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March 29, 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.

Recently, this Court withdrew its opinion in *United States v. Kleinman*, 859 F.3d 825 (9th Cir. 2017), and replaced it with a revised decision, *United States v. Kleinman*, 880 F.3d 1020 (9th Cir. 2018).

*Kleinman*'s discussion of the appropriations rider appears unchanged. *See id.* at 1027-30. And the Court still holds that it is error—though not structural—when a court gives an anti-nullification instruction similar to the one in Lynch's case. *See id.* at 1031-34.[1] But the Court now applies the *Chapman* harmless-error test to determine whether such error is reversible. *See id.* at 1034-36 (citing *Chapman v. California*, 386 U.S. 18 (1967)). The question thus becomes "whether the Government has proved beyond a reasonable doubt that the district court's erroneous . . . instruction, which implied that jurors could face a legal consequence for nullification, did not contribute to the guilty verdict." *Id.* at 1035.

Initially, Lynch notes the government had the opportunity to prove harmless error in its Second Cross-Appeal Brief, but chose not to, and either has waived the argument or not met its burden. *See United States v. McEnry*, 659 F.3d 893, 902 & n.16 (9th Cir. 2011).

[1] Lynch maintains that *Kleinman* was wrongly decided on the structural-error point.

Further, the factors demonstrating harmlessness in *Kleinman* are not present here. Whereas the improper "instruction was a small part of the court's final instructions to the jury, and was delivered without particular emphasis" in *Kleinman*, *Kleinman*, 880 F.3d at 1035, in *Lynch* the court delivered the erroneous instruction alone and with emphasis—even questioning jurors individually on whether they would follow it. (*See* First Cross-Appeal Br. 58-61.) Moreover, unlike in *Kleinman*, this case presents a "dispute regarding the adequacy of the district court's jury instructions as a whole," *Kleinman*, 880 F.3d at 1035, and evidence that jurors *were* swayed by the Court's anti-nullification instruction. (*See* First Cross-Appeal Br. 43-56, 60-61.)

The instructions here were more coercive than in *Kleinman*, and not harmless beyond a reasonable doubt.

Sincerely,

*/s Alexandra W. Yates*

Alexandra W. Yates
Deputy Federal Public Defender