheriff said Ryan Doughtery allegedly had medical marijuana plants in his car. The address does not seem to exist.

33. I believe that I helped more people during the one year that the CCCC was open than I have in my entire life. Since the dispensary closed, I am aware of

several patients who have passed away. Several died of the ailments that brought them to the CCCC.

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

Executed this 30 th day of January, 2009, at 8:30am, California.

Charles C. Lynch

CHARLES CORNELIUS LYNCH