CA NO. 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

APPELLANT'S THIRD CROSS-APPEAL BRIEF

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

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Rules and Sentencing Guidelines

TABLE OF AUTHORITIES

Page(s)

I. INTRODUCTION

Charlie Lynch did not receive a fair trial. The government tries to defend the district court's errors one by one, but individually and cumulatively they denied Lynch his constitutional right to present a defense. The jurors who convicted Lynch heard only part of the story. For this and other reasons, the Court should vacate Lynch's conviction.

And the Court should reject the government's unjustified request to send Lynch, who operated the Central Coast Compassionate Caregivers ("CCCC") medical marijuana dispensary with the blessing and support of his local government, to prison for five years. In fact, since 2014, all of the federal government's work on this case has been illegal, because congressional legislation stripped the Department of Justice ("DOJ") of funds for Lynch's prosecution. This Court should enforce Congress's will, and order the case dismissed.

II. ARGUMENT

A. Lynch Renews His Motion To Enforce a Congressional Appropriations Rider That Prohibits the Department of Justice from Spending Funds on His Case

"Since December 16, 2014, congressional appropriations riders have prohibited the use of any DOJ funds that prevent states with medical marijuana programs (including California) from implementing their state medical marijuana laws." *United States v. Kleinman*, 859 F.3d 825, 2017 WL 2603352, at *3 (9th Cir. June 16, 2017). If a federal defendant fully complied with state medical marijuana

laws, the operative rider prevents the DOJ from spending funds on his criminal case. *See United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). Because Lynch so complied, he moved this Court to enforce Congress's will and order the DOJ to cease all case-related expenditures; alternatively, he requested a hearing on his compliance, as authorized by *McIntosh*. (Dkt. 137.)[1] The government opposed (Dkt. 142), and Lynch replied (Dkt. 147).

A motions panel denied Lynch's request without prejudice to renewing it in his third cross-appeal brief. (Dkt. 150.) Lynch hereby does so, and notifies the Court of *Kleinman*, decided after Lynch's *McIntosh* briefing was complete.[2]

Specifically, *Kleinman* rejected the government's claim that the rider applies only to cases where conviction and sentence predate its enactment. Instead, *Kleinman* recognized the rider's force in cases on appeal, debunking the government's purported retroactivity and savings statute concerns. *Kleinman*, 2017 WL 2603352, at *4. And although *Kleinman* held the rider "does not require a court to vacate convictions that were obtained before [it] took effect," the *Kleinman* panel did not address Lynch's argument that, while the rider may not

[1] All docket references are to CA No. 10-50219.

[2] Lynch understands the motions panel's order to follow the Court's usual practice and defer consideration of the fully briefed motion, opposition, and reply to the merits panel, rather than require the Parties to rewrite each of those pleadings. If the Court instead wishes Lynch to incorporate all of the arguments in his motion and reply into this brief, he will file a revised version.

require such an order in every case, the Court should issue one here because the government has not explained how it might comply with an injunction absent dismissal in this particular case. *Id.*[3]

B. The Court Denied Lynch His Rights To Present a Defense and to a Fair Trial

At trial, Lynch tried to present an entrapment-by-estoppel defense, but was stymied at every turn. The court outright precluded the defense for two counts. On the remaining counts, the court misinstructed the jury as to its elements. Lynch might have been able to satisfy the court's heightened requirements, but he was not allowed to present crucial evidence, leaving his testimony uncorroborated and the government's prejudicial evidence unanswered. When Lynch later learned the government failed to reveal exculpatory evidence demonstrating its key witness gave false testimony, the court denied his motion for new trial. This Court should remedy these errors.

[3] The Parties sought leave to file petitions for rehearing in *Kleinman*. *United States v. Kleinman*, No. 14-50585, ECF Nos. 105-06. To the extent *Kleinman*'s ruling on vacatur holds, it was wrongly decided.

1. Lynch Presented Evidence To Support an Entrapment-by-Estoppel Defense to All Counts, but the Court Misinstructed the Jury on Its Elements and Application

a. Lynch Satisfied the Low Threshold for Presenting an Affirmative Defense

As an initial matter, the government's oblique complaint that Lynch's "secret defense" was improper is not well taken. (GB 7-9.)[4] The government had no right to discover Lynch's defense. "A defendant needn't spell out his theory of the case" pretrial, "[n]or is the government entitled to know in advance specifically what the defense is going to be." *United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th Cir. 2013). Rather, "when our rules and precedents don't require the defendant to give notice, he's entitled to remain silent as to what defense he will present, and the government must anticipate any issues he might raise." *Id.* at 765. Perhaps for this reason, the government alludes to possible error in the fact section of its brief but does not argue the point—waiving any theoretical claim on appeal. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986).[5]

Turning to the substance of the government's claim, the facts Lynch presented were more than sufficient to meet the low bar for his defense to go to the

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[4] "DB" refers to Defense Brief, or Lynch's first cross-appeal brief. "GB" refers to Government Brief, or the second cross-appeal brief.

[5] The government's unreasoned assertion in a footnote (GB 64 n.7) that Lynch's entrapment-by-estoppel defense was a public-authority defense subject to notice requirements is meritless and in any event also waived. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996).

jury. If there was "any foundation in the evidence" to support entrapment by estoppel—even if that evidence was "weak, insufficient, inconsistent, or of doubtful credibility"—Lynch was entitled to present the defense. *United States v. Burt*, 410 F.3d 1100, 1103 (9th Cir. 2005).

Construing the evidence in the light most favorable to Lynch, as the Court must, *see id.* at 1104, it showed Lynch asked an official tasked with enforcing federal drug laws whether he could open a medical marijuana dispensary in California; that official understood what Lynch meant and told Lynch the legality of the operation was up to state and local authorities; the official's response made sense to Lynch based on his lay research; and Lynch then opened and operated his dispensary according to state and local rules. As discussed in detail below, these facts establish the elements of entrapment by estoppel.

Indeed, this Court has found entrapment by estoppel *proved as a matter of law* on far weaker evidence. *See United States v. Tallmadge*, 829 F.2d 767, 775 (9th Cir. 1987); *id.* at 780-81 (Kozinski, J., dissenting) (describing "scant factual basis for an estoppel defense" and "thin record presented in this case"). Sister circuits reviewing similarly skimpy evidence also have reversed for failure to instruct on this defense. *See, e.g.*, *United States v. Abcasis*, 45 F.3d 39 (2d Cir. 1995); *United States v. Thompson*, 25 F.3d 1558 (11th Cir. 1994).

The fundamental flaw in the government's argument is its assumption that a judge—not a jury—should decide the fact-intensive questions raised by an entrapment-by-estoppel defense. But "[f]actfinding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law." *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984). Where there is "a triable issue of fact," a court commits reversible error by precluding the jury from considering its merit. *Id.*; *see United States v. Gaudin*, 515 U.S. 506, 510-15 (1995) (holding failure of judge to put all relevant fact questions to jury violates defendant's constitutional rights).

In particular, "Supreme Court precedent makes clear that questions of credibility are for the jury to decide." *Cudjo v. Ayers*, 698 F.3d 752, 763 (9th Cir. 2012). And so, the government's attacks on Lynch's credibility are immaterial to his right to present his defense. For even if there was "good reason . . . to doubt" Lynch's assertions, he was "not required to pass a credibility test to have [his] defense presented to the jury." *Abcasis*, 45 F.3d at 44. Jurors "may or may not [have] accept[ed] [Lynch's] story," but he "alleged facts sufficient to present his defense" to them. *United States v. Kuok*, 671 F.3d 931, 950 (9th Cir. 2012).

b. Lynch Was Not Required To Prove He Provided All Relevant "Historical Facts" in His Call, but Nonetheless Presented Sufficient Evidence That He Did

(1) The Government Overstates the "Historical Facts" Requirement

According to the government, Lynch's defense fails as a matter of law because he did not disclose in his phone call all of the facts alleged in the indictment. In so arguing, the government creates an element of entrapment by estoppel that does not exist. For this Circuit's precedent requires only an *accurate* statement of the defendant's proposed conduct, not an overly detailed accounting of each and every potentially relevant fact. *See United States v. Batterjee*, 361 F.3d 1210, 1213-14 (9th Cir. 2004). Lynch's evidence that he asked a Drug Enforcement Agency ("DEA") agent whether he could open a medical marijuana dispensary in California, to which the agent responded without confusion (ER 2374), was sufficient for his defense to go to the jury—especially when coupled with evidence that a DEA agent would have understood what the term "medical marijuana dispensary" meant (ER 2862-63).

This Court's decisions in *Batterjee* and *Tallmadge* control. In each, the defendant did not present to any federal authority the crucial fact on which his criminality turned. *See Batterjee*, 361 F.3d at 1214; *Tallmadge*, 829 F.2d at 770, 772. That was no bar to establishing entrapment by estoppel outright. *See Batterjee*, 361 F.3d at 1212, 1218 (rejecting government's "historical facts"

argument); *Tallmadge*, 829 F.2d at 775. Although the government cites out-of-circuit cases purportedly[6] requiring greater detail, those cases do not govern in this Circuit, where *Batterjee* and *Tallmadge* are the law. In any event, none of the government's cited cases requires a defendant to reveal each and every fact later alleged in the government's indictment.

Moreover, because this Court may affirm on any basis supported by the record, Lynch preserves the argument that he was not required to present any historical facts at all. (*See* DB 47.) *Raley v. Ohio*, 360 U.S. 423 (1959), and *Cox v. Louisiana*, 379 U.S. 559 (1965), where the Supreme Court established entrapment by estoppel as a defense, make no mention of this supposed element. *Tallmadge* extended these cases to include an "historical facts" requirement, and that law currently binds this Circuit. *Tallmadge*, 829 F.2d at 774. But not every circuit has done so. *See, e.g.*, *United States v. Bader*, 678 F.3d 858, 886 (10th Cir. 2012).

(2) The Court Misinstructed the Jury on the "Historical Facts" Element

Here, the court instructed jurors they could not acquit unless a federal official "was made aware of all the relevant historical facts." (ER 324.) Standing

[6] *United States v. Triana*, 468 F.3d 308, 317-18 (6th Cir. 2006), does not actually stand for the government's proffered point; it rejected entrapment by estoppel because the defendant affirmatively misled government agents about the relevant facts. *United States v. Trevino-Martinez*, 86 F.3d 65, 70 (5th Cir. 1996), is similarly unilluminating because the defendant in that case withheld the precise kind of material facts this Court found inessential in *Batterjee* and *Tallmadge*.

alone (and putting aside the circuit split), this instruction is not necessarily problematic in every case. However, in this case, where the government argued that jurors must convict unless Lynch informed the DEA of every fact ultimately relevant to the legality of his conduct (ER 3092-93), the instruction was "misleading [and] inadequate to guide the jury's deliberation." *United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003). It was "far from a complete statement of our caselaw," because it gave jurors the false impression that Lynch could not meet his burden without proving he represented each and every fact about his proposed medical marijuana dispensary to the DEA agent with whom he spoke. *See Hunter v. Cty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011).

United States v. Hernandez, 859 F.3d 817 (9th Cir. 2017) (per curiam), is directly on point. There, the court gave an instruction explicitly affirmed by the Supreme Court in an earlier case. *See id.* at 823. Even though this instruction "accurately stated the law," when coupled with the government's evidence and argument, it "could have been misunderstood by the jury" as an inaccurate explanation of a required element. *Id.*; *see id.* at 824. "[T]he combination of the broad jury instruction and the government's" misleading position required reversal for instructional error. *Id.* at 824. Similarly here, the instruction on "historical facts," combined with the government's evidence and argument suggesting Lynch

needed to report every fact potentially relevant to the legality of his conduct, misled the jury and requires reversal.

The government briefly raises the possibility that Lynch waived this claim by proposing an instruction loosely following *Batterjee*. (GB 51-52.) But waiver is the *intentional* relinquishment of a known right. *See United States v. Alferahin*, 433 F.3d 1148, 1154 n.2 (9th Cir. 2006). Sitting en banc, this Court has held that where a defendant proposed flawed jury instructions, the Court nonetheless reviews the matter unless there is "evidence in the record that the defendant was aware of, *i.e.*, knew of" the deficiency but made a tactical decision to forgo objection. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc); *see United States v. Lindsey*, 634 F.3d 542, 555 (9th Cir. 2011); *Alferahin*, 433 F.3d at 1154 n.2. The government points to no such evidence here; Lynch did not waive this claim.

(3) The Court Improperly Precluded the Jury from Considering Lynch's Defense to the Minors Counts

The district court adopted the government's strict interpretation of the "historical facts" element, and precluded Lynch from offering his defense to Counts Two and Three, the "minors" counts. According to the court, because Lynch did not ask the DEA about distributing to minors, he could not make out an entrapment-by-estoppel defense to those counts as a matter of law. (ER 2413-28, 2971-72.) But Lynch presented evidence that distributing marijuana to 18-to-21-year-olds "was part of the way dispensaries worked," and necessarily encompassed

by his question about opening a dispensary in California. (ER 2548.) Under this Court's precedent—and surely under Supreme Court precedent—that was enough for the question to go to the jury. For all of the reasons already discussed, Lynch had a right to present his defense to Counts Two and Three.

The Second Circuit's decision in *Abcasis*, cited favorably in *Batterjee*, 361 F.3d at 1216, is instructive. Two defendants in that case claimed they were confidential informants who believed DEA agents authorized them to conspire to import heroin. *Abcasis*, 45 F.3d at 42. A third defendant charged with use of a telephone to facilitate the scheme, *see id.* at 40, never spoke with the DEA; she "based her defense on the claim that she was helping her husband and son, whom she believed were authorized by the DEA to engage in the deal as informants." *Id.* at 42. There was no evidence the two purported informants ever mentioned the third defendant or anyone's use of a telephone to facilitate drug importation. And yet, the Second Circuit reversed *all three defendants'* convictions because the trial court failed to instruct on entrapment by estoppel. *See id.* at 43-45. The court necessarily found the historical facts presented sufficient to establish the defense, even though they did not address one of the specific counts of conviction.

As in *Abcasis*, Lynch's defense to the minors counts does not fail simply because he did not discuss sales to minors explicitly. Lynch notified the DEA of

proposed conduct that an agent reasonably could have assumed would encompass those acts. Nothing more was required.

c. Lynch Presented Evidence That a Federal Official "Affirmatively" Misled Him, but the Court Improperly Narrowed That Term

The court's instruction on "affirmative misleading" also was improper because it narrowed that term to exclude "implied" assurances of legality, whereas Supreme Court and Ninth Circuit precedent plainly take a broader approach. *Cox*, 379 U.S. at 571; *see Raley*, 360 U.S. at 430-31, 437-39; *Batterjee*, 361 F.3d at 1218 (rejecting "expressly state" requirement); *see also Abcasis*, 45 F.3d at 45 (approving "statements or . . . acts that produced in the defendants a reasonable belief that they were authorized to engage in the illegal conduct"). Even silent acquiescence by a government official may be enough. *See Raley*, 360 U.S. at 426-28, 439); *cf. United States v. Timmins*, 464 F.2d 385, 387 (9th Cir. 1972) (finding affirmative misleading where official failed to correct inquirer's erroneous understanding of the law).

The government's proffered contrary authority is not, in fact, contrary. In both *Ramirez-Valencia* and *Brebner*, government officials made no representations of legality at all. *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (per curiam); *United States v. Brebner*, 951 F.2d 1017, 1025 (9th Cir. 1991). In the former case, the only information provided to the defendant suggested his

proposed conduct was *unlawful*. *Ramirez-Valencia*, 202 F.3d at 1109-10. As *Batterjee* later explained, these cases are distinguishable from ones where there is *some* representation regarding potential lawfulness. *Batterjee*, 361 F.3d at 1217-18.

What is more, the government's claim that the court's instruction was sufficient because it followed language in *Ramirez-Valencia* "nearly verbatim" (GB 53), is squarely foreclosed by *Hernandez*, 859 F.3d at 823-24. In this particular case, where the government argued there had to be "a clear statement that this did not violate federal law" (ER 3092), and told the jury it could not "consider what the agent didn't say" (*id.*), the court's failure to explain otherwise was misleading, inadequate, and incomplete. *See Hunter*, 652 F.3d at 1233; *Garcia-Rivera*, 353 F.3d at 792.

The government strays still further from precedent when it contends the court should have precluded Lynch's defense because the DEA agent's response was "vague or even contradictory." (GB 56.) To start, the response was neither vague nor contradictory; it clearly and consistently indicated a dispensary was legal if it complied with state and local rules. Furthermore, the government takes the "vague or even contradictory" language out of context. It derives from *Raley*, where the Court said: "Here, there were more than commands simply vague or even contradictory. There was active misleading." *Raley*, 360 U.S. at 438. The "more" in *Raley* included representations that did not expressly condone conduct

"in so many words," but "that would tend to create . . . an impression" of legality on the recipient. *Id.* at 430-31; *see id.* at 439 (rejecting requirement of "explicit" assurance); *Abcasis*, 45 F.3d at 43-44 (finding affirmative misleading where agent "effectively communicates an assurance," even if only through "unclear and confusing" response to defendant's actions). The DEA agent's statement that it was up to local authorities to determine whether Lynch could open a medical marijuana dispensary clearly meets this standard. At a minimum, the jury could have so concluded.

Finally, the government's suspicion that Lynch "appears to have relied on the DEA's failure to tell him to stop" (GB 56), is a credibility argument for the jury, and in any event goes to reliance not affirmative misleading.

d. Lynch Presented Evidence That He "Reasonably Relied" on the Federal Official

Regarding reliance, the government inaccurately represents the record by claiming "undisputed evidence demonstrated that defendant never actually relied on his phone call with the DEA." (GB 57.) Lynch testified as follows:

> Q. Did you always rely on the phone calls you made to the DEA?
> A. Yes.
> Q. Sometimes were they further in the back of your mind than others?
> A. Yes.
> Q. Would you have opened your dispensary had you not had the conversation you had with the DEA?

> A. I would not have opened the dispensary if they told me not to.

(ER 2813.) The government questions Lynch's veracity, but that was a matter for the jury. Given this evidence, the court would have erred if it precluded Lynch's defense entirely.

This case is nothing like *United States v. Schafer*, 625 F.3d 629 (9th Cir. 2010), where the Court rejected two medical marijuana defendants' claimed reliance on erroneous government advice. In *Schafer*, one of the defendants testified under oath that she knew marijuana was illegal under federal law without exception. *Id.* at 637-38. Both defendants distributed marijuana recommendations that stated "cannabis remains illegal under Federal Law," also without caveat. *Id.* They "submitted no admissible evidence that refuted the recommendations and testimony or that supported an inference that they relied on any of the alleged misrepresentations." *Id.* at 638.

By contrast, Lynch testified that he understood medical marijuana to be legal despite the general federal prohibition because of the powers reserved to California under the Tenth Amendment. (ER 2458-59.) The forms he distributed to his customers and employees were consistent with this understanding. The employee agreement form stated, "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].” (GER 1044 (emphasis added).) The membership agreement form was similar. (*See* GER 86 (acknowledging “medical cannabis could be prosecuted as a federal crime” but that there was a constitutional exception protecting patients “from federal government prosecution”).) Whereas in *Schafer*, the “uncontested evidence established that Appellants were aware that marijuana was illegal under federal law” when they incorrectly were told otherwise, *Schafer*, 625 F.3d at 638, Lynch’s evidence—that he misunderstood the law and that the DEA’s erroneous advice was consistent with that misunderstanding—supported a finding of reliance.

The government attempts to convert Lynch’s entrapment-by-estoppel defense into a mistake-of-law defense simply because Lynch’s misunderstanding of the law is relevant to the reliance question. But Lynch did not raise a mistake-of-law defense, as the court recognized when the government initially took this tack. (ER 2366.) *See United States v. Eaton*, 179 F.3d 1328, 1332 (11th Cir. 1999) (per curiam) (explaining the difference). That defense is not germane to this case.

And the government twists the definition of reliance when it suggests Lynch needed to alert others who raised questions about the dispensary, such as the local police chief, to the DEA call. A defendant is not required to trot out official misrepresentations to show reliance. While evidence Lynch referenced the DEA call would support a reliance finding, the absence of that evidence does not negate one. Furthermore, Lynch testified that he did discuss his call with some people, but

simply did not think the police chief—who did not deny Lynch permission to operate, but merely abstained from the decision—was one of them. (ER 2679-81.) And of course, as discussed below, Lynch also brought the DEA call to his local attorney's attention—but the court precluded him from telling the jury as much.

Turning to the reasonableness of Lynch's reliance, the inquiry is whether "a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." *Batterjee*, 361 F.3d at 1216-17 (alteration and internal quotation marks omitted). This is a factual, not legal, question, and one properly left to the jury.

Moreover, it was reasonable for Lynch to rely on the DEA response because it was not ambiguous; was consistent with his lay research; and appeared to come from a DEA agent to whom Lynch was transferred specifically for the purpose of answering his question. Although Lynch had seen many references to the federal prohibition on marijuana, the DEA call cleared up his initial confusion about how those statements reconciled with his observations of dispensaries operating throughout California. (ER 2374-75, 2450-59.)

It also was reasonable for Lynch to continue relying on the DEA call when faced with questions by the police chief or others, because Lynch knew the law was confusing but believed he had received an authoritative explanation from the DEA. (*See id*.) Even after the dispensary raid, it was reasonable for Lynch to rely

on the call and reopen because he thought the raid was improper and a scare tactic; he was not arrested; and the local sheriff confirmed on television that Lynch was welcome to do so. (ER 2708-21.) Indeed, by that point, the state attorney general had confirmed Lynch's understanding of the law. (ER 2802-04.) Certainly, Lynch's reliance was not unreasonable as a matter of law, which is the only question presented to this Court. *See Cox*, 379 U.S. at 572 (holding defendant who believed order to stop his conduct was improper—although given by the very officials who had authorized his conduct—was justified in continued reliance on earlier permission).

e. The Court Incorrectly Required Lynch To Prove His Call Recipient Had *Actual* Authority To Render Advice When *Apparent* Authority Is the Standard

The court's instruction on the first element of entrapment by estoppel also misled the jury. That instruction precluded Lynch from proving his defense unless the official with whom he spoke "was empowered to render the claimed erroneous advice." (ER 324.) But Supreme Court precedent requires only "apparent" authority, not actual empowerment. *See Raley*, 360 U.S. at 437. The proper question was whether the official *appeared to Lynch* to have authority to offer the advice, not whether he genuinely was empowered to do so.

Although the "empowered" language comes from *Brebner*, 951 F.2d at 1027, and later was cited in *Batterjee*, 361 F.3d at 1216, and *Schafer*, 625 F.3d at

637, none of those cases addressed the question of actual versus apparent authority. The relevant officials in *Brebner* and *Batterjee* were federal firearm dealers, who under *Tallmadge* qualified as authorized government officials as a matter of law. *Tallmadge*, 829 F.2d at 774; *see Batterjee*, 361 F.3d at 1217; *Brebner*, 951 F.2d at 1015. In *Schafer*, the Court rejected an entrapment-by-estoppel defense because there was no *reliance* on official statements, and never reached the question presented here. *Schafer*, 625 F.3d at 638.

Unlike in *Brebner*, *Batterjee*, and *Schafer*, this case presented a live dispute over actual versus apparent authority. In cross-examination and argument, the government questioned whether Lynch's call recipient was a DEA agent with actual authority to advise Lynch on drug law. (*See* DB 46.) The court's instructions mistakenly advised the jury this was a proper inquiry. In this particular case, the instructions were misleading, inadequate, and incomplete. *See Hernandez*, 859 F.3d at 823-24; *Hunter*, 652 F.3d at 1233; *Garcia-Rivera*, 353 F.3d at 792. Were this Court to hold otherwise, it would create a circuit split. (*See* DB 47.)

As to the facts, Lynch put forth sufficient evidence for a reasonable juror to conclude the person with whom he spoke had the requisite apparent authority. Lynch placed four calls trying to reach someone at the DEA who could answer his question about the legality of a dispensary. Each time, the DEA referred Lynch to a branch office or individual who purportedly could assist him. Lynch's final call

was handed off to someone precisely for that purpose. When Lynch asked that individual his question, he gave what appeared to be an authoritative answer. (ER 2368-74.) This evidence was sufficient not only to satisfy the "apparent authority" test, but even an "actual authority" requirement because a juror could reasonably infer Lynch spoke with a DEA agent. *See Abcasis*, 45 F.3d at 45 (recognizing entrapment-by-estoppel where DEA agents made representations about legality of drug transactions).

As to the government's passing claim of waiver (GB 91), again there is no evidence counsel were aware of but chose not to present the "apparent authority" argument. This Court should review the issue. *See Perez*, 116 F.3d at 845.

f. These Errors Individually and Cumulatively Require Reversal

The government does not argue these instructional errors are harmless, waiving any potential claim otherwise. *See United States v. Murguia-Rodriguez*, 815 F.3d 566, 572-73 (9th Cir. 2016). Indeed, with respect to the minors counts, the error is structural. *See United States v. Brown*, 859 F.3d 730, 737 (9th Cir. 2017); *United States v. Smith-Baltiher*, 424 F.3d 913, 922 (9th Cir. 2005).

Even for the two instructional errors not raised below, the harmless error burden is on the government because the issues present pure questions of law and the government has had a full opportunity to brief them on appeal. *See United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1106 (9th Cir. 2009). In any event,

for all of the reasons discussed above and in the initial brief, assuming *arguendo* plain error applies to those two claims, this Court should reverse.

2. The Court Further Gutted Lynch's Defense by Prohibiting Him from Presenting Important Evidence and Instructing the Jury To Disregard Properly Admitted Evidence

Even if the court's instructions were correct, its evidentiary rulings prevented Lynch from proving his defense.

a. The Court Prevented Lynch from Presenting Relevant Evidence in Support of His Defense

(1) The Court Excluded Lynch's Prior Consistent Statements

In cross-examination and on rebuttal, the government attempted to show Lynch was lying about what the DEA said. Part of its strategy was to suggest Lynch's story was fabricated for trial. To prove otherwise, Lynch sought to present the only corroborating evidence he had—testimony from his former attorney (Lou Koory) that Lynch disclosed the same information to him in January 2006, long before opening the dispensary, and a radio broadcast confirming as much. These were prior consistent statements admissible under then-current Federal Rule of Evidence 801(d)(1)(B).[7] The government disagrees for several faulty reasons.

To start, the government raises a red herring about Lynch's failure to turn over Koory's files. The court required Lynch to do so only prior to Koory

[7] All citations to the Federal Rules of Evidence are to the 2008 version.

testifying, not prior to ruling *whether* he could testify. (ER 274A, 2918, 2922-23.) Because the court never ruled in Lynch's favor, that obligation was not triggered.

The court also required Lynch to waive his attorney-client privilege before Koory could testify, and in ruling on Lynch's motion for new trial said Lynch had not done so. (ER 3293-94.) But the court's later recollection was mistaken; Lynch specifically and repeatedly said he would waive the privilege. (ER 2577, 2706, 2898, 2952, 3294-96, 3594.) Because the court did not allow the defense to present Koory's testimony, Lynch never had the chance to do more.

Regardless, Lynch's initial request was not to present Koory's testimony, but the recording and transcript of the radio interview. Lynch specifically offered the live testimony only as an alternative in the event the court disallowed the radio evidence. (ER 2768-69, 2774-75.) But the radio interview was not an attorney-client conversation that required Lynch to waive his privilege. Thus, even if this Court could affirm preclusion of Koory's testimony on privilege grounds (which it cannot), the district court separately erred by disallowing the radio evidence, and privilege is irrelevant to that point.

Turning to the more substantive issues the government raises, its jury presentation plainly introduced questions about whether Lynch made up the DEA statement for trial. The prosecutor engaged in a lengthy, aggressive cross-examination designed to show the DEA never gave Lynch permission to open a

dispensary and to damage Lynch's credibility generally. (ER 2537-91, 2647-758.) The prosecutor did not merely insinuate Lynch lied about the contents of the DEA call, he outright asked, "Isn't it true that the first time you told anyone in the federal government that you had a conversation with the DEA in September of 2005 was when you came to testify in this case?" (ER 2706.) The government then presented Reuter's testimony, which was directed entirely to undermining any possibility Lynch was truthful about the substance of the call. (ER 2825-51.) Any fine line between Lynch "hear[ing] what he wanted to hear" (GB 81) and lying undoubtedly was lost on the jury.

Sure, the government also suggested that, if the DEA said what Lynch claimed, Lynch did not rely on that information because he did not discuss the call with certain individuals. But that was not the only inference the jury could draw from the government's cross and evidence—nor the only one the government sought. (ER 3089-91.) As the prosecutors themselves conceded, their argument was Lynch's story "is just not accurate" because "it was a fabrication. The government is going to be claiming that it was a fabrication in just some way, shape or form then." (ER 2937, 2939; *see id.* at 2908 ("[H]e was making things up. . . . He made it up for his own purposes.").)

These facts undercut the government's position that it never made an "express *or implied* charge" of recent fabrication, which would allow Lynch to

present his prior consistent statements. Fed. R. Evid. 801(d)(1)(B) (emphasis added). For the government's questioning of Lynch alone was enough to meet this Court's standard. *See United States v. Gonzalez*, 533 F.3d 1057, 1062-63 (9th Cir. 2008); *United States v. Washington*, 462 F.3d 1124, 1134-35 (9th Cir. 2006); *United States v. Stuart*, 718 F.2d 931, 934-35 (9th Cir. 1983); *United States v. Allen*, 579 F.2d 531, 532-33 (9th Cir. 1978).

The government's citation to *Tome* and *Bao* do nothing to undermine that precedent. *Tome* merely sets forth the governing principle that a general attack on credibility, as opposed to an express or implied charge of recent fabrication, is not enough to trigger the rule. *Tome v. United States*, 513 U.S. 150, 157-58 (1995). And *Bao* is easily distinguished: it involved "mere contradictory testimony," not "an implied charge of fabrication." *United States v. Bao*, 189 F.3d 860, 865 (9th Cir. 1999) (alteration and internal quotation marks omitted). That conclusion was obvious because the government's supposed insinuation arose during its case-in-chief, when Bao "had [not] even taken the stand and given testimony"—so the government never "had an opportunity to cast Bao's testimony as contrived." *Id.* Here, the government did imply Lynch fabricated the call for trial, and did so through cross-examination and rebuttal evidence.

Thus, the only remaining question is whether Lynch's alleged motive to fabricate arose before or after his January 2006 conversation with Koory. The

government claims Lynch's motivation to lie "always existed." (GB 83.) This hypothesis is inconsistent with the government's trial theory, which was the DEA never gave Lynch permission or else he would have told everyone about it. If Lynch always had a motive to lie about the call, he would have done so at every turn. There is no credible storyline where Lynch believed DEA permission was important (though nowhere required) and so made up that permission—but told his bogus story only to an attorney from whom he was seeking legal advice. The premise is inconsistent with the actions of a man who placed four phone calls to the DEA before distributing any marijuana and then followed local rules to a T.

Again, the government's cited cases do not blunt this conclusion. *Tome* simply established the controlling rule, which is that the proffered statement must predate the motive to fabricate. *Tome*, 513 U.S. at 158. It said nothing about how a court determines the triggering event. *See id.* at 165-66. That question is best answered by this Court's decisions in *Bao*, *Collicot*, and *Miller*, which all held a declarant's motive to lie begins when he learns of an investigation into or charges against him. *Bao*, 189 F.3d at 864 (finding motive arose when officers executed search warrant and questioned defendant); *United States v. Collicot*, 92 F.3d 973, 979 (9th Cir. 1996) (finding motive arose when declarant arrested); *United States v. Miller*, 874 F.2d 1255, 1271-72 (9th Cir. 1989) (same).

As to the radio interview, it was offered not offered for the truth of its content but to respond to the insinuation that Lynch lied when he testified to having told Koory about the DEA call. (ER 2774-75, 2949-53.) The government's claim it "never contested" this point is false (GB 83); what other purpose did its questioning have?

> Q. And are you aware of any of the just press stories in which you gave statements or your attorney gave statements where you said that you were operating with approval of the DEA?
> A. Actually I do recall one particular—it was a radio station news talk sort of thing where my attorney mentioned my call to the DEA.
> Q. And do you have any record of that radio station call?
> A. Actually, yes, I do.

(ER 2698.) The government apparently got a different answer than it expected. But its question suggested Lynch was lying, and Lynch was entitled to rebut that inference. With respect to this evidence, it does not matter whether the government claimed recent fabrication or not, because even if the government's argument were purely one of feigned reliance, Lynch's statement to Koory supported an inference he relied on the DEA call. By questioning Lynch's response, the government opened the door to Lynch presenting evidence that he was telling the truth.

The government raises a concern about double-hearsay in the radio interview, but this too is a red herring because the evidence was not offered for its

truth. *See* Fed. R. Evid. 801(c)(2). And of course, if the court was concerned about hearsay, Lynch offered to call Koory directly.

Finally, the Court need not decide whether Lynch's evidence technically qualified as prior consistent statements because Lynch had a due process right to present reliable evidence that was critical to his defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The evidence was reliable because, in light of the radio recording, there is no reasonable dispute that Lynch did, in fact, report the DEA call to Koory. That is an important fact the jury never heard. Any questions about Koory's partiality were for the jury to decide, not reason to frustrate Lynch's constitutional right to present a defense. *See United States v. Evans*, 728 F.3d 953, 963 (9th Cir. 2013) ("A conflict in the evidence goes to the weight of the evidence, not to its admissibility." (alteration and internal quotation marks omitted).)

As to importance, the government cannot seriously deny that whether Lynch lied about the DEA call was a key issue at trial, or that his proffered evidence was central to that point. It was the only corroboration Lynch had to support his consistent version of the call. True, Lynch did not present the prior statements in his case-in-chief, but why would he? At that point, his credibility had not been called into question. Once the government undertook its aggressive cross-examination, the statements became material and Lynch sought to admit them. "In

these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

(2) The Court Excluded Evidence Supporting Reasonable Reliance

It was Lynch's burden to demonstrate his reasonable reliance on the DEA's statement that dispensaries' legality was up to local authorities. So he tried to present evidence that he followed the local rules he was given. He also tried to present evidence to explain why it remained reasonable for him to rely on his phone call even after the DEA raided his dispensary. He was largely unsuccessful. The court excluded: evidence of the "nuts and bolts" of the dispensary's operations; references to medical marijuana; testimony on Lynch's strict compliance with local rules and his interactions with the local mayor and city attorney; and evidence that local officials gave him permission to reopen the dispensary after the raid, including video footage showing the local sheriff (who participated in the raid) stating as much. (*See* DB 28-31.)

The government's response, essentially, is the court allowed Lynch to testify to some (but not all) of this evidence, and that should suffice. But Lynch had a constitutional right to "a meaningful opportunity to present a *complete* defense," *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010) (emphasis added) (internal quotation marks omitted). That right included, "at a minimum, the right to

put before a jury evidence that might influence the determination of guilt." *Id.* (alteration and internal quotation marks omitted). Here, Lynch was permitted to present only a portion of his defense; he "chipped away at the fringes" of the government's theory, but was unable to tell his own story fully. *Chambers*, 410 U.S. at 294. His "defense was far less persuasive than it might have been had [his other evidence] been admitted." *Id.*

Importantly, the evidence Lynch sought to present was not cumulative. Although Lynch was able to present some evidence of the initial steps he took to set up the CCCC (GB 65-67), the jury never heard about his day-to-day compliance with local rules because the court excluded the "nuts and bolts." Without evidence that he sold marijuana only for medical purposes and refused to bend the rules, Lynch was unable to rebut the government's claim that he was not running a "tight ship." (ER 3146.) To the extent he so testified himself, that seemingly self-serving testimony stood largely uncorroborated by other sources. *See United States v. Boulware*, 384 F.3d 794, 808-09 (9th Cir. 2004) (rejecting government argument that excluded evidence was cumulative because defendant testified to facts himself; defendant is "the least effective witness to testify . . . because of his perceived self-interest and bias").

Lynch tried to present individual patients, as well as the mayor and city attorney, to speak to the specifics of Lynch's strict compliance, but the court

disallowed that testimony. (ER 2021-50, 2501-05, 2615-17, 2759-66, 2815-17.) Instead, Lynch was left with two character witnesses who could speak only briefly to his general reputation for law-abidingness. (ER 2783-87, 2818-22.) Given Lynch's affirmative burden to prove reliance on his DEA call, where he effectively was told to follow local rules, the "testimony sought to be adduced would . . . have added substantially to the knowledge the jury gained during the course of the trial." *United States v. Lopez-Alvarez*, 970 F.2d 583, 588 (9th Cir. 1992). But the jury was left to deliberate without this information.

With respect to reopening after the raid, Lynch testified to his reasons for doing so, and the government extensively cross-examined him on this point. (ER 2708-21.) But again, Lynch's testimony stood unsupported by independent witnesses or evidence because the court prevented the city attorney and mayor from testifying to their conversations with Lynch, and refused to admit video evidence of the local sheriff saying Lynch was welcome to reopen. (ER 2519-24, 2768-74, 2810, 2816.)

The court's main reason for excluding this evidence was its misunderstanding of how state or local actors may relate to a federal entrapment-by-estoppel defense. As the court saw it, because Lynch could rely only on a federal official to establish his defense, evidence of what non-federal officials told him was immaterial. But this Court allows such evidence to explain the

reasonableness of a defendant's reliance on the federal statement. *See Brebner*, 951 F.2d at 1027; *Tallmadge*, 829 F.2d at 775.

The government attempts to cabin *Tallmadge*'s holding to cases where the non-federal actors' statements "directly mirrored the erroneous legal advice given to the defendant." (GB 70.) *Tallmadge* contains no such limitation. To the contrary, Tallmadge's reliance evidence included comments from a state judge and prosecutor that suggested the conduct at issue might be *illegal*. *Tallmadge*, 829 F.2d at 769-70. "No statement was made to defendant" consistent with the mistaken federal advice. *Id.* at 770. Those discrepancies were no bar to Tallmadge introducing the evidence as support for his reasonable reliance. This Court's later decision in *Brebner*—ignored by the government—similarly acknowledged the potential relevance of non-federal-actor evidence: "Rather than authorizing a defendant's reliance on non-federal officials, we analyze[] this evidence in regard to the second requirement of the entrapment by estoppel test, namely the reasonableness of the defendant's reliance on" the federal official. *Brebner*, 951 F.2d at 1027. Of course, there is no logical reason to limit reliance evidence simply because it involved state or local individuals. In any event, the local officials' advice here was consistent with the DEA's statement.

Finally, with respect to the city attorney's testimony about Lynch's local-rule compliance, the court precluded it on relevance, not hearsay, grounds:

> [DEFENSE COUNSEL]: Mr. Schultz will testify to Mr. Lynch's compliance.
>
> THE COURT: I already indicated that's not a subject which can come in.
>
> . . . .
>
> But, again the city attorney's discussion of the issue can't be a basis for estoppel by entrapment. It has to come from a federal official.

(ER 2815-16; *see id.* at 2817 ("I told you Mr. Lynch's compliance with the city's requirements are irrelevant pretty much.").) The court did suggest hearsay problems with the mayor's proposed testimony, but only after finding it irrelevant for similar reasons. (ER 2501-05, 2759-66.) And as counsel made clear, the mayor personally observed Lynch's operation of the CCCC, which would have avoided hearsay issues. (ER 2764.)

In sum, Lynch proffered evidence that "was important to his defense"; its exclusion "amounts to a constitutional violation." *Lopez-Alvarez*, 970 F.2d at 588.

b. The Court Allowed the Government To Present Inflammatory Evidence and Prevented Lynch from Rebutting It

The court allowed the government to present highly prejudicial evidence, but did not let Lynch rebut it. Much of this evidence should have been excluded outright because it was unnecessary and inflammatory. At least Lynch should have been able to counter it.

The government's brief tries to separate out questions of admissibility and rebuttal, but this Court should not be misled. The salient question is whether the

court's rulings—government admission and defense exclusion together—created a "one-sided picture" for the jury. *United States v. Waters*, 627 F.3d 345, 357 (9th Cir. 2010) (as amended).

(1) Baxter Side-Deal

One of Lynch's employees, Abrahm Baxter, sold marijuana to an undercover agent outside the CCCC. The government says evidence of this sale was relevant to its conspiracy charge. Had the government ever proved Baxter's deal was within the scope of the conspiracy, Lynch would agree. However, as the district court found at sentencing, the government never did. (ER 407, 424.)

More importantly, even where evidence is relevant, it is inadmissible if its limited probative value is outweighed by its likely prejudicial effect on the jury. *See* Fed. R. Evid. 402, 403. In weighing those factors, a court must consider whether the evidence is truly necessary to prove the desired point. *See Old Chief v. United States*, 519 U.S. 172 (1997). Put differently, even if a fact is technically relevant, if it is inflammatory and does not meaningfully contribute to the case, the court should exclude it. *See Waters*, 627 F.3d at 358. Because the government presented extensive evidence demonstrating Lynch conspired to and did distribute marijuana from the CCCC, the Baxter side-deal added nothing but encouragement to jurors to convict based on emotion rather than reason.

Even assuming the evidence was admissible, the court prevented Lynch from rebutting it with anything other than his own testimony. The government asserts there was no need to do so because "[o]nly defendant sought to link Baxter's distribution to local law compliance." (GB 68 n.8.) This is a fanciful account of trial. The entire thrust of the government's presentation and cross-examination, not to mention its argument to the jury, was that Lynch was not "running such a tight ship." (ER 3146.) Plainly, the Baxter evidence undermined Lynch's affirmative defense that he relied on the DEA's advice by following local rules and was someone "sincerely desirous of obeying the law." *Batterjee*, 361 F.3d at 1217 (internal quotation marks omitted). Lynch was entitled to rebut it.

And he had evidence to do so: Baxter's spontaneous admission that "Charlie didn't know anything about his deal" (ER 2601), which was admissible as a declaration against interest. *See* Fed. R. Evid. 804(b)(3).

The government claims this statement was not against Baxter's interest because it did not involve an admission of criminal liability. But by referring to "his deal," it obviously did. Baxter did not need to "confess[] his criminal liability in detail" to admit he did something illegal. (GB 87.) And Baxter's subsequent questions about Lynch's trial and whether testifying for Lynch would affect his own pending state case did nothing to undermine his clear statement that he

conducted a "deal." (ER 2601.) If anything, they suggest an unsophisticated criminal unlikely to lie.

Baxter's statement was corroborated by, among other things, a state prosecutor's declaration that the distribution was "without authorization" from the CCCC. (ER 2608.) The government resurrects an issue about the ethics of the defense investigator to whom Baxter made the statement, in an effort to attack its reliability. But as counsel explained at trial, he tried to contact Baxter's lawyer, was unsuccessful, and so instructed his investigator to subpoena Baxter and walk away without asking any questions. (ER 2781, 2880-81.) The court recognized nothing improper in serving the subpoena, though it queried whether the investigator should have done more when Baxter spontaneously asked questions. (ER 2880-81.) Ultimately, the court rested its decision to exclude Baxter's statement not on any purported impropriety but on the text of Rule 804(b)(3). (ER 2881.) Rightly so, because the alleged ethics concerns are irrelevant to the declaration-against-interest decision. And the circumstances of the encounter do nothing to undermine the reliability of Baxter's statement.

Furthermore, even if Lynch did not satisfy Rule 804(b)(3)'s test, Baxter's statement was sufficiently reliable and critical to the case that its exclusion violated Lynch's due process right to present a defense. *Chambers*, a declaration-against-interest case, is on all fours. *Chambers*, 410 U.S. at 302.

Finally, the government is flat wrong when it insists Lynch waived or forfeited these arguments. Lynch repeatedly attacked the Baxter evidence on relevance and prejudice grounds. (*See, e.g.*, ER 693-96, 892-93, 1439-43.) He also cited *Chambers* and explained that, because Baxter's declaration against interest was crucial to his case, its exclusion violated his right to present a defense. (ER 2598-99, 2890.) The record on these matters is pellucid.

The government takes an isolated comment out of context to argue Lynch intentionally withdrew his objection to evidence of the side-deal. At a pretrial hearing on Lynch's motion to exclude this evidence, the government argued it had charged a broad conspiracy including the Baxter deals and was entitled to prove up that conspiracy. (ER 695.) Defense counsel responded that the government

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

(ER 695-96.) The court asked, "in that case then why is there an objection insofar as the [pretrial motions to exclude this evidence] are concerned, if that's the defense's position?" (ER 696.) Counsel answered that he "would stick by the position I made in the motion" (*id.*), which was that the Baxter evidence was irrelevant and prejudicial (ER 39-40). He then objected to the Baxter evidence at

least twice more, and further objected to the court's refusal to permit Lynch to rebut it. (ER 892-93, 1439-43, 1603-13, 2437-44.) These issues are preserved.

(2) General Noncompliance

The government presented considerable additional evidence with little probative value but a strong likelihood of prejudicing the jury. Specifically, the government sought to prove other CCCC employees illegally distributed marijuana; introduced evidence suggesting the CCCC sold to healthy teenagers looking to get high; and emphasized an "AK47" marijuana strain and chart describing different strains' effects, with no apparent value other than to inflame the jury. (*See* DB 36-38.) All of this evidence tended to show Lynch did not rely on the DEA call by complying with state and local rules. Yet the court prevented Lynch from rebutting that inference with his own evidence of compliance.

(a) Outside Sales

Regarding the evidence of other employees potentially selling marijuana outside the dispensary, again the government failed to prove up any knowledge or foreseeability on Lynch's part. (ER 407-08.) More importantly, the court should have excluded this evidence under Rule 403 because it had low probative value but was highly prejudicial. The government's insistence that it needed the evidence "to prove the CCCC's continuous operation" (GB 37) is ridiculous. And even indulging that farce, the government has no response to Lynch's claim that he was

denied his right to rebut the evidence with something more than his own uncorroborated testimony.

(b) Sales to Teenagers

Similarly, the government did not need to highlight repeat sales to apparently healthy teenagers in order to prove Lynch sold marijuana to 18-to-21-year-olds. The obvious and presumably intended inference from this evidence was that Lynch did not follow state law; he sold to kids looking to get high for fun. Again, the evidence should have been excluded for undue prejudice. At minimum, Lynch needed to rebut it with evidence of strict compliance—but he could not.

As the government acknowledges, Lynch objected on Rule 403 grounds to at least some of the video evidence of sales to teenagers and to Exhibit 140, a chart designed to show frequent visits by these patients. (ER 2070, 2081-81.) That Lynch did not separately object to Exhibits 116 and 139 is irrelevant, for those exhibits are not structured to highlight prejudicial facts. (*Compare* ER 3778-82, 3790-95, *with* ER 3797-802.) Indeed, had the court done a proper analysis, their admission would have been part of the calculus for excluding Exhibit 140. *See Old Chief*, 519 U.S. at 184-85.

(c) AK47 Strain and Exhibit 100

The government may be correct that, in the context of an otherwise fair trial, its references to the dispensary's sale of an "AK47" marijuana strain and a chart

showing the "type of high" different strains produced would be trivial and not unfairly prejudicial. But Lynch's was not an otherwise fair trial. This marginally probative and potentially prejudicial evidence was part of a larger pattern where the government painted Lynch as someone not seriously trying to follow the law, while it simultaneously sought exclusion of his evidence to the contrary. "Taken together, the wrongful admission of the government's evidence and the erroneous exclusion of the defense evidence left the jury with only half the picture." *Waters*, 627 F.3d at 359 (alterations and internal quotation marks omitted).

(3) Profits

The court excluded expert testimony that Lynch made very little money from his operation of the CCCC, but then allowed the government to present evidence and argument designed to suggest otherwise. Even if the government's evidence of sales and Lynch's control of bank accounts was relevant to legitimate trial issues, that does not address the larger problem of "the imbalance in the evidence that resulted from the district court's rulings." *Id.* at 357.

Moreover, the government is mistaken that it needed an unredacted check Lynch wrote to himself to show his control over the dispensary's bank accounts. Lynch's name at the top of the check—not to mention myriad other evidence that Lynch controlled the CCCC's finances—adequately demonstrated this fact. (GER 778.) And although the court redacted the amount on the check, it did not redact

the named recipient—Lynch. (*Id.*) It was that unredacted fact that was so prejudicial because it suggested Lynch was padding his pockets with CCCC funds.

The government notes that this same evidence was introduced a second time, later in the trial, and Lynch did not object. That is no obstacle to relief. For having once objected and been denied, Lynch was not required to raise the issue a second time. *See United States v. Varela-Rivera*, 279 F.3d 1174, 1177-78 (9th Cir. 2002) ("Where the trial court has left no possibility of a different ruling on a renewed objection, there is no requirement that a party engage in a futile and formalistic ritual to preserve the issue for appeal.").

c. The Court Instructed the Jury To Disregard Relevant Defense Evidence

Even the limited defense evidence the court admitted was of little help to Lynch because the court told jurors they could not consider state and local laws for any purpose—making no exception for their relevance to Lynch's entrapment-by-estoppel defense. (*See* DB 54-57.) The prosecutor reinforced the point, arguing in rebuttal that although defense counsel "talk[ed] about state law and what the city attorney did," jurors should "look at the jury instructions. Does any of that matter? No." (ER 3142-43.) He followed up, "All the stuff about what the state officials did or what my city attorney did, my landlord did, that's not relevant to the case." (ER 3146.) But as previously explained, Lynch's understanding of and compliance with state and local law was relevant to his reasonable reliance on the DEA's

misrepresentation. The court's instructions, especially when coupled with the prosecutor's argument, were misleading and inaccurate, and deprived Lynch of his right to instruct the jury on his theory of defense.

The government's initial response is that the court admitted some of Lynch's state-law-compliance evidence, so the instructions posed no problem. This is a strange argument because the question is not what evidence was presented, but what evidence the jury considered. By its instructions, the court told the jury it could not consider any of the state-law evidence it heard. We presume jurors followed these inaccurate instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Thus, the error. *See United States v. Rubio-Villareal*, 967 F.2d 294, 299-300 (9th Cir. 1992) (en banc) (holding instructions may not suggest jurors ignore relevant evidence).

The government also explains how each instruction, standing alone, accurately stated the law. Whether or not true, even instructions that "accurately state[] the law" may be "misunderstood by the jury" and require reversal. *Hernandez*, 859 F.3d at 823. Where the government capitalized on the misleading instructions in its closing argument, all the worse. *See id.* at 824.

Instruction 34, which defined entrapment by estoppel, only amplified the problem. It did not "otherwise instruct[]" the jury on how state law was relevant to the case. (GB 94.) Rather, through emphasis in its text ("an authorized federal

government official"), it highlighted that jurors were to consider federal law alone. (ER 324.)

Ultimately, the government falls back on its position that state-law evidence served no purpose but to encourage jury nullification. Plainly, this evidence had a valid purpose: supporting Lynch's claim that he reasonably relied on the DEA's advice. Just because evidence makes a defendant more sympathetic does not render it irrelevant. *See United States v. Haischer*, 780 F.3d 1277, 1282 (9th Cir. 2015).

d. These Errors Individually and Cumulatively Require Reversal

"A violation of the right to present a defense requires reversal of a guilty verdict unless the Government convinces us that the error was harmless beyond a reasonable doubt." *Stever*, 603 F.3d at 757. Where errors do not rise to a constitutional level, "[t]he government bears the burden of proving harmlessness, and must demonstrate that it is more probable than not that the errors did not materially affect the verdict." *Waters*, 627 F.3d at 358 (alteration and internal quotation marks omitted). Under either standard, the government cannot meet its burden.

The district court excluded Lynch's corroborating testimony and prevented him from presenting facts to prove his affirmative defense. This evidence was not cumulative or repetitive; without it, Lynch could point to little but his own seemingly self-serving statements and the brief attestation (unsupported by

concrete evidence) of two witnesses to his character for law-abidingness. The former was "the least effective" way to present his defense "because of his perceived self-interest and bias." *Boulware*, 384 F.3d at 809. The latter was all bones with no meat. Introduction of the excluded evidence "could have planted doubt in the minds of the jurors sufficient for an acquittal." *United States v. Leal-Del Carmen*, 697 F.3d 964, 976 (9th Cir. 2012). "Because a jury could have been swayed" by this evidence, its preclusion was not harmless. *Id.*

Making matters worse, the court's state-law instructions told the jury to ignore much of the affirmative evidence Lynch *was* able to present. "We cannot say that the jury would not have credited some or all of this evidence had the jury appreciated its relevance." *United States v. Liu*, 731 F.3d 982, 992 (9th Cir. 2013). It "may have supported a finding" that Lynch reasonably relied on the DEA call, and thus established entrapment by estoppel. *Id.* Therefore, this instructional error was not harmless. *See id.* at 993.

As to the prejudicial evidence, "[r]ather than contributing to any issue in the case, it played to the jury's emotions." *Waters*, 627 F.3d at 358. "The erroneous exclusion of [Lynch's evidence of compliance] compounded this error," leaving "the jury with only half the picture." *Id.* at 359 (internal quotation marks omitted). It is "probable that [these] errors had a material effect on [the] verdict." *Id.*

The government's emphasis in closing argument on the lack of corroboration for Lynch's defense, the improperly admitted evidence, and the improper state-law instructions bolster Lynch's position. (*See, e.g.*, ER 3090 ("Why else does the story just not make sense? We also don't have any corroboration of the story."); ER 3146 (citing Baxter and other side-deals as evidence Lynch was not "running such a tight ship"); ER 3073 (referring to underage customers as "actually very loyal customers" who "came back day after day"); ER 3142-43, 3146 (instructing jurors to disregard evidence about state law and local actors).) "[T]he prosecutor's remarks in closing argument were a persistent reminder for the jury" of the court's errors, and require a finding of prejudice. *United States v. Job*, 851 F.3d 889, 903 (9th Cir. 2017); *see Hernandez*, 859 F.3d at 824-25 (finding error prejudicial partly due to prosecutor's remarks).

The government claims the court's errors did not matter. But "[t]he Assistant United States Attorney must have believed that [the evidence] made a difference, else he wouldn't have worked so hard to keep the jurors from hearing [it]." *Leal-Del Carmen*, 697 F.3d at 973-74. Tellingly, when presented with the full story at sentencing, the district court rejected many of the inferences the government asked the jury to make. (*See, e.g.*, ER 403 & n.9, 425 (rejecting claim Lynch fabricated call); ER 403-06, 423-25 & n.25 (recognizing Lynch's compliance with local rules); ER 407-08 (rejecting link between Lynch and side-deals); ER 408-09, 429

(rejecting assumption Lynch sold to minors for recreational purposes); ER 407 & n.14 (rejecting claim Lynch made a profit).) Had Lynch been able to present his defense at trial, the jury likely would have viewed the matter similarly.

Taken individually, each of these errors was prejudicial. Moreover, given the number and severity of errors in the case, this Court should consider their collective impact on Lynch's trial. *See United States v. Lloyd*, 807 F.3d 1128, 1168 (9th Cir. 2015). Together, they require reversal.

3. The Government Withheld Exculpatory Evidence and Presented False Testimony

To undermine Lynch's credibility and question his report of the DEA phone call, the government presented Agent Reuter on rebuttal. She testified that, at the time of the call, she was not "aware of any way at that time that a marihuana store owner could avoid being prosecuted federally for running a marihuana store," without "exception[]." (ER 2843.) Reuter further testified that she never answered public questions about dispensaries by referring to "state or local" matters because "[t]hat has nothing to do with federal law." (*Id.*) According to Reuter, "federal law has nothing to do with state and local officials. We would be investigating the federal laws and the marihuana—illegal sales of marihuana federally. It doesn't matter what the state or local officials say or do." (ER 2844.) It therefore would not have mattered "if a store owner said it would comply with California state law regarding marihuana." (ER 2845.) Her only advice to a dispensary owner on "how

to avoid federal prosecution" would have been, "'There is no way to avoid federal prosecution.'" (*Id.*) Agent Reuter's colleagues held similar views and would have given identical advice. (ER 2845, 2850.)

Despite these answers, the government claims evidence of state laws' relevance to federal charging and investigation practices would not have assisted Lynch in undermining Reuter's testimony and supporting his version of the DEA call—i.e., would not have been material and exculpatory. It plainly would have. If federal prosecutors effectively defer to local rules in making charging decisions, that makes it more likely DEA agents find local rules relevant to their work. Yet Agent Reuter testified these rules were completely irrelevant. Without the withheld information, Lynch was unable to rebut this evidence. And with the inaccurate testimony, jurors were left with the misimpression Lynch was lying.

It does not matter that the withheld information involved charging decisions in early 2007, because the 2007 facts make it more likely the same policy also was in place in September 2005, when Lynch called the DEA. Besides, if the government disclosed the withheld information, Lynch would have investigated and inquired about earlier policies.

Additionally, Lynch's federal search warrant described potential state law violations, but never suggested those allegations were relevant to the government's

charging decision. The warrant did not put the defense on notice of the withheld information or the falsity of Agent Reuter's testimony.

C. The Court's Instructions Denied Lynch His Right To Trial by Jury

In his brief, Lynch argued he was denied his Sixth Amendment right to trial by jury when the district court (1) gave a coercive anti-nullification instruction, and (2) refused to inform the jury that Lynch was subject to a mandatory minimum sentence if convicted, while simultaneously (and incorrectly) telling the jury the court would have discretion at sentencing. (DB 57-68.) These are issues of law the Court reviews de novo. (*Id.* at 61-62.) *See Kleinman*, 2017 WL 2603352, at *6. Although the government initially cites the abuse of discretion standard, it ultimately acknowledges de novo review governs. (GB 96, 100.)

1. The Sixth Amendment Guarantees a Jury with the Power To Nullify

This Court recently held that an anti-nullification instruction materially indistinguishable from the one given here was improper. *See Kleinman*, 2017 WL 2603352, at *7-8. In so holding, *Kleinman* distinguished *Merced v. McGrath*, 426 F.3d 1076 (9th Cir. 2005), and *United States v. Rosenthal*, 454 F.3d 943 (9th Cir. 2006) (as amended), where the Circuit previously affirmed a judge's "duty to forestall or prevent nullification, including by firm instruction or admonition." *Id.* at *8 (alteration and internal quotation marks omitted); *see id.* at *7. Because the court's anti-nullification instruction here, as in *Kleinman*, implied "jurors could be

punished for jury nullification," it went beyond what the Court countenanced in *Merced* and *Rosenthal* and was "erroneous." *Id.* at *8.

Thus, the only remaining question for this Court is whether the error requires reversal. In *Kleinman*, the Court found the error harmless, rejecting the defendant's claim of structural error. *Id.* The Court based this holding on its understanding that "[t]here is no constitutional right to jury nullification, so depriving a defendant of a jury that is able to nullify is plainly not a constitutional violation." *Id.* However, the Court did not consider, because Kleinman did not present,[8] Lynch's argument that the Supreme Court interprets the jury trial right as it was understood at the Founding, which then guaranteed a jury with the power to nullify. (DB 62-66.)

The government does not dispute the original understanding of the Sixth Amendment encompassed the right to trial by a jury with the power to nullify. While effectively conceding this point, the government pivots to Circuit precedent holding *jurors* have the power, but not the right, to nullify. These cases do not answer the question presented here: Did *Lynch* have the right to a jury with the power to nullify? Under Supreme Court precedent, he plainly did. *See S. Union Co. v. United States*, 567 U.S. 343, 353 (2012) ("[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." (internal quotation marks omitted)). *Kleinman*'s conclusion otherwise, which did not

[8] *United States v. Kleinman*, No. 14-50585, ECF Nos. 25, 70.

account for these arguments, is mistaken and should be rejected. *See Atlantic Thermoplastics Co., Inc. v. Faytex Corp.*, 970 F.2d 834, 838 n.2 (Fed. Cir. 1992) ("A decision that fails to consider Supreme Court precedent does not control if the court determines that the prior panel would have reached a different conclusion if it had considered controlling precedent.").

Moreover, the government's argument that Lynch provoked the court's error is factually and legally wrong. Factually, the court permitted the defense to attempt to rehabilitate Juror 25. (ER 1256-57.) In doing just that, counsel did not intend to prompt a jury nullification discussion, as he repeatedly told the court. (ER 1264-81.) Legally, even if a response was necessary, this one went too far. *Kleinman* distinguished between instructions telling jurors they must follow the law and cannot rely on their consciences, and the overly coercive instruction this court gave, which also implied jurors could be punished if they violated their oaths by nullifying. *Kleinman*, 2017 WL 2603352, at *8. A valid curative instruction cures the purported error; it does not inject a new error into the trial.

2. The Sixth Amendment Guarantees a Jury with Knowledge of the Potential Punishment

The original understanding of the Sixth Amendment, which controls here, also guaranteed Lynch a jury with knowledge of the mandatory minimum punishment he faced. The government's cited precedent to the contrary, *Shannon*

v. United States, 512 U.S. 573 (1994), has been abrogated by the *Crawford*[9] and *Apprendi*[10] lines of cases, which demand courts interpret the Sixth Amendment in line with its original understanding.

Although the Second Circuit rejected this argument in *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009), that decision does not bind this Court. Nor do two post-*Crawford* unpublished Circuit cases rejecting a defendant's right to jury instructions on mandatory minimum sentences. (GB 102-03.) Even if those cases were precedential—and they are not—they would not control because they demonstrate no consideration of the *Crawford* and *Apprendi* line of cases' impact on earlier precedent. *See Atlantic Thermoplastics*, 970 F.2d at 838 n.2.

What *is* binding is Supreme Court authority holding a defendant's Sixth Amendment right is commensurate with the Framers' original understanding of it. Again, the government does not dispute the basic facts of the right to jury trial in 1791, including the right to trial by jury with knowledge of potential punishment.

Even taking *Shannon* as controlling, that case carves out an exception requiring a court to instruct on punishment where jurors were misled regarding the consequences of their verdict. *Shannon*, 512 U.S. at 587. This Court's decision in *United States v. Wilson*, 506 F.2d 521 (9th Cir. 1974) (per curiam), does not hold

[9] *Crawford v. Washington*, 541 U.S. 36 (2004).
[10] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

otherwise. *Wilson* approved of an instruction "that punishment is exclusively a matter for the court" where the trial judge was not statutorily mandated to impose a certain sentence. *Id.* at 522. Only in dicta did *Wilson* suggest the instruction would have been appropriate if the judge were bound. *See id.* at 522-23. Moreover, Wilson apparently did not request an instruction on punishment to counterbalance any misleading inference; his case thus has little relevance here.

Finally, the government's claim that Lynch's argument "rests (again) on impermissible nullification" misses the point entirely. (GB 104.) The very purpose of the original right to a jury that understood the punishment at stake was allowing nullification where that punishment was unjust. Moreover, Lynch did not run a "nullification defense," but an entrapment-by-estoppel defense. To the extent he emphasized sympathetic aspects of his conduct, he did so because those facts were relevant to his defense.

D. The Court's Secretive Approach and Coercive Response to Jury Questions Require Reversal

The court refused to disclose the contents of *ex parte* jury communications, despite defense counsel's request for that information. It then exacerbated the situation by declining to respond to the secret questions and instructing jurors not to make any more "substantive" inquiries. These errors are structural, requiring reversal. To the extent this Court considers prejudice, it is evident.

1. The Court Failed To Disclose *Ex Parte* Jury Communications

a. Lynch Preserved His Claim by Objecting at Trial

When the court announced on Trial Day 7 that its clerk received several questions from the jury that the court would not answer, Lynch immediately asked for their content: "To the extent [the jury has asked questions] already, we'd be curious as to what the questions are." (ER 2505.) The court said no. (*Id.*) Lynch's objection, while politely phrased, was sufficient to notify the court of the defense's request for disclosure. *See United States v. Sanchez*, 908 F.2d 1443, 1447 (9th Cir. 1990) (holding even inartful objection that brings dispute to court's attention preserves issue for appeal). Lynch should not bear the burden of demonstrating prejudice when the court flatly refused his request to place the contents of the inquiries on the record.

The government's insistence Lynch should have objected during prior colloquies where the court *did* disclose jury communications makes no sense. The first and only time the court did not reveal the contents of jury communications was on Trial Day 7. Although it would have been better practice for the court to have given more detailed explanations of earlier jury notes—or, to the extent those communications were oral, required their reduction to writing—the court shared their substance with Lynch. Lynch had no reason to make pointless, distracting

procedural objections at those junctures. Upon the court's first failure to disclose the substance of jurors' questions, Lynch promptly objected.

This Court should review for error, not plain error.

b. The Court Violated Constitutional and Statutory Law

And there undoubtedly was error, both constitutional and statutory. The government's only argument otherwise finds no support in caselaw. Specifically, this Court has held that Rule 43 applies to pre-deliberation proceedings, *see United States v. Reyes*, 764 F.3d 1184, 1188-90 (9th Cir. 2014), as the rule's text plainly states. *See* Fed. R. Crim. P. 43(a)(2) (requiring defendant's presence at "every trial stage, including jury impanelment"). The Supreme Court has so assumed. *See United States v. Gagnon*, 470 U.S. 522, 527 (1985) (per curiam). And two sister circuits directly have held that a judge must disclose the contents of jury communications prior to deliberations. *See United States v. Smith*, 31 F.3d 469, 471 (1st Cir. 1994); *United States v. Arriagada*, 451 F.2d 487, 488 (4th Cir. 1971).

The government cites no contrary authority. It tries to limit *Smith*'s application to in-person communications, not jury notes. But it does not matter whether a communication between court and jury is in person or via note; if the defendant is precluded from learning the contents of that communication, he has no meaningful opportunity to participate in it, in violation of his constitutional and statutory rights. *See United States v. Collins*, 665 F.3d 454, 461 (2d Cir. 2012)

("Collins was deprived of his right to be present when the district court initially chose not to disclose the contents of the Note."). And although *Arriagada* was a deliberation-stage case, it's holding that "Rule 43 . . . manifestly proscrib[es] any communications by the Court with the jury, whether before or after it has begun its deliberations, without the presence of the defendant," could not be clearer. *Arriagada*, 451 F.2d at 488.

Without precedent on its side, the government resorts to inapposite analogy, conflating a court's authority to prohibit jurors from asking questions of witnesses with the court's obligations when answering questions posed to it. The two are not the same, and the cited cases giving judges broad discretion over trial management, which exclusively discuss the former, say nothing about the procedure courts must follow when jurors request instruction. (GB 112-13.)

Even assuming arguendo the court could ignore jury questions, it plainly could not do so without first sharing those questions with the parties and receiving their input. (*See* DB 74 (collecting cases).) *See also United States v. Martinez*, 850 F.3d 1097, 1100-03 (9th Cir. 2017). Because the court did not, it erred.

c. The Court's Error Requires Reversal

The government argues the error was not prejudicial. But it was structural, requiring reversal without a showing of prejudice. *See Musladin v. Lamarque*, 555 F.3d 830, 835-43 (9th Cir. 2009) (holding denial of counsel during formulation of

response to jury note is structural error requiring reversal under *United States v. Cronic*, 466 U.S. 648 (1984)); *French v. Jones*, 332 F.3d 430, 436-39 (6th Cir. 2003); *see also Martinez*, 850 F.3d at 1105 (explaining whether error is structural "turns on both the nature of the jury's request and the need for counsel's participation in formulating a response"). Here, the nature of the jury's request was, in the court's own words, "substantive." (ER 2506.) *See Martinez*, 850 F.3d at 1105 (equating substantive inquiries with structural error). And this Court repeatedly has recognized the importance of counsel's participation in responding to substantive questions, and especially in convincing the trial court *to* respond. *See, e.g.*, *Musladin*, 555 F.3d at 842; *Frantz v. Hazey*, 533 F.3d 724, 743 (9th Cir. 2008) (en banc).

Even if harmless error analysis applies, the government cannot meet its burden to show the error was harmless beyond a reasonable doubt. *See United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1109 (9th Cir. 2002); *see also Martinez*, 850 F.3d at 1102 (setting forth three-factor test). Although Lynch raised the possibility of an evidentiary hearing to flesh out more details of the communications (DB 75), the government wholly ignores this point. The government thus must demonstrate harmlessness on the current record.

First, "the probable effect of the message actually sent" in response to the jury inquiry, *Martinez*, 850 F.3d at 1102, was to suggest the questions raised—

which may have favored Lynch—were irrelevant, and to inhibit jurors from asking further questions. *See Collins*, 665 F.3d at 462-63 (explaining failure to respond to juror's concern can leave prejudicial impression on jury). Indeed, we know the effect on at least one juror was to imply a predetermined outcome of guilt. (ER 3327-28.)[11] *Cf. United States v. Barragan-Devis*, 133 F.3d 1287, 1290 (9th Cir. 1998) (finding no probable effect where "[t]he juror who sent the note expressed no dissatisfaction with the result").

Second, it is likely "the court would have sent a different message had it consulted with appellant[] beforehand." *Martinez*, 850 F.3d at 1102. Here, not only was Lynch not privy to the jury's communications, but his counsel also were in the dark. Had the court shared the questions with counsel, they could have convinced it to give *some* response, and "any mistaken impressions might have been avoided." *Collins*, 665 F.3d at 462; *see United States v. Parent*, 954 F.2d 23, 26 (1st Cir. 1992) (characterizing "the real harm" as the "lost . . . value of the chance: the opportunity to convince the judge that some other or different response would be more appropriate").

Third, it is likely that "any changes in the message that appellants might have obtained would have affected the verdict." *Martinez*, 850 F.3d at 1102. This

[11] The Court may consider a juror's statement regarding the effect of an ex parte communication. *See Rushen v. Spain*, 464 U.S. 114, 120-21 & n.5 (1983) (per curiam).

was not an open-and-shut case; Lynch had a viable defense and jury deliberations lasted approximately seven hours. (ER 3149-60.) Moreover, the jury repeatedly sent questions about the facts and law prior to the Trial Day 7 exchange, but ceased doing so after, suggesting the court's instruction prevented the parties from learning of further juror confusion. *See Arizona v. Johnson*, 351 F.3d 988, 997-98 (9th Cir. 2003) (emphasizing seriousness of error when jury responds to court's admonition by refraining from asking additional questions).

To the extent the record is murky, the government bears that cost. *See Smith*, 31 F.3d at 473-74 (refusing to find error harmless where communications not preserved and unavailable for review); *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 587 F.2d 813, 828-29 (6th Cir. 1978) (finding prejudice where no record of "length and nature of the law clerk's contact with the jury" was made).

For these same reasons, Lynch also wins on plain error review. The court's error is plain. *See Barragan-Devis*, 133 F.3d at 1289. And unlike in *United States v. Throckmorton*, 87 F.3d 1069, 1071 (9th Cir. 1996)—where the trial court shared the contents of jury notes and provided counsel an opportunity to object to its responses—the errors here affected important constitutional rights and the fairness and integrity of the trial. *See also United States v. Hammons*, 558 F.3d 1100, 1105

(9th Cir. 2009) (finding third and fourth prongs satisfied, without more, because of court's "flagrant" "failure to follow established procedures").[12]

2. The Court Refused To Answer Jury Questions and Instructed the Jury Not To Inquire Further

Lynch concedes he did not object to the court's refusal to answer already-asked questions or the instruction to not ask further "substantive" questions. Because these errors also are structural, they arguably are not subject to plain error review. *See United States v. Mitchell*, 568 F.3d 1147, 1149-50 (9th Cir. 2009) (discussing conflicting cases). But even if not, the errors were plain.

Precedent establishes the first and second prongs of the plain error test, i.e., clear error. *See Beardslee v. Woodford*, 358 F.3d 560, 575 (9th Cir. 2004) (as amended). It also establishes the structural nature of the error, which in turn satisfies the third and fourth prongs of the test. *See United States v. Recio*, 371 F.3d 1093, 1101, 1103 n.7 (9th Cir. 2004) (explaining "where a fault in the trial proceedings constitutes structural error," the third and fourth prongs are met).

Specifically, an error is structural when it "def[ies] harmless-error review," "affect[s] the framework within which the trial proceeds," or "deprive[s] [a] defendant[] of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal

[12] If the Court reviews for plain error and finds the record insufficient to reverse, Lynch seeks a hearing. (*See* DB 75.)

punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (alteration and internal quotation marks omitted). Here, the court refused to answer substantive jury questions and instructed the jury to quit asking them—instructions which had their intended effect, and deprived Lynch of his Sixth Amendment and due process rights to trial by a properly functioning jury. Moreover, we cannot know what questions the jury might have asked in the absence of the improper instruction, making harmless-error analysis impractical. *But see Beardslee*, 358 F.3d at 574-75 (reviewing for prejudice where known content of jury question indicated jury understood relevant law).

Even if these were trial, not structural, errors, they affected Lynch's substantial rights and the fairness and integrity of the trial for all of the reasons discussed above. Importantly, this was a complex case where prospective jurors expressed marked confusion during voir dire and where the seated jurors continued to have questions throughout the trial—until the court stopped answering inquiries and forbade the jury from sending any more.

The government mistakenly claims the court continued to entertain substantive jury questions, but the record shows the court welcomed only questions about procedure or specific instructions. (ER 2506-07, 3060-61, 3064.) The court never cured its directive not to ask further substantive questions, and this Court

should reject the government's invitation to assume jurors disregarded that improper instruction. *See Bollenbach v. United States*, 326 U.S. 607, 611 (1946).[13]

E. Should This Court Affirm Lynch's Convictions, He Nonetheless Is Entitled to Resentencing Below the One-Year Mandatory Minimum

If this Court affirms Lynch's convictions, it should remand for resentencing on Counts One, Two, and Three. The government concedes the verdict did not support a mandatory one-year sentence on Count One. And because the statute of conviction for Count One authorized a five-year minimum sentence, the exception to the one-year mandatory minimum for Counts Two and Three was triggered, permitting the time-served sentence the judge wished to impose.

But the Court should reject the government's cross-appeal seeking a five-year sentence. The district court committed no error, clear or otherwise, in finding Lynch was not an organizer, leader, manager, or supervisor ("OLMS"), as that term is defined by the guidelines, and applying the safety-valve. Besides, the jury did not make an OLMS finding, so the court would have violated Lynch's Sixth Amendment rights had it sentenced him to a mandatory five-year term.[14]

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[13] The government offers no response to Lynch's claim the Court should exercise its supervisory power and reverse (DB 76-77), waiving any contrary argument. *See United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011).

[14] Lynch preserves but does not further discuss his argument that *United States v. Kakatin*, 214 F.3d 1049 (9th Cir. 2000), was wrongly decided, and the safety valve applies to Counts Two and Three. (DB 80.)

1. The Government Concedes the Verdict Does Not Support a Mandatory One-Year Sentence on Count One

The government agrees "there was no jury finding to support a mandatory one-year sentence . . . for Count One," as the law requires. (GB 146.) That concession means Lynch is entitled to resentencing on Count One. First, because the district court made clear its "preference would be that if I could find a way [to vary below the one-year mandatory minimum], I would . . . [b]ecause, frankly, I don't think that this particular case is one which merits a mandatory minimum." (ER 3434; *see* ER 3658-59 (agreeing "that where the court does have the ability to impose a more lenient sentence" of "time served" the court would "do that"); ER 429.) And second, because even if the court's preference were unclear, "there is a 'reasonable probability' that the [mandatory minimum] influenced the length of the sentence imposed" on Count One, which is enough under Circuit precedent to require remand, even on plain error review. *United States v. Tapia*, 665 F.3d 1059, 1061 (9th Cir. 2011); *see id.* at 1062-63.

2. The One-Year Mandatory Minimum Does Not Apply to Counts Two and Three Because a Greater Mandatory Minimum Is Otherwise Provided by Statute

As Lynch explained in his initial brief, the plain language of 21 U.S.C. § 859 mandates a one-year mandatory minimum "[e]xcept to the extent a greater minimum sentence is otherwise provided by section 841(b)." 21 U.S.C. § 859(a).

Because a five-year minimum sentence was provided by section 841(b) in Lynch's case, the statutory exception was triggered.

The government responds with policy arguments for what it deems a better reading of the "except" clause. But "[p]olicy arguments cannot displace the plain language of the statute; that the plain language of § [859(a)] may be bad policy does not justify a judicial rewrite." *In re Catapult Entm't, Inc.*, 165 F.3d 747, 754 (9th Cir. 1999).

The Supreme Court departed from the plain text of 18 U.S.C. § 924(c), a firearm sentencing provision, in *Abbott v. United States*, 562 U.S. 8 (2010), but no court appears to have extended *Abbott*'s logic to section 859. This Court should not do so because the concerns animating *Abbott* are not present here.

Specifically, without the *Abbott* Court's limiting construction, the "except" clause in 924(c) would exclude defendants from increased punishment whenever "a greater minimum punishment is otherwise provided . . . *by any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added). A defendant could avoid punishment for his firearm-related conduct if any other offense of conviction (firearm-related or not) carried a mandatory minimum penalty. By contrast, the "except" clause in section 859 specifically refers to greater mandatory minimums "provided by section 841(b)," the general drug sentencing provision. 18 U.S.C. § 859(a). Thus, a defendant only avoids mandatory punishment under section 859 if

he is eligible for greater mandatory punishment for his drug-related activities. And that defendant still receives punishment for his underlying sales-to-minors offense; the court simply is freed from 859's mandatory constraints. By contrast, a contrary ruling in *Abbott* might have precluded 924(c) punishment entirely. *See Abbott*, 562 U.S. at 21-22.

To the extent the statutory language is ambiguous, the rule of lenity mandates this Court adopt Lynch's interpretation. *See United States v. Santos*, 553 U.S. 507, 514-15 (2008).[15]

3. The Court Properly Sentenced Lynch Below the Five-Year Mandatory Minimum

a. Background

Lynch's conviction on Count One carried a potential five-year mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(B)(vii). However, in recognition that less culpable defendants deserving of lower sentences sometimes are swept within the ambit of mandatory minimums, Congress has enacted an exception to certain drug sentences, including those mandated by section 841. *See United States v. Thompson*, 81 F.3d 877, 879 (9th Cir. 1996).

[15] The government incorporates by reference briefing submitted in district court. (GB 147-48.) Circuit rules prohibit this tactic, and Lynch does not respond to these improperly raised arguments. *See* Ninth Cir. R. 28-1(b).

As codified, this "safety valve" directs a court to "impose a sentence . . . without regard to any statutory minimum sentence" if five prerequisites are met. 18 U.S.C. § 3553(f); *see* U.S. Sentencing Guidelines Manual § 5C1.2. There is no dispute Lynch satisfied four of the five. (ER 420; GB 132.)

Lynch's eligibility for a below-five-year sentence turned on whether he "was an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(4). A court makes this determination by reference to guideline 3B1.1 (Aggravating Role). That guideline authorizes two-, three-, or four-level increases in offense level based on the defendant's role in the relevant "criminal activity." U.S. Sentencing Guidelines Manual § 3B1.1(a)-(c). According to its background comment, the Sentencing Commission included guideline 3B1.1 "primarily because of concerns about relative responsibility," and because "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." *Id.* § 3B1.1 bkgd.

To determine whether Lynch qualified for a role enhancement, the court began with the guideline's text and commentary. (ER 421-22.) After recognizing the guideline's stated purpose, the court observed the permissive language of application note two, which states, "*To qualify* for an adjustment under this section,

the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." U.S. Sentencing Guidelines Manual § 3B1.1 cmt. n.2 (emphasis added). Looking at 3B1.1's text and commentary as a whole, the court reasoned that

> 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.

(ER 422.)

The court explained that a contrary reading of the guideline would lead to an irrational and inappropriate result at odds with its stated purpose. (ER 423.) The court catalogued the many ways Lynch's involvement in the CCCC reduced potential criminal aspects and harmful consequences of its operation, and concluded that "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." (ER 424-25.) "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

purported criminals so accommodating, this country would be a much safer and law-abiding place." (ER 428-29.)

Based on the absurd result that would ensue from a contrary interpretation, the court found "that Lynch does not fall within USSG § 3B1.1." (ER 426.) Accordingly, the court applied the safety valve, and sentenced Lynch below the five-year mandatory minimum. (*Id.*)

b. Standard of Review

The government, without argument, posits de novo review of the court's decision. (GB 132.) Against this bare assertion stands a wall of Ninth Circuit authority uniformly applying the highly deferential clear error standard of review to 3B1.1 enhancements. *See, e.g.*, *United States v. Christensen*, 828 F.3d 763, 816 (9th Cir. 2015) (as amended); *United States v. Doe*, 778 F.3d 814, 821-26 (9th Cir. 2015); *United States v. Yi*, 704 F.3d 800, 807 (9th Cir. 2013); *United States v. Lopez-Sandoval*, 146 F.3d 712, 716-18 (9th Cir. 1998); *United States v. Varela*, 993 F.2d 686, 691 (9th Cir. 1993) (as amended); *United States v. Hoac*, 990 F.2d 1099, 1110 (9th Cir. 1993); *United States v. Avila*, 905 F.2d 295, 298 (9th Cir. 1990), *superseded on other grounds by* U.S. Sentencing Guidelines Manual § 3E1.1 cmt. n.4; *see also United States v. Lizarraga-Carrizales*, 757 F.3d 995, 997 (9th Cir. 2014) ("Our review of the district court's denial of safety valve relief is deferential . . . .").

Even putting aside the Circuit's repeated holding that "[t]he question of a defendant's role in a conspiracy is a question of fact that the court reviews for clear error," *Avila*, 905 F.2d at 298, and assuming *arguendo* the court's decision involved application of the guidelines to facts, this Court would review only for abuse of discretion. *See Yi*, 704 F.3d at 805. A district court does not abuse its discretion unless it identifies the wrong legal standard or makes findings that are "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).[16]

In any event, for the reasons discussed below, even applying de novo review, this Court should affirm.

c. The Court Correctly Held Lynch Was Not an Organizer, Leader, Manager, or Supervisor

(1) The Court Properly Interpreted the Guidelines

The district court correctly understood the text and purpose of 3B1.1, which exclude Lynch. It followed basic canons of statutory interpretation to reach its conclusions. As the government concedes, "conventional statutory-construction principles" unquestionably applied. (GB 136.)

[16] The court's decision was fact-specific, so the holding of *United States v. Gasca-Ruiz*, 852 F.3d 1167 (9th Cir. 2017) (en banc), that this Court reviews broader rule-making de novo, does not apply. But even if it did, the Court reviews ultimate application of those rules to the facts deferentially. *See id.* at 1171-74.

Specifically, the court started with the plain language of the guideline and found that its apparent meaning led to an absurd and unreasonable result. In such circumstances, the Supreme Court and this Court require a judge to consider the guideline's purpose to determine its true meaning. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 452-55 & n.9 (1989); *United States v. Combs*, 379 F.3d 564, 569-72 (9th Cir. 2004). That is precisely what the court did here.

First, the court found that "the literal reading of [3B1.1] would compel an odd result." *Public Citizen*, 491 U.S. at 454 (internal quotation marks omitted). As the court explained, "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 the offense level under USSG § 3B1.1. In fact, just the opposite." (ER 423.) These facts made a literal reading not "rational" or "appropriate." (*Id.*)

Second, the court "search[ed] for other evidence of congressional intent to lend the term its proper scope." *Public Citizen*, 491 U.S. at 454. The court reviewed the purpose of the safety valve generally and guideline 3B1.1 in particular, and found both reflected Congress's desire to sentence more culpable defendants—including those who present a greater danger to the public or likelihood of recidivism—more severely. (ER 421-22.) This "[l]ooking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is

difficult to fathom or where it seems inconsistent with Congress' intention." *Public Citizen*, 491 U.S. at 455. Rather than create a policy exception, the court interpreted 3B1.1 in light of its purpose and common sense—precisely as precedent required.

Finally, the court correctly read the guideline and its commentary as a whole, *see United States v. Staten*, 466 F.3d 708, 715 (9th Cir. 2006) (as amended), and found them ambiguous as to whether application note two rendered imposition permissive. The court looked to the "context and purpose of the Sentencing Guidelines," including 3B1.1 and 5C1.2, to resolve that question. *United States v. Leal-Felix*, 665 F.3d 1037, 1038 (9th Cir. 2011) (en banc).

(2) The Court's Ruling Is Supported by the Facts

In any event, it does not matter whether the court interpreted 3B1.1 correctly because this Court may affirm on any ground supported by the record. *See Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir. 1987). Here, Lynch did not play an aggravated role in the relevant criminal conduct, when properly defined.

As 3B1.1's introductory commentary explains, "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of 1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction." U.S. Sentencing Guidelines Manual ch. 3, pt. B, introductory cmt. (2009). "Relevant conduct" is defined to include,

> in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]

Id. § 1B1.3(a)(1)(B). Therefore, the court was required to consider Lynch's role in the broader criminal plan of medical marijuana distribution in Morro Bay and even California.

This plain language interpretation is consistent with the application notes to 3B1.1, which define criminal participants and organizations broadly. "A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." *Id.* § 1B1.3 cmt. n.1. A criminal "organization" includes "all persons involved during the course of the entire offense," even if not criminally liable. *Id.* § 1B1.3 cmt. n.3. Recognizing these points, the Circuit has explained that "[a]ny person who knowingly abets the defendant's conduct qualifies as a 'participant.'" *United States v. Smith*, 719 F.3d 1120, 1126 (9th Cir. 2013). "[I]t is immaterial" that the putative participant "did not herself commit the same underlying offense as [the defendant] so long as she was a knowing accessory to his crime." *Id.*

And so, Mayor Janice Peters, attorneys Rob Schultz and Lou Koory, members of the City Council, the City Planner, the CCCC's landlord and marijuana suppliers, and doctors who prescribed medical marijuana for CCCC patients—who each knowingly abetted Lynch's conduct—plainly were participants in the relevant criminal activity. Without being facetious, one could say the California legislature and voters are participants germane to an assessment of Lynch's role in the relevant criminal activity, as defined by the guidelines. For without the actions of these other participants, Lynch never would have been involved in illegal marijuana distribution at all. (ER 428 ("[B]ut 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.").) When viewed at the proper level of abstraction, the court's conclusion that Lynch's role was not aggravated manifestly finds support in the record.

The result of this plain language interpretation of "criminal activity" aligns with the purpose of guideline 3B1.1, which is to address "concerns about relative responsibility" and to punish more severely those who "profit more from [the criminal activity] and present a greater danger to the public and/or are more likely to recidivate." U.S. Sentencing Guidelines Manual § 3B1.1 bkgd. For as the court found, Lynch is not a danger to the public or likely to recidivate, and the government did not prove any profit. (ER 407, 423, 427-29.) Those findings are

not clearly erroneous and support the court's ultimate ruling. *See Avila*, 905 F.2d at 297 (holding government bears burden of establishing facts to support a role enhancement).

Even if the criminal activity is limited to operation of the CCCC, virtually all of the above-listed individuals were participants in that conduct over whom Lynch exercised no control. Lynch occupied no position of authority with respect to local officials, who by their own testimony provided rules for him to follow. (ER 3457-64; GER 411-13, 416-17.) It was Lynch who complied with these participants' guidelines, including those set forth in a business license issued by the City of Morro Bay. (GER 405.) Certainly, Lynch had no authority over the doctors and lawyers involved. And although Lynch no doubt played "an important role in [the] offense," that fact is insufficient to support a role enhancement. *United States v. Whitney*, 673 F.3d 965, 975 (9th Cir. 2012) (internal quotation marks omitted).

With respect to other members of the dispensary, "Lynch did not present any great[er] danger to the public . . . than any of his fellow participants in the CCCC." (ER 425.) To the contrary, some participants—on their own and without Lynch's knowledge or approval—distributed marijuana for improper purposes and their own personal gain. (ER 407-08, 424.)

Often, Lynch took direction *from* CCCC employees, including his various managers who handled purchases from vendors, inspected the marijuana to verify

it was medical grade, and then *told Lynch* if the CCCC could accept it. (ER 2735-38; Dkt. 138 at 37-44, 53-54, 65, 78, 84-85.) Lynch had no expertise in growing marijuana, and learned about the process from CCCC employees and patients. (Dkt. 138 at 33-34, 52-53.) He did not set the prices for purchase or sale of marijuana; his vendors and managers did. (*Id.* at 65-66, 225-27.) *See Lopez-Sandoval*, 146 F.3d at 718 (reversing role enhancement where defendant did not "set the price of the drugs rather than merely relaying the price set by his supplier"). Hiring and firing "was kind of a team effort." (Dkt. 138 at 210.) Notably, for one three-month period, Lynch was too sick to work, yet the operation continued without his regular presence. (ER 2729-30.) And although Lynch paid the CCCC's bills and handled the accounting "[m]ost of the time" (Dkt. 138 at 210), simple "[c]ontrol over the activities and assets" of a business also is not enough to justify a role enhancement. *Whitney*, 673 at 975 n.6.

This Court's decision in *United States v. Frega*, 179 F.3d 793 (9th Cir. 1999), is instructive. There, the government cross-appealed seeking a role enhancement, citing "evidence that Frega was the scheme's central actor, having bankrolled it, profited from it, involved other participants, and exercised control over co-conspirators." *Id.* at 811. Yet this Court affirmed. Although it was possible to conclude that "all the factors a court is to consider in determining whether an individual was an organizer or leader point to an enhancement," there was "support

for the district court's assessment as well." *Id.* In such circumstances, the Court would not disturb the district court's decision. *See id.*; *see also Rosenthal*, 454 F.3d at 951 n.8 (approving, in dicta, application of safety-valve to medical-marijuana defendant); *United States v. Scholz*, 907 F. Supp. 329, 333-34 (D. Nev. Nov. 22, 1995) (applying safety valve where defendant ran two or three marijuana operations that were part of a larger scheme), *aff'd*, 91 F.3d 157 (9th Cir. July 19, 1996) (mem.). The Court similarly should affirm here.[17]

d. The Sixth Amendment Demands a Jury Make any Finding That Increases the Mandatory Minimum

This Court also can affirm the district court's below-five-year sentence on constitutional grounds. *See Marino*, 812 F.2d at 508.

In *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155 (2013), the Supreme Court held "that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." Because an OLMS finding increases the mandatory minimum in this case from zero to five years, and because the jury

[17] The government might cite to *United States v. Washington*, 580 Fed. Appx. 578 (9th Cir. June 25, 2014) (mem.), an unpublished decision rejecting legal reasoning similar to the court's approach in this case. Of course, *Washington* has no precedential value. *See* Ninth Cir. R. 36-3(a). What is more, on remand in that case, the court again rejected a role enhancement and applied the safety valve—this time based on reasoning similar to what Lynch outlines in this brief. Transcript of Resentencing, *United States v. Washington*, No. 9:11-CR-61-DLC (D. Mont. Oct. 31, 2014), ECF No. 629. The government did not appeal.

never made that finding, Lynch's Sixth Amendment rights would be violated if the district court imposed a five-year mandatory minimum sentence.

This Court held otherwise in *United States v. Lizarraga-Carrizales*, 757 F.3d 995 (9th Cir. 2014), but should consider en banc whether *Lizarraga-Carrizales* was wrongly decided.

F. This Court Need Not Take the Unusual Step of Reassigning to a New Judge for Resentencing

At sentencing, the court expressed its belief Lynch should be sentenced to time served, but still imposed a one-year term the court thought mandatory. The government nonetheless *suspects* the court would flout any ruling by this Court requiring a five-year sentence, and asks for reassignment in those circumstances.[18]

"Absent personal bias, remand to a new judge is warranted only in rare circumstances." *United States v. Johnson*, 812 F.3d 757, 765 (9th Cir. 2017). Because the district court has demonstrated its willingness to follow this Court's instructions regardless of its own views; because reassignment is unnecessary to preserve the appearance of justice; and because reassignment would entail massive waste and duplication of effort, this Court need not take that unusual step. *See id.*

First, the district court plainly determined it would sentence Lynch below any mandatory minimums only *if* this Court's authority so permits; if this Court

[18] The government explicitly does not seek reassignment unless it prevails on cross-appeal. (GB 142-43.)

holds it does not, there is no indication the district court would ignore that ruling. To the contrary, the court expressly viewed its role as "bound" by congressional mandates and decisions of higher courts. (ER 3308, 3434, 3452; *see also* ER 3183, 3353-54, 3423-31, 3493, 3625-26.)

The government's record citations reveal a court wary of sentencing Lynch to more time than necessary, but unwilling to sentence outside the confines of its lawful authority. Importantly, though the court believed a time-served sentence appropriate, it nonetheless imposed one-year mandatory minimums for Counts 2 and 3—rejecting defense arguments for a lower sentence. (ER 3432-35.)

Two quotations illustrate the court's general approach, first with respect to the five-year mandatory minimum, and second regarding the one-year minimum:

> I understand the equitable factors. . . . The issue is the legal issue, which is the mandatory minimum. *The equitable factors don't come into play unless the court has an ability to exercise discretion in that regard*. So either the answer would be yes I can or no I can't. I know the extent to which I will exercise my discretion in this matter *if I have it*.

(ER 3313 (emphasis added).)

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

> legislature has clearly spoken on this issue. And even though one may say, "Oh, maybe you should be brave enough to do something different," one of the things that would happen if I were brave enough to do something is that the Government would appeal . . . . And so I can't see that as being anything other than a monumental waste of time for both the Government and also the defense in the end . . . .

(3434-35.) There are no concerns about a runaway judge here.

Second, the court's actions at trial and sentencing do not give rise to an appearance of unfairness against the government. As Lynch's appeal demonstrates, the court was unabashed about ruling against the defense at trial. And though the court, after hearing all the evidence, believed a mandatory minimum sentence unjust, it continued to rule for the government on several sentencing issues, and recently adopted the government's position at a *McIntosh* hearing. (ER 3432-35, 3490, 3611-22, 3637; Dkt. 137.)

That the court ruled for Lynch on the OLMS issue is not enough to negate this Court's "general rule" that "[a]bsent unusual circumstances, resentencing is to be done by the original sentencing judge." *United States v. Waknine*, 543 F.3d 546, 559 (9th Cir. 2008) (internal quotation marks omitted). For in any case requiring resentencing, the court by definition made an error of law or fact. If the court here took an unusual procedural approach to sentencing, that simply reflects the difficult nature of the case. This Court should reject the government's attempt to conjure unfitness from genuine legal and factual disputes.

Third, reassignment would involve a huge waste of resources and duplication of effort and—contrary to the government's professed desire to avoid further delay—significantly delay resolution of the case. Even if the government prevails on cross-appeal, this Court is unlikely to mandate imposition of a five-year sentence. For in the earlier-discussed *Washington* case, after the Court reversed, it remanded for additional fact-finding and legal analysis on the OLMS enhancement and safety valve. *Washington*, 580 Fed. Appx. at 578-79. The district court's deep institutional knowledge of this case would be lost if that process were reassigned to another judge. Moreover, if this Court also remands for consideration of Lynch's *McIntosh* motion, it would be wasteful and redundant to have one judge handle that matter and another resentencing. Yet those proceedings also will benefit from the court's familiarity with the extensive history of this case.

This Court should not take the "rare" step of reassigning to another judge.

III. CONCLUSION

For the reasons stated in Lynch's *McIntosh* motion and reply, he respectfully asks the Court to prohibit the DOJ from spending funds on his case, and order the case dismissed. In the alternative, for the foregoing reasons, as well as those stated

in the First Cross-Appeal Brief,[19] Lynch seeks an order vacating his convictions and sentence.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: July 17, 2017

By */s Alexandra W. Yates*
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[19] Lynch maintains that cumulative trial errors require reversal. (AOB 77.)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 28-1.1, I certify that this reply brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 18,504 words. I am filing a motion for leave to file an oversize brief.

DATED: July 17, 2017

/s Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that today I electronically filed the foregoing **APPELLANT'S THIRD CROSS-APPEAL BRIEF** 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.

DATED: July 17, 2017

Lorena Macias
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