Nos. 10-50219, 10-50264

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES C. LYNCH,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 07-0689-GW

GOVERNMENT'S FOURTH BRIEF ON CROSS-APPEAL

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I

INTRODUCTION

The government's contention on cross-appeal that the district court erred as a matter of law in refusing to apply the mandatory minimum sentence on Count One has strengthened since the filing of the second cross-appeal brief. A unanimous unpublished opinion by a panel of this Court reversed another district court that specifically relied on the sentencing memorandum of the district court in this

matter. The panel's opinion provides a clear road map of the "legal errors" of the district court in this case when it created an exception to the role enhancement provision, USSG § 3B1.1, and thereby erroneously found defendant eligible for the safety valve. The panel's opinion is supported by precedent and unimpeachable logic, and should be followed here to reverse the district court.

Upon such reversal, this Court need not remand for further factual findings on the role enhancement, as defendant requests. At sentencing, defendant specifically conceded the facts and analysis of the Probation Office in applying § 3B1.1(a), thus establishing all the factual predicates for the enhancement. The district court made further findings regarding defendant's organizational role and his control over others to confirm that defendant qualifies under § 3B.1.1(a) as both an "organizer" and also as a "leader." The case should be remanded with instructions to apply the role enhancement and sentence defendant to the applicable five-year mandatory sentence.

Remand should be accompanied by reassignment to a new district judge. There are sufficient unusual circumstances here to warrant reassignment without the need to show bias by the court. The district

court expressed extremely strong views against application of the mandatory sentence over the long course of sentencing. It expended considerable effort and caused uncommon delay in finding a path to the erroneous result it sought. In similar circumstances, this Court has repeatedly reassigned cases on remand.

In his third cross-appeal brief, defendant sought to add a new issue to this appeal, but this Court should not consider it because defendant has not properly set it forth as required despite clear direction from this Court and ample time and opportunity. After the filing of the first two briefs in this case, Congress passed an appropriations rider which has been interpreted to restrict the Department of Justice's (DOJ) spending on medical marijuana prosecutions in limited circumstances. Over the three years defendant was preparing his third brief, he filed two motions in this Court and one in the district court seeking to use the rider to dismiss his case or enjoin the government from continuing to litigate. Twice this Court denied his motions without prejudice to defendant renewing arguments about the rider "in the third cross-appeal brief." Rather than renewing any arguments in that brief, as directed, defendant instead, in a little over a

page, incorporated by reference voluminous prior briefing in this Court without organizing arguments or following appellate rules. On this record, the Court should find any arguments about the rider waived and abandoned.

If this Court chooses to address the appropriations rider, the rider does not undermine defendant's conviction or otherwise apply to this case. Ninth Circuit case law has interpreted the rider narrowly. It limits the rider temporally and to DOJ spending only, while holding that the rider provides no immunity from federal marijuana law. That narrow interpretation, and binding rules of statutory interpretation, dictate that the rider not apply to cases like this where the defendant's sentence and judgment occurred, and this appeal commenced, before the rider's enactment. Even if the rider did otherwise apply, undisputed facts, defendant's own admissions, and findings by the district court conclusively show that defendant did not fully and strictly comply with all California medical marijuana laws, as required by Ninth Circuit law for the rider to apply.

II

ARGUMENT

A. The Five-Year Mandatory Minimum Sentence Applies

1. The District Court Erred as a Matter of Law by Failing to Apply USSG § 3B1.1 and Granting Safety Valve Relief

The district court erred as a matter of law by failing to apply the five-year mandatory minimum sentence applicable to Count One. (GAB 122-42.)[1] While finding the facts necessary to apply a role enhancement under USSG § 3B1.1(a), the court nevertheless refused to apply any role enhancement based on its creation of an exception to that provision for defendants who, in the court's view, present a low risk of recidivism or harm to the public. (GAB at 134-36; ER 420-27.) The court's refusal to apply § 3B1.1 then led to the court's conclusion that

[1] "CR" refers to the clerk's record in the district court and "CTA" to the clerk's record in this Court, and both are followed by the docket number. "ER" refers to the Excerpts of Record filed by defendant, "AOB" to his first brief on cross-appeal, "ARB" to his third brief on cross-appeal, "GER" to the Government's Excerpts of Records, "SER" to the Government's Supplemental Excerpts of Record, and "GAB" to the government's second brief on cross-appeal; all references are followed by the applicable page references. "GX" and "DX" refer to the government and defendant's exhibits at trial, respectively, followed by exhibit number. "PSR" refers to the Revised Presentence Investigation Report that defendant filed under seal, and it is followed by paragraph number.

defendant was safety-valve eligible. This was a results-driven interpretation of the sentencing guidelines and is contrary to law. The government's position that the district court's sentencing ruling was wrong and should be reversed with instructions to apply USSG § 3B1.1(a), and the mandatory five-year sentence, has strengthened since filing its second brief on cross-appeal.

In *United States v. Washington*, a panel of this Court, in an unpublished memorandum decision, reversed a district court in the District of Montana that had specifically relied on the sentencing opinion of the district court in this case. That district court, following the district court here, refused to apply an aggravating role enhancement under USSG § 3B1.1 to a defendant, thereby enabling that court to similarly grant the defendant safety valve relief from a mandatory minimum sentence. *United States v. Washington*, 580 Fed.Appx. 578, 578-79 (9th Cir. 2014).[2] *Washington*, and other recent case law, confirm the district court's sentencing errors in this case.

[2] The sentencing decision in this case, available on legal databases, was cited and argued directly by the parties in *Washington*, after the district court relied on it in that case. *See United States v. Washington*, 9th Cir. Case No. 13-30143, Docket Nos. 8, 19, 22 (briefs).

Using the same reasoning as the government in this cross-appeal, the Court in *Washington* held that the Montana district court had committed "two legal errors" by neglecting to examine whether defendant had organized or controlled others in the crime, as required by § 3B1.1, and instead following the sentencing opinion under review here in carving out a policy-based exception to the role enhancement through a misreading of the Guidelines and a misunderstanding of *Koon v. United States*, 518 U.S. 81 (1996). *Washington*, 580 Fed.Appx. at 578-79. *Washington* noted that the district court had not looked to defendant's control of other participants in the crime or to "his organizational role at all." *Id.* at 578. It then flatly rejected the creation of an exception from § 3B1.1, adopted from the opinion of the district court under review here:

> Although sentencing courts may draw upon background commentary to inform their analysis, they must begin with the plain language of the guidelines. *See United States v. Cruz-Gramajo*, 570 F.3d 1162, 1167, 1168 n.4 (9th Cir. 2009). As with the enhancement for obstruction of justice, if the court determines that the factual predicate for the enhancement under § 3B1.1 has been established, application of the enhancement is mandatory. *See*, *e.g.*, *United States v. Anchetta*, 38 F.3d 1114, 1118 (9th Cir. 1994) (holding that once a guideline provision's criteria have been met, the enhancement is "mandatory not discretionary").

Id. at 578-79.

This Court in *Washington* also found that the district court committed legal error when it imported references and concepts from *Koon* into consideration of the applicability of the role enhancement and safety valve provisions (again following the sentencing opinion of the district court in this case). Citing *United States v. Valencia-Andrade*, 72 F.3d 770, 773-74 (9th Cir. 1995), it held that "when determining eligibility for the safety valve, the court must apply the enhancement according to its plain terms, without regard to departures." *Washington*, 580 Fed.Appx. at 579. It was thus error for a district court to "import the 'heartland' analysis of *Koon* into the safety valve context." *Id.* Such analysis is only relevant to the issue of variance or departure after the applicable guideline range has been calculated, but "has no relevance when a court is determining whether a particular guideline enhancement applies in the first place." *Id.* (citing USSG § 1B1.1). This Court thus reversed and remanded the district court's sentencing decision.

While not precedential, *Washington* is persuasive and should be followed. It applies binding precedent and well-established sentencing

concepts to set forth the legal errors in a sentencing ruling that had adopted wholesale the district court's sentencing opinion here to create an exception under § 3B1.1 for "low risk" defendants.[3] In addition to *Anchetta*, cited by *Washington*, cases in the Supreme Court, this Court, and nearly every court of appeals have stressed that district courts do not have discretion to avoid application of similarly structured enhancements like §§ 3B1.1 and 3C1.1 when the record shows facts supporting the enhancement. *E.g.*, *United States v. Dunnigan*, 507 U.S. 87, 98 (1993); *United States v. Barajas*, 360 F.3d 1037, 1043 (9th Cir. 2004); *United States v. Austin*, 948 F.2d 783 (1st Cir. 1991); *United States v. Savin*, 349 F.3d 27, 30 n.9 (2d Cir. 2003); *United States v. Williamson*, 154 F.3d 504, 505 (3d Cir. 1998); *United States v. Ashers*,

[3] In holding that the district court committed two "legal errors," *Washington* makes clear that the district court's ruling here should be reviewed *de novo*, not for abuse of discretion, as defendant suggests. (ARB 66-67.) *Washington* is confirmed by a recent Ninth Circuit *en banc* case. *See United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170-71 (9th Cir. 2017) (*de novo* review applies when the question is whether the district court "select[ed] and properly interpret[ed] the right Guidelines provision," and where a district court formulates or adopts "generalized rules" applicable to more than one case).

968 F.2d 411, 414 (4th Cir. 1992); *United States v. Velgar-Vivero*, 8 F.3d 236, 242 (5th Cir. 1993).

Washington's holding that a district court errs by failing to apply a sentencing enhancement and the safety valve by their plain terms, and instead creating an exception for unusual or sympathetic defendants outside the "heartland" of cases, is also clearly correct. *Valencia-Andrade*, cited by *Washington,* instructed district courts "to resist the temptation to extend the reach of a statute beyond the express intention of Congress, to avoid a harsh result" because courts "have no constitutional authority to adopt a new exception to the mandatory minimum penalty requirements." *Id.* (quoting *Crooks v. Harrelson*, 282 U.S. 55 (1930)); *see also United States v. Yepez*, 704 F.3d 1087, 1090-91 (9th Cir. 2012) (*en banc*) (looking to plain language of guidelines, refusing to "carve out an exception" to safety valve inconsistent with express term of guidelines, and warning against safety valve exceptions by "judicial fiat"); *United States v. Hernandez-Castro,* 473 F.3d 1004, 1008 (9th Cir. 2007) (reaffirming *Valencia-Andrade* based on plain reading of guidelines). The district court failed to heed this advice.

Washington provides a well-reasoned judicial road map for rejecting the attempt by the district court in this matter to create an exception to § 3B1.1 and the safety valve requirements to avoid imposing on defendant the mandatory minimum sentencing required by law and the jury's verdict. In his third cross-appeal brief, defendant makes no effort to engage with *Washington*'s analysis and its rejection of the pertinent reasoning of the district court in this matter -- a significant omission given the close identity of issues in the two cases. (ARB 74 n.17.)

Defendant instead attempts to defend the district court's legal errors by suggesting it was permitted to avoid the plain language of § 3B1.1 in order to avoid a claimed "absurd" result. (ARB 67-69.) This argument fails in the face of the case law in this circuit and elsewhere set forth above that a literal reading of § 3B1.1 and the safety valve is exactly what is intended by Congress and the sentencing commission, and required by the courts. *E.g.*, *United States v. Valenzuela*, 495 F.3d 1127, 1133 (9th Cir. 2007) (plain meaning of unambiguous guideline provision controls); *Anchetta*, 38 F.3d at 1118 (application of guideline provision mandatory). Congress itself carefully balanced concerns

about recidivism, public safety, criminal conduct, and related issues in the express terms of the safety valve and its incorporated guideline provisions such as § 3B1.1, and courts are not permitted to upset that balance through their own recalibration of these issues, even in an ostensibly sympathetic case. *See Valencia-Andrade*, 72 F.3d at 774.

Defendant also identifies no ambiguity in the language of the statutory provision at issue to trigger a search into legislative history and purpose, as in *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440 (1989), on which defendant relies. *Public Citizen*, 491 U.S. at 452-53 (resorting to legislative history where key statutory term "utilize" was "woolly" and "undefined"). Finally, as set forth in the second cross-appeal brief, the guideline notes and commentary on which the district court erroneously relied actually *support* a plain, literal reading of § 3B1.1. (GAB 139-40.) Both Application Note Two and the commentary to § 3B1.1 show that the size of the enhancement increases with the number of criminal participants, without supporting the district court's effort to create an exception based on public danger or likelihood of recidivism. *(Id.)*

2. Undisputed Facts Require Application of § 3B1.1 and the Mandatory Minimum Sentence

In this case, the record -- including defendant's own concessions and findings by the district court -- conclusively establishes the factual predicates for a role enhancement under § 3B1.1, so no remand for further fact-finding is necessary. *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1070, 1076 n.7 (9th Cir. 2003) (remand for fact finding unnecessary where record permits only one resolution of the factual issue); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1162 (9th Cir. 2001) (remand not required where it would serve "no practical purpose"); *DeMarah v. United States*, 62 F.3d 1248, 1250 (9th Cir. 1995) ("If the matter on remand concerns primarily factual issues about which there is no dispute, and the appeal concerns primarily a question of law, then the 'policies of judicial efficiency and finality are best served by resolving the question now.'") (internal citations omitted). Defendant's request for a remand is, therefore, misplaced. (ARB 74 n.17, 78.) While the Court ordered remand in *Washington* for further fact finding, this was because the district court there did not address "at all" defendant's organizational role or control of others under § 3B1.1, a sharp contrast to the record here. *See Washington*, 580 Fed.Appx. at 578.

As noted by the Court in *Washington*, the factual predicates for a role adjustment under § 3B1.1 are minimal. All that is required are that the defendant "exercised some control over others involved in the commission of the offense or was responsible for organizing others for the purpose of carrying out the crime." *Washington,* 580 Fed.Appx. at 578 (citing *United States v. Yi*, 704 F.3d 800, 807 (9th Cir. 2013)); *United States v. Alonso*, 48 F.3d 1536, 1545 (9th Cir. 1995). These requirements are disjunctive. Organization of others to set up or execute the crime is different from the exercise of control over others during the crime, though each kind of activity provides a valid path to a role enhancement. *United States v. Doe*, 778 F.3d 814, 823-25 (9th Cir. 2015). In *Doe*, this Court explained that a defendant qualifies as an "organizer" under § 3B1.1(a) or (c) if they made arrangements for or coordinated the criminal activities of others, even if they did not control them or stand as "a supervisor or a superior in a hierarchy of criminal associates." *Id.* at 823 (upholding application of § 3B1.1(c) as "organizer" and finding of safety valve ineligibility where defendant put drug deals together, but did not supervise participants); *see also United States v. Morales*, 680 Fed.Appx. 548, 552 (9th Cir. 2017) (holding that

defendant who rented property to marijuana growers and managed access to centralized locations was "at least an organizer" under § 3B1.1(a)); *see United States v. Avila*, 905 F.2d 295, 298 (9th Cir. 1990) (§ 3B1.1(a) enhancement for coordinating the procurement and distribution of drugs).

With respect to controlling others, the Ninth Circuit has held that "a single instance of persons acting under a defendant's direction" is sufficient to support a § 3B1.1 role enhancement. *United States v. Maldonado*, 215 F.3d. 1046, 1050-51 (9th Cir. 2000); *see also United States v. Gadson*, 763 F.3d 1189, 1222 (9th Cir. 2014) (§ 3B1.1(b) enhancement where defendant supervised one uncharged, unnamed drug transporter); *United States v. Barnes,* 993 F.2d 680,685 (9th Cir. 1993) (§ 3B1.1(a) enhancement where defendant negotiated price of cocaine sales and supervised one person); *United States v. Roberts*, 5 F.3d 365, 371 (9th Cir. 1993) (leadership enhancement where defendant owned chemical supply company and gave orders to one employee); *United States v. Smith*, 924 F.2d 889, 895 (9th Cir. 1991) (§ 3B1.1(a) applied though defendant only supervised one out of five participants).

Here, it was undisputed that the crime involved more than five participants and that defendant engaged in the organizational activity and the supervisory control of others to satisfy the factual predicate for the enhancement under any of USSG § 3B1.1's sub-sections, but specifically § 3B1.1(a)'s four-level "organizer" enhancement. In analyzing the four-level aggravating role enhancement under USSG § 3B1.1(a) in the PSR, the Probation Office stated:

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

(PSR ¶ 55.) Defendant never objected to and instead *admitted* in his sentencing brief that this recitation of facts by the Probation Office was accurate and correct. (GER 590-91 (prefacing quotation of ¶ 55 of PSR above with the phrase "as accurately noted by the probation office").)

Defendant further conceded that "it is clear that the probation office has employed a natural reading of the role adjustment under USSG § 3B1.1." (GER 590.) Defendant only asserted legal theories against § 3B1.1(a)'s application. (*See* GER 591-96.)

Defendant thus admitted to the factual predicates for a four-level role enhancement under § 3B1.1(a) under either of the two possible prongs: (1) he admitted to being an "organizer" through hiring, leasing, and controlling the operations and money of the criminal activity; and (2) he admitted having more than five other criminal participants "under Lynch's control". (PSR ¶ 55.) No further fact findings by the district court were or are required for the enhancement to apply. *See United States v. Casteneda-Martinez*, 425 Fed.Appx. 569, 571 (9th Cir. 2011) (no factual findings needed for sentencing enhancement where defendant did not object); *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995).

Nevertheless, the district court did make findings supporting the factual predicates for the enhancement. As to defendant's organizational role and the number of participants, among other things, it found that "Lynch employed approximately ten people to *help him*

run CCCC as security guards, marijuana growers, and sales staff." (ER 405 (emphasis added).) It noted that defendant ran payroll, obtained business licenses, installed a security system, coordinated activities with city officials, and documented the purchases of marijuana from vendors and all sales at the store. (ER 404-406, 425; *see also* PSR ¶ 9 ("In addition to hiring employees, Lynch played a central role in the operation of the enterprise.").) It also made findings confirming the Probation Office's conclusion (and defendant's admission) that defendant had control and leadership over his employees at the CCCC. This included that defendant himself hired them, and "attempted to regulate the conduct of the CCCC's employees by not hiring felons and requiring workers to sign an Employment Agreement which included promises to abide by CCCC's conduct standard." (ER 425; *see also* ER. 405 (employees executed employment agreement and defendant ran their payroll).) The employment agreements, like all agreements at the CCCC were with defendant, the owner. (ER 405; GER 289; *see, e.g.,* GER 291, 295.) The Court also found that defendant conducted employee background checks, and worked at the store most days. (ER 405-07, 424-25.) It concluded that "Lynch did put together [the

marijuana store's] operations which had about ten employees," and noted that it was defendant who "ran the store." (ER 425.) Hence, even without defendant's admissions, this record conclusively establishes that while the district court sought to avoid application of § 3B1.1(a) on a flawed legal theory, it found facts establishing that defendant was both an organizer and a leader of five or more participants.

This record rebuts defendant's attempt on appeal to rely on isolated instances where defendant took advice from others, or allowed his employees to take the lead on certain matters, and defendant's similar attempt to expand the definition of criminal "participant" in defendant's crime to include members of the California legislature or city officials. (ARB 72-74.) First, under *Doe,* the mere fact that defendant undisputedly "set up" the marijuana store with multiple workers, as the district court found, would be enough for an organizer enhancement even if defendant had not supervised others thereafter. *Doe*, 778 F.3d at 825 (organizer need not also have hierarchical authority over others); *see Morales*, 680 Fed.Appx. at 552. In addition, there can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." USSG. § 3B1.1,

comment. (n.4); *United States v. Rivera*, 527 F.3d 891, 910 (9th Cir. 2008). Even the presence of other leaders or actors above a defendant in the criminal hierarchy presents no bar to application of an enhancement to a defendant who helped organize a crime or supervised some criminal participants. *See*, *e.g.*, *United States v. Govan*, 152 F.3d 1088, 1095-96 (9th Cir. 1998) (upholding four-level leadership enhancement where defendant, *inter alia*, recruited perpetrators for the crime, even though co-defendant "appear[ed] to have been the more dominant member of the conspiracy"); *United States v. Alonso*, 48 F.3d 1536, 1545 (9th Cir. 1995) (rejecting argument that defendant was not entitled to role enhancement "because other conspirators also exercised some degree of decision-making authority and control"). Thus, even if defendant were able to identify other individuals who at times took a supervisory role, or who may also be responsible for the activities at the CCCC, that fact would not undercut application of the role enhancement to defendant. Given this legal backdrop, and the

undisputed record of his prime role, defendant's effort to point the finger at others is irrelevant.[4]

The undisputed record and binding authority clearly demonstrate the district court's legal errors. While remand is required to correct those errors, remand should not be for further factual findings. Instead, this Court should instruct the district court to apply § 3B1.1(a) and, accordingly, sentence defendant to the five-year mandatory minimum sentence for Count One.[5]

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[4] Defendant's reliance on *United States v. Frega*, 179 F.3d 793 (9th Cir. 1999) is misplaced, as there the district court specifically found there was no leader in the conspiracy, while here the district court's findings and defendant's admissions established defendant's clear leadership and control. The district court opinion in *United States v. Scholz*, 907 F. Supp. 329, 333 (D. Nev. 1995), is also unpersuasive as defendant's CCCC was not part of a larger interstate enterprise like the marijuana operation in *Scholz*; it was the whole enterprise.

[5] As defendant acknowledges (ARB 74-75), his claim that a district court's fact finding on the safety valve or § 3B1.1 is unconstitutional under the Sixth Amendment and *Alleyne v. United States*, 133 S.Ct. 2151 (2013) has been rejected by this Court in *United States v. Lizarraga-Carrizales*, 757 F.3d 995, 997-999 (9th Cir. 2014). There is no reason to reconsider that holding, *en banc* or otherwise, as it is in accord with all six other Circuits that have considered the issue. *United States v. Leanos*, 827 F.3d 1167, 1169-70 (8th Cir. 2016) (collecting cases); *accord United States v. Caballero*, 672 Fed.Appx. 72, 75 & n.3 (2d Cir. 2016).

B. Reassignment Is Appropriate

"A remand to a different district judge is appropriate if there is a demonstration of personal bias or in unusual circumstances." *United States v. Peyton*, 353 F.3d 1080, 1091 (9th Cir. 2003) (quotation omitted), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010). The government does not contend that the district judge was biased, only that "unusual circumstances" warrant reassignment here.[6] "To determine whether unusual circumstances are present, [this Court] consider[s] the following factors: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Id.* (quotation omitted). "A finding of

[6] Because the government does not rely on a claim of bias, it is immaterial that the district court may have ruled in favor of the government or against the defendant on other trial or sentencing issues. (*See* ARB 77.)

either one of the first two factors supports remanding the resentencing to a different judge." *Id.*

The district judge in this case told the parties it knew the result it wished to get to prior to the filing of any sentencing positions. (ER 3313-14.) It repeatedly made clear during a sentencing process that stretched for months that it believed the mandatory minimum sentence was excessive and that it was trying to avoid imposing the mandatory minimum. (ER 3434, 3505 ("to be blunt, I will indicate 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."[7]); 3183 (court looking for a way to "get around" the mandatory minimum).) Then, after spending almost an additional year to fashion its ruling, it devoted seven pages of its sentencing memorandum specifically to explaining why it believed application of the mandatory minimum sentence – which would be required if the court imposed a role adjustment under USSG § 3B1.1 – was not warranted. (ER 420-26.)

[7] The government mistakenly cited this quotation as "ER 3444" in its second brief on cross-appeal.

In similar circumstances, where the district court has expressed strong views as to the appropriate (or inappropriate) punishment, this Court has repeatedly reassigned the case on remand. *See United States v. Valencia-Mendoza*, 517 Fed. Appx. 590, 591 (9th Cir. 2013) (ordering reassignment after reversing finding of district court that defendant was safety-valve eligible, where district court had indicated that imposition of mandatory minimum offended its sense of justice); *see also United States v. Nickle*, 816 F.3d 1230, 1239 (9th Cir. 2016) (remanding to a different judge to preserve the appearance of justice where it was "unlikely that the district judge would be able to put out of his mind his already-developed notions about what [the defendant's] punishment should be"); *United States v. Dunlap*, 593 Fed. Appx. 619, 621 (9th Cir. 2014) (ordering reassignment where district judge made statements indicating that he intended to impose a lenient sentence); *United States v. Murrillo*, 548 F.3d 1256, 1257 (9th Cir. 2008) (ordering reassignment where judge imposed unauthorized suspended sentence).

Defendant argues against reassignment on the ground that if this Court remands for further fact-finding on the aggravating role enhancement, as in *Washington*, the district court's extensive

knowledge of the case would be lost. (ARB 78.) However, whether further fact-finding is required or not, given the district court's history of delay and maneuvering in an effort to avoid imposing the legally mandated sentence, reassignment is strongly warranted to preserve the appearance of justice. *See United States v. Quach*, 302 F.3d 1096, 1103-04 (9th Cir. 2002) (ordering reassignment to preserve the appearance of justice where court's statements indicated "potential bias" against granting a downward departure should the government file a substantial assistance motion); *see also United States v. Li*, 548 Fed. Appx. 426 (9th Cir. 2013) (ordering reassignment where, despite determining that the defendant was eligible for safety valve relief, district court based sentence on contrary finding that defendant did not provide truthful information about his offense to government).[8]

Moreover, assuming any fact-finding on remand with respect to the application of a role enhancement, contrary to the analysis herein,

[8] Where the district court's strong beliefs about the case may have contributed to its adamancy in its erroneous rulings, this Court has found reassignment desirable despite a belief that the district court would be fair and impartial on remand. *United States v. Reyes*, 313 F.3d 1152, 1160 (9th Cir. 2002).

it would be fairly limited given the established record and defendant's admissions (and particularly given that, for example, supervision of just one other criminal participant is sufficient to defeat application of the safety valve), and thus any impact on judicial efficiency would not be "out of proportion to any gain in preserving the appearance of fairness." *Peyton*, 393 F.3d at 1091.

For these reasons, this Court should order reassignment to a different district court judge on remand.

C. Defendant's Conviction and Sentence Are Not Affected By A Congressional Appropriations Rider On Medical Marijuana

1. Procedural Background

On December 16, 2014 -- long after defendant had been convicted and sentenced, and nine months after the government had filed its second brief on cross-appeal -- the President signed into law a budget bill, which became the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130. Section 538 of that Act prohibited the use of DOJ funds to "prevent [California] from implementing [its] own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.*

§ 538, 128 Stat. 2217 (the "appropriations rider"). On December 18, 2015, the appropriations rider was re-enacted as Section 542 of the Consolidated Appropriations Act of 2016. Pub. L. No. 114-113, 129 Stat. 2242, 2332-33, § 542. ("§ 542," or the "appropriations rider"). Subsequent legislation extended the rider in "essentially the same" format through September 30, 2017. *See United States v. Kleinman*, 859 F.3d 825, 831 (9th Cir. 2017) (describing legislative history).

On February 24, 2015, defendant filed in this Court a motion for an order based on the appropriations rider -- later designated as "urgent" -- that the government cease spending funds on this case on appeal. Alternatively, defendant asked that the issue be remanded to the district court. (CTA 91, 95.) The government asked to be allowed to respond to defendant's motion as part of its final cross-appeal brief. (CTA 94, 97.)

On April 13, 2015, a motions panel of this Court denied defendant's urgent motion without prejudice to defendant renewing his arguments about the appropriations rider "in the third brief on cross-appeal." (CTA 100.) The panel denied defendant's alternative request for remand, without prejudice to defendant seeking an indicative ruling

in the district court pursuant to Fed. R. App. P. 12.1. (*Id.*) Filing multiple briefs and exhibits, defendant sought reconsideration or rehearing *en banc* on his motion, which this Court denied on June 22, 2015. (CTA 101-12.) This Court *sua sponte* granted defendant a fourth extension to file the third brief, until August 21, 2015. (CTA 112.) Defendant then obtained eight more extensions to file his final brief with repeated advisements from the Court that further extensions would be disfavored or strongly disfavored. (CTA 114, 119, 121, 123, 125, 127, 129, 133.)

On December 12, 2017, twenty months after this Court had denied defendant's "urgent" motion under the appropriations rider and referenced the indicative motion procedure provided by Fed. R. App. P. 12.1, and weeks before another filing deadline was to expire, defendant filed a motion in the district court seeking an indicative ruling for relief under the appropriations rider. (CR 453; SER 8-29.) He included over two hundred pages of exhibits. (CR 451-1 to 451-5.)

The government opposed the motion. Procedurally, it argued that the motion was untimely under Fed. R. Crim. P. 37, and that the issues in it should be raised in defendant's third cross-appeal brief, as

referenced in the motion panel's April 13, 2015 order. On the merits, it asserted that the rider did not apply to a past conviction and that defendant's admissions and the district court's rulings had already established that defendant had not complied with state medical marijuana law. (CR 458; SER 30-61.)

After defendant filed his reply, (CR 463; SER 62-78), the district court on February 6, 2017 held a hearing on the indicative motion, and refused to grant or entertain it. (CR 458; RT 2/2/17: 1-48; SER 79-127.) Instead, it chose to defer ruling on the motion under Fed. R. Crim. P. 37(a)(1) until this Court ruled on any issues on the rider, and repeatedly said that the case would proceed more quickly and efficiently if this Court addressed defendant's contentions under the rider as part of the briefing on the pending appeal. (RT 2/2/17: 29-32, 43-44, 47-48; SER 107-110, 121-22, 125-26.) As a result, it did not revisit its prior findings on defendant's lack of compliance with state law. (*See id.*) In its subsequent minute order, the court indicated that it had denied defendant's motion. (CR 466; SER 137.)

Notwithstanding this denial, and almost three years after the third cross-appeal brief was first due, defendant filed in March 2017 a

motion before this Court under Federal Rule of Appellate Procedure 12.1 (the "Rule 12.1 motion") with exhibits seeking a remand to the district court and a dismissal or an injunction against further government expenditures on the case. (CTA 137, 147.) Though styled as a "notice" of an indicative ruling under Rule 12.1, defendant included in his 67 total pages of briefing a variety of legal arguments about the rider beyond anything reached by the district court. (*See id.*)

The government opposed the motion on multiple procedural and substantive grounds. (CTA 142.) In addition to other procedural infirmities, the government asserted that there was no statutory basis for the motion given the district court's denial of defendant's Fed. R. Crim. P. 37 indicative motion, and it also asked that that any arguments concerning the rider should be raised in defendant's next brief on cross-appeal. (CTA 142 at 25-29.) The government also asserted, among other things, that the new motion was part of a series of attempts by defendant to delay completion of the briefing of the case, and requested that the Court grant defendant no further extensions on the third brief. (*Id.* at 1, 56.) Defendant then filed a thirteenth and

fourteenth request for extensions and a reply in support of his Rule 12.1 motion. (CTA 144, 147, 149.)

On June 15, 2017, a three-judge panel of this Court denied defendant's Rule 12.1 motion, "without prejudice to renewing the arguments in the third cross-appeal brief." (CTA 150 at 2.) The Court ruled that no motions for reconsideration would be entertained, that defendant's third brief was due within 30 days, and that no "further requests for extension of time will be entertained." (*Id.*)

On July 17, 2017, defendant filed an oversized third cross-appeal brief. (CTA 151-52.) Rather than setting forth arguments and requests for relief in that brief, in a one-and-a-half page introductory section, defendant cited to his briefing on his Rule 12.1 motion, and claims to renew the motion's arguments about the rider. (ARB 1-3.) Defendant referenced a new opinion by this Court on the rider decided after the Rule 12.1 motion (*id.* at 2 (citing *Kleinman*, 859 F.3d at 825)), but otherwise makes no effort to organize or set forth arguments from the prior briefing in the district court or this Court. In a footnote, defendant says that he assumes this Court had "deferr[ed] consideration" of the Rule 12.1 motion to the merits panel, and says

that he would "rewrite" his prior pleadings "into this brief" if the Court "wished." (*Id.* at 2 n.2.)

The government filed an opposition to defendant's third brief, specifically to defendant's incorporation by reference of the extensive rider motion practice. (CTA 153.) It asserted that this violated the specific orders of the two motions panels specifying that any rider arguments be in the third brief itself, as well as multiple rules of appellate procedure. (*Id.* at 4-8.) Given the three years of delay and clear violation of court rules and orders, it requested a ruling in advance of the government's fourth brief that defendant had abandoned any arguments from his prior motions on the rider, and asked for an order stating that the government need not respond. (*Id.* at 8-10.)

On August 25, 2017, the clerk of this Court issued an order striking defendant's third brief. (CTA 155.) The order noted that the motion panel's June 15, 2017 order denying defendant's Rule 12.1 motion had been "without prejudice to renewing the arguments in the third cross-appeal brief." Thus, any arguments from the motion "must be contained within the third cross-appeal brief itself." (*Id.* (citing Fed. R. App. P. 28(a)(8).) The order required defendant to file a substitute

third brief by September 1, 2017 that complied with "the requirements of Fed. R. App. P. 28(a)(2)-(8) and 9th Cir. R. 28.1(c)(3)" and further stated that any arguments not raised in the brief "may be deemed waived." (*Id.*)

The day before the substitute brief was due, defendant filed a motion requesting a further extension (his fifteenth for the third brief). (CTA 156.) In response, the clerk vacated its prior order striking defendant's third brief, deemed the brief filed, and referred to the merit's panel the government's prior request that defendant's arguments on the rider be deemed abandoned. (CTA 157.)

2. This Court Should Not Consider the Impact of the Rider Because Defendant Has Not Properly Raised It

Defendant has not properly raised claims concerning the appropriations rider in his third brief, and this Court should not consider them. After over three years to prepare, while raising numerous other issues on appeal, defendant's third brief, in a little more than a page, seeks to raise new claims concerning the appropriations rider by incorporating by reference defendant's 67 pages of briefing and 217 pages of exhibits (as well as the government's additional responsive materials) from his prior Rule 12.1 motion, which,

in turn, purported to provide notice of defendant's prior 39-pages of briefing and 250 pages of exhibits in support of his indicative motion in the district court. (ARB 1-3; *see* CTA 137, 147; CR 458, 463.)

Defendant's brief does not organize, select, or develop the numerous substantive and procedural arguments from this extensive prior motion practice, or cite to or prepare an excerpt of the relevant parts of the record. Instead, defendant asks this Court to sift through a pile of prior motion briefs and exhibits in the district court and this Court in the hope that the Court will find something in his favor. (*Id.*) This Court has repeatedly rejected such invitations and instead held that they result in abandonment of the argument at issue. *United States v. Williamson*, 439 F.3d 1125, 1138 (9th Cir. 2006) (Court will not "manufacture arguments for an appellant" who failed to present "specific, cogent argument[s] . . . especially where a host of other issues are presented for review.") (citations and internal quotation marks omitted); *United States v. Kimble*, 107 F.3d 712, 715-16 n.2 (9th Cir. 1997); *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Defendant's attempt to incorporate arguments by reference without developing them in the brief violates Federal Rule of Appellate Procedure 28(a)(8), which requires that an argument in a brief contain a party's contentions and reasons, with citations to case law and the record. Fed. R. App. P. 28(a)(8). This Court has consistently referenced this rule and its predecessors to hold that where a party's argument "was not coherently developed in [their] *briefs on appeal,* we deem it to have been abandoned." *Kimble*, 107 F.3d at 715-16 n.2 (emphasis added); *see also United States v. Velasquez-Bosque*, 601 F.3d 955, 963 n.4 (9th Cir. 2010) (declining to consider argument made in passing and not coherently developed in brief); *Williamson*, 439 F.3d at 1138 (claim not supported by argument and legal authority was waived). Nor is there any support for defendant in other appellate rules which allow incorporation by reference in cases with multiple parties where one party may "adopt by reference" a portion of another parties' brief. *See*

Fed. R. App. P. 28(i); *cf.* 9th Cir. R. 28-1(b) (barring incorporation by reference to briefs from other courts or prior appeals).[9]

Defendant's failure to set forth arguments with clarity or specificity in violation of appellate and Circuit rules is egregious in this matter because it flatly violates two prior orders by motions panels. Contrary to defendant's unsupported statement in a footnote in the third brief, in denying both defendant's 2015 and 2017 motions concerning the rider, this Court said nothing about deferring its rulings to a later merits panel. (*See* CTA 100, 150.) Instead, this Court denied defendant's motions (once also denying both rehearing and *en banc* review), and explicitly stated that defendant could renew his "arguments" from the motions "*in defendant's third cross-appeal brief*." (*Id.* (emphasis added).) As recognized by the clerk of this court, the emphasized language unambiguously references "arguments" to be made in a specific "brief" -- "defendant's third cross-appeal brief" -- not motion pleadings to be incorporated by reference without any argument,

[9] The incorporation by reference tactic employed in the third brief also circumvents brief limits imposed by Federal Rule of Appellate Procedure 28.1(e) and 9th Circuit Rules 28.1-1(b) and 32-2(a).

organization, or analysis. (*See* CTA 155 (clerk's order recognizing that panel had specified that arguments must be "in third cross-appeal brief itself").)

A defendant's refusal to provide additional briefing in order to preserve an argument despite an opportunity provided by the Court constitutes waiver, even if the issue "could arguably have some merit." *See United States v. Norales*, 597 Fed.Appx.463, 463-64 (9th Cir. 2015) (unpublished) (citing *Williamson*, 439 F.3d at 1138, to hold that defendant's decision not to amend or supplement opening brief despite opportunity provided by Court results in waiver despite support in recent case law). The case for waiver against defendant is clearer than in *Norales* because defendant here was twice instructed in the proper means to preserve his arguments, but did not comply.

Defendant's prior Rule 12.1 and Rule 37 motions also invite confusion if incorporated into his third cross-appeal brief. Significant portions of the parties' briefing on defendant's Rule 12.1 motion concerned its procedural infirmities, such as its untimeliness, and the fact that it was not supported by a district court's decision to grant or certify a "substantial question" to this court as required by Rule 12.1.

(*E.g.*, CTA 142 at 9-28; CTA 147 at 2-8, 10-13.) The third brief does not address the relevance of these issues taken out of the context from which they arose in an appellate motion. Further, defendant's primary request for relief in the former motion was for the case to be remanded to the district court under Federal Rule of Appellate Procedure 12.1 without a decision on the other issues on appeal. (*See* CTA 137 at 27.) The third brief does not explain whether defendant still seeks an immediate remand or a partial, separate adjudication of the rider issues on appeal. *See* Fed. R. App. P. 28(a)(9) (requiring brief to state "the precise relief sought."); *Indep. Towers of Wash.*, 350 F.3d at 929 (to avoid waiver issues in brief must be argued "specifically and distinctly").

In sum, despite having ample time and opportunity, and being ordered by this Court to do so, defendant has not preserved or developed his arguments on the appropriation rider by setting them forth in the third brief. By referencing the issue in the most cursory way, and relying on incorporation by reference, defendant puts the burden on the Court and the government to sift through voluminous prior briefing to make sense of potential claims on a complex issue in an

complicated procedural posture. *Id.* at 929 ("the term 'brief' in the appellate context does not mean opaque nor is it an exercise in issue spotting.") This Court should reject this improper invitation and instead find the issue abandoned and waived.

3. If This Court Does Consider the Issue, the Rider Does Not Apply

a. The Rider and Ninth Circuit law

This Court has addressed the appropriations rider's scope in four published decisions. In *Olive*, this Court held that, notwithstanding the appropriations rider, a medical marijuana business could not deduct its business expenses under the federal tax code, because the business, even if compliant with California law, was engaged in drug trafficking under federal law. *Olive*, 792 F.3d at 1149. *Olive* rejected the claim that the appropriations rider barred the government from continuing to litigate the appeal. *Id.* at 1150-51. Among other things, the Court held that the rider did not change the CSA, and that while enforcement of the tax made it "more costly to run the dispensary," it did not change whether the business was "*authorized* in the state." *Id.* at 1151 (emphasis retained).

In *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), the Court considered ten consolidated pre-conviction interlocutory appeals and petitions for writs of mandamus brought by defendants pending trial in three separate cases on marijuana-based Title 21 violations. The question presented was "whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the [DOJ] from spending funds to prevent states' implementation of their own medical marijuana laws." *McIntosh*, 833 F.3d at 1168. The Court rejected the government's contention that the appropriations rider did not apply to criminal prosecutions at all, finding that the defendants could invoke the Appropriations Clause of the Constitution to challenge their convictions under the rider, but otherwise interpreted the provision narrowly. *Id.* at 1174-75. It held that "§ 542 prohibits DOJ from spending money on actions that prevent the Medical Marijuana States giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.* at 1176. This means that DOJ is prohibited from "spending funds from relevant appropriations acts for the prosecution of individuals who

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

McIntosh equally emphasized, however, that "§ 542 does not provide immunity from prosecution for federal marijuana offenses" and that marijuana possession, distribution, and manufacture, including for medical purposes, remains prohibited under the CSA. *Id.* at 1179 n.5. Thus, defendants who violate the CSA through marijuana activity remain subject to federal prosecution under the CSA. *Id.* Section 542 only "prohibits DOJ from spending funds on certain actions." *Id.* at 1173. Second, § 542 is "temporal[ly]" limited to the term of the appropriations bill in which it was included. *Id.* at 1179 ("DOJ is currently prohibited from spending funds from specific appropriations . .. for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow."). Finally, in

ruling that § 542 extends only to those defendants in "strict" and "full" compliance with all state medical marijuana laws, the Court expressly rejected the defendants' argument that the appropriations rider be extended to include individuals not in strict compliance, but for whom there is a "reasonable debate" that they complied with state marijuana law. *Id.* at 1177.

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

United State v. Nixon, 839 F.3d 885 (9th Cir. 2016) further emphasized the limited scope of the appropriations rider. In *Nixon*, the defendant, while on probation, moved in the district court under the appropriations rider to allow him to use marijuana in compliance with California medical marijuana law. *Id.* at 887. The district court denied the motion, ruling that the appropriations rider had "no effect on the Court or the Probation Office" and federal law continued to require a prohibition on marijuana use on probation. *Id.* This Court affirmed, holding that the rider applied only to DOJ's ability "to use certain funds on particular prosecutions during a specific fiscal year" and reiterated that the CSA remained in effect nationally. *Id.* at 888.

In the most recent case, *United States v. Kleinman*, 859 F.3d 825 (9th Cir. 2017), this Court considered the appeal of a defendant who had been convicted of participation in a marijuana conspiracy involving over 1,000 kilograms, as well as other drug trafficking and money laundering counts, based on his operation of a marijuana store that he opened in 2007 or 2008. *Id.* at 830-31. Defendant was convicted and sentenced eight days prior to enactment of the rider, but sought to use it to dismiss the case or enjoin DOJ from continuing to prosecute his

case on appeal. *Id.* at 831. This Court rejected this attempt and upheld the conviction and sentence while refusing defendant's request of a remand for a "*McIntosh* hearing" in district court to determine whether the defendant fully complied with California medical marijuana law. *Id.* at 834.

Preliminarily, *Kleinman* held that the application of the rider was not barred by the federal saving statute, 1 U.S.C. § 109, because the rider "does not concern the repeal of any statute," as marijuana remains illegal under federal law. *Id.* at 832. It also ruled that principles against retroactive application of statutes did not apply because "this case refers to DOJ's litigation *on appeal*," and it only concerned future DOJ expenditures after passage of the rider. *Id.* (emphasis added); *see id.* (case involved "continued expenditures on a direct appeal after conviction.").[10] The Court ruled as a matter of law, however, that the rider "does not require a court to vacate convictions that were obtained before the rider took effect." *Id.* Even if the conviction was based on conduct "wholly compliant with state law" that fact "would *not* vacate

[10]The petitions for rehearing in *United States v. Kleinman*, C.A. No. 14-50585, are due for both parties on September 22, 2017.

that conviction." *Id.* (emphasis retained.) The Court explained that, under *McIntosh*, § 542 did not "change any substantive law; it merely placed a temporary hold on the expenditure of money for a certain purpose." Accordingly, even if a defendant had been convicted of a crime involving conduct that fully complied with state marijuana law, the rider would impose only a "temporary spending freeze" for the government's prosecution of the appeal, but "does not spoil the fruits of the prosecutorial expenditures made before § 542 took effect." *Id.* at 833; *see also id.* at 834 (the rider has "no effect on [defendant's] trial and sentencing" and the "only disability on the DOJ" would be a prohibition on defending the conviction "on appeal after § 542 took effect").

Kleinman also clarified that the rider only applies, if at all, to "a *specific charge* involving conduct that is fully compliant" with state medical marijuana laws, so that a court must engage in a count-by-count analysis "to determine which charges, if any, are restricted by § 542." *Id.* (emphasis retained). Applying that rule, the Court held that the rider did not apply to the conspiracy counts before it involving money laundering and marijuana distribution. *Id.* at 833. Even though

the conspiracy involved over 1,000 kilograms of marijuana, the Court found dispositive that, as part of the conspiracies, defendant had sold 85 kilograms of marijuana to customers outside of California. Relying on the August 2008 California Attorney General's guidelines and the California Court of Appeals decision in *People v. London*, 228 Cal.App.4th 544 (2014), the *Kleinman* Court held that these out-of-state sales to people outside any collective violated the Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA), California's medical marijuana laws, and noted further that defendant had conceded these violations in the district court. *Id.* at 833-84. Thus, the record was clear without need for a hearing that the rider would not apply to these counts. *Id.*

As to the other counts of conviction, the Court noted that it was less clear whether they involved conduct not fully compliant with state law. Nonetheless, the Court found remand on those counts for a *McIntosh* hearing unnecessary because defendant had not made any count-specific rider arguments on appeal, and changing the non-conspiracy counts would not impact the sentence. *Id.* at 834-35 & n.2.

b. Even if defendant had strictly complied with California medical marijuana law the rider would not apply

i. Application of the rider is barred by *Kleinman* and rules against retroactivity

Even if defendant could show that his criminal conduct was fully and strictly in compliance with all California medical marijuana law as required by *McIntosh,* (which, as set forth below, he cannot), the appropriation rider would still not apply or provide defendant with any of the remedies he seeks. In this case, before the enactment of the rider, the district court had already sentenced and entered judgment, and the government had noticed its cross-appeal and filed its first brief. The rider therefore does not apply, and defendant cannot use it to dismiss his conviction, avoid imprisonment, or prevent the government from continuing to defend the conviction.

Defendant attempts to use the rider to obtain dismissal of his conviction (ARB 2-3), but this Court has already flatly rejected that argument in *Kleinman*, ruling that "when a defendant's conviction was entered before § 542 became law, a determination that the charged conduct was wholly compliant with state law would *not* vacate that conviction." *Kleinman*, 859 F.3d at 822. Following *McIntosh's*

emphasis on the limited "temporal" nature of the rider's spending restrictions and the fact that the rider did not provide immunity from federal marijuana law, *Kleinman* held that any "temporal spending freeze" imposed on DOJ by the rider "does not spoil the fruits of prosecutorial expenditures made before § 542 took effect." *Kleinman*, 859 F.3d at 833.

This holding is also fatal to any claim by defendant that the appropriations rider could be used to prevent DOJ from carrying out the terms of defendant's judgment and commitment order by spending funds to imprison defendant according to the terms of that order (*see* CTA 137 at 12), an issue *Kleinman* did not address. *Kleinman*, 859 F.3d at 835 n.2. Just as vacating defendant's conviction would "spoil the fruits of prosecutorial expenditures" used to convict and sentence defendant, so too would any order preventing the terms of the conviction and sentence from being carried out according to the terms of the judgment by preventing or suspending imprisonment. *Kleinman*, 859 F.3d at 833. Importantly, not only is this conclusion determined by logical extension of the holding in *Kleinman* against vacating

convictions, but it is also required by a long-standing rule preventing the interpretation of statutes to create retroactive effects.

It is well-established that "[a]bsent clear legislative intent, commonly expressed through a retroactivity clause, a statute is not given retroactive effect." *United States v. Rewald*, 835 F.2d 215, 216 (9th Cir. 1987) (citing *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1504 (9th Cir. 1984) (collecting cases)); *see Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 (1997) ("we apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary."); *United States Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible to any other"); *Elim Chruch of God v. Harris*, 722 F.3d 1137, 1140 (9th Cir. 2006). "A statute, order, or edict 'operates retroactively' when it seeks to impose 'new legal consequences to events completed before its' announcement." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015) (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 (2001)); *accord United States v. Padilla-Diaz*, 862 F.3d 856, 863 (9th Cir. 2017).

This rule of construction is one of universal application, and not limited to retroactive applications that impair rights or impose new duties on individuals. *Hughes Aircraft Co.*, 520 U.S. at 947; *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994). This Court has applied it against application of laws that may potentially benefit criminal defendants. *See Rewald*, 835 F.2d at 216. In *Rewald*, the Court employed the rule to hold that a new sentencing act would not apply to criminal defendants sentenced prior to its effective date, but still on appeal, if the statute's text were silent or ambiguous as to its retroactivity. *Id.*

The rule against retroactivity applies here to bar any remedy for defendant not already foreclosed by *Kleinman*. There is no mention in the appropriations rider's text of past prosecutions or convictions, it says nothing about cases or spending prior to its enactment, and it lacks a retroactivity clause. The rule thus applies to prevent interpretation of the rider that would have retroactive effects. *Rewald*, 835 F.2d at 216. Because the rider was enacted after conviction, sentence and the commencement of this appeal, any application of the rider in this case, would have an impermissible retroactive effect and violate the anti-

retroactivity rule. There would be impermissible "new legal consequences" to the conviction were the rider used to prevent funds from being used to defend the conviction or carry it out.

Kleinman ruled that, in the case before it, it would not be a retroactive application of the rider to apply it to "continued expenditures on direct appeal after conviction." *Kleinman*, 859 F.3d at 832. The government preserves its view that this ruling, as applied to the facts of *Kleinman*, is a mistaken application of the retroactivity law set forth above. However, *Kleinman*, also should be distinguished from this case on that point. In ruling that the rider could not be applied to upset the past conviction, but potentially could be used to suspend DOJ funding on direct appeal, the *Kleinman* Court noted that the rider was passed after the conviction and sentence but "before the appeal." *Id.* at 833; *see id.* at 831 (rider passed eight days after sentencing hearing in district court). By contrast, in this case, not only had the parties noticed their appeals prior to enactment of § 542, but the government had filed its brief defending the conviction and appealing the sentence. Thus, unlike in *Kleinman,* a suspension of the government's ability to continue its appeal would have a retroactive effect, and impermissibly

"spoil the fruits of prosecutorial expenditures made before § 542 took effect." *Id.*

Such an order would also improperly impact the Court itself when the rider has only has only be read to apply to DOJ. *Nixon*, 839 F.3d at 887-88. There is no hint in the appropriations rider or this Court's decisions that it could change alter this Court's power to review a duly entered judgment, and to affirm that judgment if otherwise free from error. Moreover, no case has imposed such a litigation restriction under the rider. This Court has twice rejected enjoining government spending in this case after lengthy motions, exhibits, and a request rehearing *en banc* by defendant (*see* CTA 100-12), and *Olive* specifically similarly rejected such a restriction. *Olive*, 792 F.3d at 1150-51. Further, *McIntosh* recognized the government's right to represent its interests in proceedings in which § 542 challenges are raised, including to litigate whether defendants have strictly complied with state medical marijuana law. *McIntosh*, 833 F.3d at 1179.

ii. Application of the rider is barred by 1 U.S.C. § 109

The government preserves its alternative legal argument, rejected generally in *Kleinman*, that application of the rider to the case of any

criminal defendant who incurred criminal liability by committing federal marijuana crimes prior to the enactment of the rider is barred by the general savings statute, 1 U.S.C. § 109. That law states that absent an express contrary provision in the repealing law itself, "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under the statute, . . . and such statute shall be treated as remaining in force for the purpose of sustaining *any proper action or prosecution*." 1 U.S.C. § 109 (emphasis added).

The Supreme Court has held that this statute creates a "demanding interpretive requirement" that a new statute reducing criminal liability be applied only prospectively to new criminal conduct after the date of enactment unless retroactivity is expressly stated in the statute or manifest by "necessary implication." *Dorsey v. United States*, 132 S.Ct 2321, 2331 (2012). It applies to all cases based on conduct prior to the new law's enactment including those pending on appeal at the time of enactment. *Warden v. Marrero*, 417 U.S. 653, 660 (1974) (statute abrogated the common law presumption that criminal statute's repeal abated prosecutions "which had not reached final

disposition in the highest court"); see *Dorsey*, 132 S.Ct. at 2332 (statute applies to "pre-Act offenders"). The statute's rule against retroactivity has been applied "broadly in criminal and civil contexts" such as to terms of parole, civil forfeitures, and regulations. *United States v. Avila-Anguiano*, 609 F.3d 1046, 1050-51 (9th Cir. 2011) (collecting cases).

Kleinman stated that this savings statute does not apply to § 542 because the rider "did not concern the repeal of any statute," and marijuana remains illegal under federal law." *Kleinman*, 859 F.3d at 832. However, this narrow construction of the savings statute and the reasoning supporting it are both contradicted by Supreme Court precedent. The saving statute applies broadly to all legislation which diminishes criminal prosecutions or punishments, and is not limited to formal repeals. "Case law makes clear that 'repeal' applies when a new statute simply diminishes the penalties that the older statute set forth." *Dorsey*, 132 S. Ct. 2321, 2330-31; *see also Marrero*, 417 U.S. at 660 (§ 109 applies when new law results in diminishment of penalty, forfeiture or liability). In *Marrero*, the Supreme Court specifically

rejected that idea that it applied only to "unequivocal statutory repeals." *Id.* at 660.

This Court was even more expansive in *United States v. Van Den Berg*, 5 F.3d 439 (9th Cir. 1993), a case where the government conceded that the law at issue had not been "repealed." *Id.* 442 n. 4. After examining the purpose of the savings statute since its enactment in 1871, this Court concluded that "Congress intended to enact an all-encompassing statute." *Id.* at 444. *Van Den Berg* ruled that § 109 applied to alterations in statutes that were permanent, temporary, or "indefinite," and also held that Congress intended "to subject the General Savings Statute to all legislation that become inoperative upon the occurrence of *any legislatively established condition*, whether the passage of time or otherwise." *Id.* (emphasis added); *accord United States v. Avila-Anguiano*, 609 F.3d 1046, 1050 (9th Cir. 2011). Accordingly, the saving statute has been applied broadly, including in instances where the underlying criminal statute was not repealed, but where leniency was granted through other means. *E.g., Van Den Berg*, 5 F.3d at 439 (law changed by Presidential executive order ending sanctions on foreign country); *Martin v. United States*, 989 F.2d 271,

274 (8th Cir. 1993) (change in definition of penalty provision creating greater leniency in potential punishment).

Kleinman's reasoning that the rider did not reduce a defendant's "liability" because the rider "did not change the legality of marijuana under federal law," but merely enjoins certain expenditures while it is in effect is also contrary to precedent. *Kleinman*, 859 F.3d at 832. Legislative action that allows a punishment to be carried out more leniently is sufficient to activate § 109 even if the underlying criminal conduct remains unlawful. *See Marrero*, 417 U.S. at 661-64. In *Marrero,* § 109 applied to bar a new law providing parole eligibility even though it was uncertain whether defendant would be given parole or less prison time, and the dissenting judges pointed out the defendant "is still fully subject to the service of his sentence." *Id.* at 666-67 (Marshal, J., dissenting). By focusing on the continued existence of criminal liability for the defendant, and not considering the potential diminishment of a punishment, *Kleinman* essentially followed the reasoning of the dissent in *Marrero*.

Here, defendant incurred his "liability" within the meaning of § 109 well before the enactment of the appropriations rider when he

committed his crimes in violation of the CSA. *See Dorsey*, 132 S.Ct. at 2331 (liability incurred when offender "commits the underlying conduct that makes the offender liable"). At minimum, by seeking dismissal of his already-established judgment – a remedy already foreclosed by *Kleinman* – or preventing the expenditure of funds for his imprisonment through the rider, defendant is clearly attempting to use a subsequent legislative enactment to remove or reduce a previously imposed "penalty" or "liability." This is impermissible under § 109. Indeed, in his motions defendant argued that the government's pursuit of its cross-appeal constitutes the application of a "punishment" and is part of a "prosecution" (CTA 137 at 17-18) further demonstrating that this case is covered by § 109 which covers all punishments and specifically references "sustaining . . . prosecutions" after legislative actions. 1 U.S.C. § 109.

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

i. Defendant bears the burden of showing strict compliance

Should this Court reach the issue, the burden of showing strict compliance with state marijuana law under the appropriations rider

rests with defendant. This is apparent from: (1) the plain language of the statute that, unlike other laws, does not put the burden on the government;[11] (2) § 542 does not alter the elements of a CSA offense or provide for an affirmative defense that negates any particular element[12]; (3) defendant is the moving party, seeking injunctive and associated relief,[13] and (4) defendant is attempting to thwart his lawful conviction and sentence on a ground unrelated to his guilt or innocence

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[11] *Contrast Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 426 (2006) (Religious Freedom Restoration Act explicitly places burden on government to demonstrate that prohibiting use of controlled substance in religious ceremony represents the least restrictive means of advancing a compelling government interest); 42 U.S.C. § 2000bb-1

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

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

(and, indeed, unrelated to any defect in the proceedings leading to his conviction and sentence).[14]

ii. Defendant cannot show strict compliance

(A) California medical marijuana law

Under California law, two state statutes provide limited defenses for certain individuals who possess or sell marijuana for legitimate medical purposes. The CUA, California Health & Safety Code 11362.5, provides that the laws against possession and cultivation of marijuana "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." *People v. Hochanadel*, 176 Cal.App.4th 997, 1007 (2009). The CUA defines a "primary caregiver" as the individual who "has

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

consistently assumed responsibility for the housing, health, or safety of that person." *Id.* As many courts have observed, the defense in the CUA is quite limited. *See, e.g., People v. Mentch*, 45 Cal.4th 274, 286 n.7 ("The [CUA] is a narrow measure with narrow ends."); *People v. Mitchell*, 225 Cal.App.4th 1189, 1203 (2013) (the CUA "was not intended to decriminalize marijuana on a wholesale basis nor eviscerate this state's marijuana laws").

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

As *Hochanadel* observed, storefront marijuana stores like defendant's cannot qualify as a primary caregiver:

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

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

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

In August 2008, the California Attorney General promulgated guidelines for implementing the CUA and MMPA ("Cal. A.G. Guidelines," GER 310-20), including setting forth requirements for valid collectives or cooperatives under the MPAA, which have been consistently adopted by California courts, and this Court, in interpreting the meaning of California's two medical marijuana statutes. *E.g. London*, 228 Cal.App.4th at 554; *see United States v. Kleinman*, 859 F.3d 825, 833 (9th Cir. 2017) (applying Cal. A.G. Guidelines). Under these guidelines, as later adopted by California courts, lawful cooperatives must be nonprofits, distribution and sales to nonmembers is prohibited, and cooperatives may acquire marijuana only from their constituent members. *Hochanadel*, 176 Cal.App.4th at 1010.

(B) Defendant's admissions and the district court's findings

At sentencing, the government asserted that in addition to violating federal law, defendant's criminal activity was at all times

violating California marijuana law. (GER 488-502.) Not only was defendant not a primary caregiver, as he had always asserted while operating his store (which included "Caregiver" in its name), but also defendant's CCCC was not a collective or cooperative under the MMPA. (GER 488-94.) Rather than being organized as a non-profit with joint ownership, as required by California case law and the Cal. A.G. Guidelines, the CCCC was a sole proprietorship. (GER 492-94; *see also* GER 409 ¶ 31 (defendant's admission that business was sole proprietorship).) The government produced evidence showing that defendant did not even purport to run a collective or cooperative, or tried to be anything other than a primary caregiver, which he plainly was not. (GER 248, 288-97 (forms), GER 409 ¶ 31 (defendant considered himself a "primary caregiver"), 492-94 (cataloguing evidence).) The government also set forth evidence, including admissions through counsel by defendant's own financial expert, that defendant operated a for-profit enterprise, also contrary to the MMPA. (GER 164 ¶ 3, 177-79, 250 ¶ 6, 256 ¶ 4, 324-28, 493.)

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

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

(CR 255; GER 545 (emphasis added).) Defendant never altered this position prior to judgment. Rather, he argued that that the Cal. A.G. Guidelines were flawed, and that he qualified as a primary caregiver under the primary caregiver law of the CUA set forth under the California case *People ex rel. Lungren v. Peron*, 59 Cal.App.4th 1383 (1997). (*Id.*)

During its four sentencing hearings, the district court also considered the opinions of a purported expert on state marijuana law, Joseph Elford.[15] Elford submitted a declaration to the district court,

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

relying heavily on the Cal. A.G. Guidelines, opining that defendant's CCCC could claim protection as a collective/cooperative under MMPA. (CR 279; SER 1-7.) The district court permitted Elford to argue the point at sentencing. (RT 4/23/09: 76-84; ER 3477-85). After Elford set forth in detail the theory that the CCCC was a collective/cooperative under the MMPA, the Court interrupted:

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

(RT 4/23/09: 81; ER 3482). Elford argued that defendant's customers were "patients" but the Court replied: "Well, no. There is no indication that they were members of a collective." (RT 4/23/09: 81-82; ER 3482-83.) After further discussion, the Court indicated that it understood Elford's position and would look at law he had cited. (RT 4/23/09: 83-84; ER 3483-84.); *see also* (RT 4/23/09: 7-8; ER 3408-09 (Court acknowledges that it had read Elford's declaration but did not believe it agreed with it).)

In its 41-page sentencing memorandum, the district court concluded that the government had "correctly argu[ed]" that

defendant's marijuana store "was *not* operated in conformity with California state law." (ER 423-24 n. 25 (emphasis added).) The court said that "medical marijuana distribution operations (such as the CCCC)" could not show that they fall within the definition of "primary caregiver" under either the CUA or the MMPA. (*Id.*) The court reasoned that, among other things, California case law, starting as early as *Peron* in 1997, and confirmed by the California Supreme Court later in *Mentch*, had held that a primary caregiver must prove that he or she consistently provided care independent of, and prior to, the provision of marijuana. (*Id.*)

Although the correct requirements for valid primary caregiver status had been set forth as early as *Peron* in 1997, the district court suggested that due to the "somewhat unsettled" nature of the law at the time of defendant's criminal conduct, defendant "could have reasonably believed" that the CCCC "complied with California law because it was acting in the capacity of a primary caregiver." (*Id.*) The court also explained the MMPA in detail, including quoting Cal H&S Code § 11362.775, the Cal. A.G. Guidelines, and case law for the proposition that California law provides "for properly organized" collectives and

cooperatives "that dispense medical marijuana though a storefront." (ER 397-99.) Nonetheless, the court agreed with the government in concluding that defendant had not complied with state marijuana law. (ER 423 n. 25.)

On July 9, 2012, soon after defendant had filed his first brief in this Court, Elford filed an amicus brief on defendant's behalf reprising the arguments rejected by the district court at sentencing. (CTA 42 at 13-14.) The amicus brief relied again heavily on the 2008 Cal. A.G. Guidelines on medical marijuana, and cases such as *Hochanadel*, to suggest that defendant had run a collective or cooperative under the MMPA, or at least defendant "reasonably believed this was so." (*Id.* (at 13-14); *see id.* at 8, 9, 12 (citing and relying on Cal. A.G. Guidelines).)

In his indicative motion seeking relief under the rider, defendant conceded that the district court had ruled that defendant had not complied with California marijuana law, but reversed his position from sentencing and claimed that he had complied with state law not because he was a primary caregiver, but because his CCCC had, after all, been a collective or cooperative under the MMPA. (*See* SER 23-25.) In support, defendant expressly adopted Elford's amicus brief, which he

attached as an exhibit, but did not mention the district court's specific findings rejecting Elford's theory at sentencing. (*See id.* & CR 453-2 (adopting amicus brief, and attaching it as exhibit to defendant's indicative motion).) Defendant also twice urged the district court to decide its motion to apply the rider without further factual development or evidentiary proceedings, because the record was already "well-developed." (SER 18, 28.) In later briefing, defendant further modified his position, relying on case law interpreting the MMPA and CUA to purportedly show that he ran a collective under state law, but insisting that violations of the Cal. A.G. Guidelines were irrelevant because the Guidelines were promulgated after his criminal conduct. (*See* SER 75; CTA 137 at 18-20.)

(C) The record conclusively demonstrates that defendant did not strictly comply with California medical marijuana law

As in *Kleinman*, the district court record is conclusive that defendant's criminal conduct did not fully and strictly comply with all California medical marijuana laws, so this Court need not remand for a further hearing on that issue. *Kleinman*, 859 F.3d at 833-34. The district court's finding at sentencing that defendant did not comply with

state marijuana law, without resort to defendant's burden or the heightened standard of "strict" and "full" compliance under *McIntosh*, precludes application of § 542. *McIntosh*, 833 F.3d at 1177-78. That the court suggested that defendant "could have reasonably believed" he was complying with state law as a primary caregiver is irrelevant to analysis of the appropriations rider. *McIntosh* specifically restricted the scope of § 542 to those in actual strict state law compliance, rejecting that the provision could apply to those for whom there was a "reasonable debate" about their compliance. *Id*. at 1177.

As in *Kleinman*, defendant in this case has made "only global attacks on his conviction and sentence" rather than any directed towards specific counts, so the district court's finding prevents application of the rider as to any count. *Kleinman*, 859 F.3d at 825. In any event, all Counts in the indictment involve marijuana distribution from defendant's CCCC store, so the district court's findings of non-compliance with state law covers all five counts.[16]

[16] Count One involved the broader marijuana conspiracy including defendant's operations of the CCCC, Counts Two and Three involved sales by defendant to CCCC customers and employees who were under 21, Court Four involved plants and marijuana possessed at the CCCC,

To avoid the impact of this dispositive finding, defendant has reversed his position from sentencing that he "does not dispute the government's assertion that he made no attempt to operate a classic collective" (GER 545), and argued in his Rule 12.1 motion that he had complied with state law not because he was a primary caregiver under the CUA (as claimed in the district court), but because his CCCC had, after all, been a collective or cooperative under the MMPA. This contradictory argument is both waived and barred by the doctrine of judicial estoppel. *Marx v. Loral Corp.*, 87 F.3d 1049, 1056 (9th Cir. 1996) (party waived argument by taking directly contradictory position; finding "about-face, at best, inventive" and barring revised theory), *overruled on other grounds by Lee v. Maricopa County*, 693 F.3d 893, 925-28 (9th Cir. 2010) (*en banc*); *see also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (applying judicial estoppel to bar party from advancing inconsistent position; litigants may not "tak[e] inconsistent positions" and "play[] fast and loose with courts"); *Hefland v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) (applying judicial

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and Court Five alleged that the CCCC was a drug-involved premises. (ER 437-44; *see* PSR ¶¶ 1-5, 39-40, 50-52, 59.)

estoppel to inconsistent attorney arguments regarding party's intent, holding that doctrine applies both to factual and legal assertions).

At minimum, defendant's admissions in district court fully support the district court's finding that defendant failed to comply with California law. The district court was also clearly familiar with the MMPA on which defendant now relies. It explained that statute at length and expressly noted that the MMPA provides "for properly organized" collectives and cooperatives "that dispense medical marijuana through a storefront," yet nonetheless found defendant did not comply with state law. (ER 397-99, 423 n.25.) The district court was also presented with and flatly rejected Elford's collective/cooperative theories later adopted by defendant. In response, the court specifically stated that the collective theory "doesn't fit Mr. Lynch's operation," that "there wasn't a group. It was operated by [Lynch]," that the CCCC was selling "to people who were not part of the collective," and "[t]here is no indication that [the customers] were members of a collective." (RT 4/23/09: 81-82; ER 4382-83.) Thus, the district court's findings that defendant did not comply with state law were purposeful, consistent, and made with clear knowledge of the

relevant legal background. This Court should not disturb these findings on appeal.

Further, substantial evidence in the record bolsters the district court's findings (and defendant's prior admission) that defendant did not run a collective or cooperative under the MMPA. First, defendant directly admitted that he did not even attempt to organize or run his sole proprietorship as a collective or cooperative. (GER 409 ¶ 31); *see Hochanadel*, 176 Cal.App.4th at 1010 ("collective" jointly owned and operated). Second, as the court noted at sentencing, and as proven in his customer forms and other evidence, the vast majority of defendant's customers designated defendant as a primary caregiver, but had no relationship with his store other than as marijuana purchasers. (*E.g.*, GER 248 ¶ 2, 250-51, 288-97; ER 423 n.25); *see Hochanadel*, 176 Cal.App.4th at 1018 (where purchasers merely required to fill out primary caregiver form with no evidence of other relationship with collective/cooperative "strong indication of unlawful activity"). There was no evidence, for example, that defendant shared financial information with customers, as required by lawful

collectives/cooperatives. *See People v. Solis*,, 217 Cal.App.4th 51, 58-59; *People v. Jackson*, 210 Cal.App.4th 525, 539 (2010).

Third, under California law, a valid collective/cooperative under the MMPA must be a "closed-circuit" that does not involve purchases or sales of marijuana with non-members. *London*, 228 Cal.App.4th at 555; *Solis*, 217 Cal.App.4th at 59-60 (in violation of MMPA defendant made purchases of marijuana from two vendors without membership records who provided false names); *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal.App.4th 747-48 (2010). Yet, here, defendant admitted in his safety valve interview with the government (a transcript of which was made part of the record at sentencing) that he stocked his store in part with marijuana he purchased from non-member stores in Oakland. (CR 293, 462; SER 144-47.) Additionally, he allowed an employee to make multiple trips to Northern California to buy marijuana for the CCCC from non-member vendors not listed in any store record. (SER 144, 146.) Even if these purchases were only a small portion of the overall marijuana distributed at defendant's store, that is enough to show a lack of "strict" and "full" compliance with state marijuana, as required for application of the appropriations rider. *Kleinman*, 859 F.3d at 833

(in conspiracy involving over 1,000 kilograms, admitted sales of only 85 kilograms in violation of California marijuana law show defendant is not entitled to a *McIntosh* hearing or the "benefits of § 542.").

Fourth, contrary to the MMPA, defendant made no effort to set up or run his sole proprietorship as a non-profit enterprise. *See* Cal. Health & Safety Code § 11362.765 (MMPA does not permit for-profit marijuana activity); *London*, 228 Cal.App.4th at 554, 566 (no MMPA defense instruction where defendant did not register as non-profit and insufficient proof of non-profit sales); *Mitchell*, 225 Cal.App.4th at 1193, 1207-08 (MMPA collective defense inapplicable for grower of marijuana for purported collective where marijuana not grown on non-profit basis even though neither grower or collective made money). In addition to the evidence at sentencing from defendant's financial expert and other sources, that defendant sold at a profit (GER 164 ¶ 3, 177-79, 250 ¶ 6, 256 ¶ 4, 324-28, 493.), defendant admitted that he sold marijuana at a market price, rather than an amount solely to cover costs and expenses. (SER 157-58.) This also violates the MMPA. *See Hochanadel*, 176 Cal.App.4th at 1010-11 (any monetary "reimbursements" from members of a collective/cooperative "should only be amount necessary to cover

overhead costs and operating expenses."); *accord London*, 228 Cal.App.4th at 566; *Jackson*, 210 Cal.App.4th at 535-536.

Defendant also admitted to taking $3,500 every two weeks out of his store's revenues which he used to pay personal expenses, including his mortgage and personal debts. He typically also took an additional sum to support a software business he owned as a sole proprietorship prior to starting the CCCC. (SER. 153-55, 156.) On one occasion, defendant took $10,000 out of the CCCC to pay down a prior debt he had incurred on this software business. (SER 154-55) This unfettered salary-taking further shows that defendant did not operate a valid cooperative/collective under the MMPA. *London*, 228 Cal.App.4th at 565-66; *Solis*, 217 Cal.App.4th at 59-60 (no valid MMPA defense for defendant running 1,700-member dispensary who took payment to himself of annual salary as "reasonable compensation" unaccompanied by financial accountability to member/customers or effort to match compensation to specific store expenditures); *compare People v. Holistic Health*, 213 Cal.App.4th 1029, 1033-34, 1039-41 (2013) (lawful MMPA cooperative, where, among other things, store organized as non-profit, including articles of incorporation, all money received went back to

cooperative as confirmed by tax returns, and store never had more than three pounds of marijuana on premises). In sum, the record overwhelmingly rebuts defendant's changed theory of state law compliance and supports the district court's contrary finding.

Under *Kleinman*, the illegal activities of defendant's employees that were charged as part of the marijuana conspiracy in the indictment can also be used to defeat reliance on the rider. Although *Kleinman* did not specifically say that the conduct of co-conspirators can defeat a defendant's reliance on the § 542, the conclusion follows from its holding that § 542 only prohibits expenditure of DOJ funds in connection with a "*specific charge*" and requiring a count-by-count analysis of whether the conduct in a count "wholly" complied with state law. *See Kleinman*, 859 F.3d at 832 (emphasis retained). It is also a logical application of the rider to prevent conspiracies that include both compliant and non-compliant behavior from avoiding investigation and prosecution. Here, among other events, it is undisputed that, as charged as an overt act in the indictment, that the security chief that defendant hired at the CCCC, Abraham Baxter, sold marijuana outside the CCCC to law enforcement outside any purported compliance with California law.

(*See* PSR ¶ 24-25; ER 407, 442 ¶¶ 17-18 (indictment).) Even though the district court found insufficient evidence at sentencing that defendant was aware of this transaction (ER 407), Baxter's actions further demonstrate that the conduct charged in Count One was not wholly compliant with state marijuana law, as required by *Kleinman*.

After adopting arguments relying heavily on the Cal. A.G. Guidelines in his indicative motion to the district court (CTA 42 at 8, 9, 12-14; SER 22-25), defendant's final gambit in his later pleadings is to suggest that they not be relied on because they were promulgated after his criminal conduct. First, this argument should also be rejected on waiver and estoppel grounds given defendant's reliance on the same guidelines on the same issue in this litigation. Second, the argument is barred by *McIntosh*, which emphasized that a defendant seeking protection under the rider must show "strict compliance" so that his conduct was "completely" authorized by "all relevant conditions imposed by state law," and further noted that the broad definition of "law" under the rider included "sets of rules," as well as "regulations" and "administrative decisions." *McIntosh*, 833 F.3d at 1177, 1778-79. By not complying with the Cal. A.G. Guidelines, defendant did not strictly

and completely comply with "all" state laws. Indeed, this Court in *Kleinman* specifically relied, in part, on the Cal. A.G. Guidelines to conclude that defendant before had not wholly complied with California law, even though the conduct at issue took place in 2007 and 2008, and the A.G. Guidelines were not issued until August, 2008. *See Kleinman*, 859 F.3d at 833 (citing Cal. A.G. Guidelines).

Finally, and obviously, defendant did not just violate the Cal. A.G. Guidelines, he violated the MMPA statute itself, as the statute has been interpreted by case law. The Cal. A.G. Guidelines -- along with the cases cited above -- merely interpret the MMPA, which was existing at all relevant times of defendant's criminal conduct. *See London*, 228 Cal.App.4th at 554. Indeed, nearly all the California cases cited by defendant in his Rule 12.1 motion rely and adopt these guidelines in their interpretation of the MMPA, and none rejects them. *See People v. Anderson*, 232 Cal.App.4th at 1277-78 (2015); *London;* 228 Cal.App.4th at 554-56; *People v. Colvin*, 203 Cal.App.4th 1029, 1040-41 (2012); *Hochanadel*, 176 Cal.App.4th at 1009-10. Unlike statutes, case law interpreting statutes apply retrospectively. *E.g.*, *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982). Thus, defendant cannot

escape the import of his failure to comply with the MMPA through his revised, contradictory theory, and his claims under the rider must fail.

III

CONCLUSION

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

DATED: September 22, 2017

Respectfully submitted,

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STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6, that *United States v. Kleinman*, C.A. No. 14-50585, raises issues closely related to those at issue in this appeal.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 10-50219,10-502

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant: /s/ David Kowal

Date: Sep 22, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

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

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Sep 22, 2017 .

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.

Signature (use "s/" format) /s/ David Kowal

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)