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March 28, 2018

Molly C. Dwyer
Clerk, Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States v. Charles C. Lynch*, CA Nos. 10-50219, 10-50264
Scheduled for Argument: April 13, 2018, Pasadena, California

Dear Ms. Dwyer:

Defendant-Appellant/Cross-Appellee Lynch submits this letter pursuant to Federal Rule of Appellate Procedure 28(j), advising the Court of pertinent new authority.

First, on March 23, the President once again signed into law a budget bill containing the appropriations rider at issue in this case. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-____, Div. B, § 538, ____ Stat. ____, ____, 2017 CONG US HR 1625 (Westlaw); 2018 WL 1444598 (Mar. 23, 2018) (indicating presidential signing). Congress included the rider in the bill over the Department of Justice’s express objection. (*See* attached letter.) Without interruption, Congress now has prohibited the DOJ from spending funds on medical marijuana prosecutions from December 2014, through September 30, 2018.

Second, after Lynch filed his final brief, two courts in this Circuit granted relief to defendants based on the appropriations rider.

In *United States v. Pisarski*, 274 F. Supp. 3d 1032 (N.D. Cal. 2017), the court granted defendants’ motion to enjoin their federal marijuana prosecutions following a *McIntosh* hearing.

In *United States v. Firestack-Harvey*, during appeal from defendants’ federal marijuana convictions, the government “agree[d] that, in light of this Court’s decisions in *United States v. Kleinman*, 859 F.3d 825 (9th Cir. 2017), and *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), it [would] not pursue th[e] prosecution further and agree[d] that on remand to the district court” it would move to dismiss the indictment. Motion for Order of Dismissal Without Prejudice, *United States v. Firestack-Harvey*, No. 13-CR-24-TOR (E.D. Wa. Dec. 29, 2017),

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ECF No. 828, at 6 n.4. Although the government did not concede that dismissal was required, it nonetheless sought that remedy based on “the fact that th[e] matter ha[d] been pending since 2013,” *id.* at 7, and the intervening Circuit precedent which “provide[d] direction . . . as to how to proceed with marijuana prosecutions when the conduct may, or may not, be in compliance with state medical marijuana statutes,” *id.* at 6. The district court granted the government’s motion, and vacated the judgments. *See id.*, ECF No. 831, at 5 (Order Dismissing Superseding Indictment Without Prejudice).

Sincerely,

/s Alexandra W. Yates

Alexandra W. Yates
Deputy Federal Public Defender

encl.



Office of the Attorney General

Washington, D. C. 20530

May 1, 2017

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
Washington, D.C. 20510

The Honorable Charles Schumer
Minority Leader
U.S. Senate
Washington, D.C. 20510

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

Re: Department of Justice Appropriations

Dear Senators McConnell and Schumer, Speaker Ryan, and Representative Pelosi:

I write to renew the Department of Justice's opposition to the inclusion of language in any appropriations legislation that would prohibit the use of Department of Justice funds or in any way inhibit its authority to enforce the Controlled Substances Act (CSA).

As you know, the most recent continuing resolution contained a rider that restricts the Department from using appropriated funds to prevent certain states "from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana," even though marijuana remains unlawful under the Controlled Substances Act. *See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, § 101, 130 Stat. 1005, 1006 (2016) (extending 2016 Consolidated Appropriations Act).*

Last year, and over the Department's objection, the U.S. Court of Appeals for the Ninth Circuit interpreted this provision broadly to apply both to Department actions that prevent states from implementing their laws regarding medical marijuana and to Department prosecutions of certain individuals and organizations that operate under those laws. *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). The court held that the Department may not prosecute violations of the CSA with respect to marijuana unless a court concludes that the individuals or organizations are not in compliance with state medical marijuana law. As a result, in the Ninth Circuit, many individuals and organizations that are operating in violation of the CSA and causing harm in their communities may invoke the rider to thwart prosecution.

I believe it would be unwise for Congress to restrict the discretion of the Department to fund particular prosecutions, particularly in the midst of an historic drug epidemic and potentially long-term uptick in violent crime. The Department must be in a position to use all laws available to combat the transnational drug organizations and dangerous drug traffickers who threaten American lives.

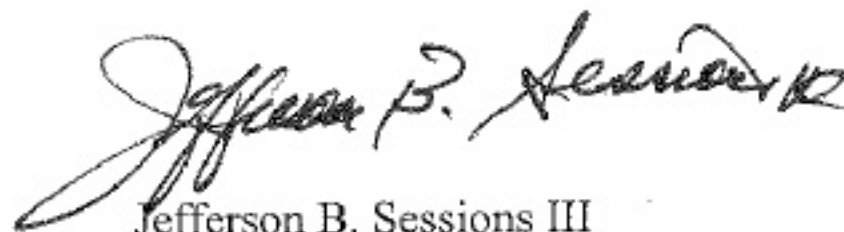
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Drug traffickers already cultivate and distribute marijuana inside the United States under the guise of state medical marijuana laws. In particular, Cuban, Asian, Caucasian, and Eurasian criminal organizations have established marijuana operations in state-approved marijuana markets. *E.g.*, U.S. Dep't of Justice & Drug Enforcement Administration, *National Drug Threat Assessment* 116-17 (2016). The individuals in these organizations often find a place for themselves within state regulatory systems. For example, just this past month in Colorado, state authorities allege that an individual who held an active Colorado license for operating a medical marijuana business was the ringleader of a criminal organization that also shipped marijuana out of state. *See* Jesse Paul, *Eight of 16 People Indicted in Colorado Marijuana Trafficking Operation Listed as Having State Pot Licenses*, *Denver Post* (Mar. 24, 2017).

Smoking marijuana, in addition, has significant negative health effects. According to the National Institute on Drug Abuse, marijuana use is linked to an increased risk of psychiatric disorders such as psychosis, respiratory ailments such as lung infections, cognitive impairments such as IQ loss, and substance use disorder and addiction. NIDA, *Drug Facts on Marijuana* (Feb. 2017). One recent study conducted in part by researchers at Duke University showed, for example, that people who started smoking marijuana frequently in their teens lost an average of eight IQ points by middle age. *Id.* It is thus unsurprising that in the last administration both the Department of Health and Human Services and the DEA concluded that "marijuana has a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision." Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688, 53,689 (Aug. 12, 2016).

For these reasons, I respectfully request that you oppose the inclusion of such language in Department appropriations. Please do not hesitate to contact me if you have any questions.

Sincerely,



Jefferson B. Sessions III
Attorney General

CC: The Honorable Richard Shelby, Chairman, Senate Subcommittee on Commerce, Justice, Science, and Related Agencies
The Honorable Jeanne Shaheen, Ranking Member, Senate Subcommittee on Commerce, Justice, Science, and Related Agencies
The Honorable John Culberson, Chairman, House Subcommittee on Commerce, Justice, Science, and Related Agencies
The Honorable Jose Serrano, Ranking Member, House Subcommittee on Commerce, Justice, Science, and Related Agencies

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CC: The Honorable Thad Cochran, Chairman, Senate Committee on Appropriations
The Honorable Patrick Leahy, Vice Chairman, Senate Committee on Appropriations
The Honorable Rodney P. Frelinghuysen, Chairman, House of Representatives
Committee on Appropriations
The Honorable Nita M. Lowey, Ranking Member, House of Representatives Committee
on Appropriations