APPENDIX

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES C. LYNCH, Defendant-Appellant.	No. 10-50219 D.C. No. 2:07-cr-00689-GW-1 Central District of California, Los Angeles ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CHARLES C. LYNCH, Defendant-Appellee.	No. 10-50264 D.C. No. 2:07-cr-00689-GW-1 Central District of California, Los Angeles

Before: ROGERS,[*] BYBEE, and WATFORD, Circuit Judges.[1]

A majority of the panel judges have voted to deny appellant's petition for panel rehearing. Judge Rogers recommended denying the petition for rehearing en banc. Judge Bybee voted to deny the petition for rehearing en banc. Judge

[1] [*] The Honorable John M. Rogers, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Watford voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed November 13, 2018, are DENIED.

gon's impermissible attempt to regulate particular uses of federal land under Senate Bill 3. Alternatively, I would recognize the as-applied theory for establishing preemption outlined in *Granite Rock*. Federal law preempts environmental regulation that is so severe that it operates as a de facto land use plan by rendering a particular use of the regulated land utterly impracticable. The miners put on sufficient evidence to establish at least a genuine issue for trial on this theory. Accordingly, I respectfully dissent from the majority's decision to affirm summary judgment in favor of the State of Oregon.

UNITED STATES of America, Plaintiff-Appellee,

v.

Charles C. LYNCH, Defendant-Appellant.

United States of America, Plaintiff-Appellant,

v.

Charles C. Lynch, Defendant-Appellee.

No. 10-50219, No. 10-50264

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 13, 2018 Pasadena, California

Filed September 13, 2018

Background: Defendant was convicted in the United States District Court for the Central District of California, George H. Wu, J., of conspiracy to manufacture, possess, and distribute marijuana, as well as other charges related to his ownership of a marijuana dispensary. The district court denied defendant's new-trial motions, and sentenced defendant to one year and one day in prison. Defendant appealed, government cross-appealed.

Holdings: The Court of Appeals, Rogers, Circuit Judge, held that:

(1) attorney's testimony about defendant's phone call to Drug Enforcement Administration (DEA) was not admissible as prior consistent statement;

(2) district court did not abuse its discretion in excluding evidence of defendant's compliance with local laws as repetitive and irrelevant;

(3) district court did not abuse its discretion in excluding video evidence of local sheriff stating that defendant was welcome to reopen medical marijuana dispensary following raid;

(4) any error by district court in admitting evidence of, inter alia, distributions by defendant's employees outside of the clinic was harmless;

(5) defendant failed to establish entrapment by estoppel defense;

(6) defendant was not eligible for safety valve relief from five-year mandatory minimum sentence; and

(7) remand was warranted to determine whether defendant was in compliance with state law, in which case the Department of Justice (DOJ) would be prohibited from spending any federal funds on the prosecution.

Affirmed in part and remanded for resentencing.

Watford, Circuit Judge, filed separate dissenting opinion.

1. Witnesses ⇨414(2)

Testimony from attorney about defendant's phone call to Drug Enforcement Administration (DEA), as well as recording of attorney discussing that call on radio program, were not admissible as prior consistent statements of defendant's trial

testimony that the DEA told him that his medical marijuana dispensary would be legal if operated in accordance with state law, in prosecution for conspiracy to manufacture, possess, and distribute marijuana, given that those out-of-court statements were made after motivation to fabricate arose, as defendant was already running a marijuana store with plans to open the dispensary at the time he told attorney about his call to DEA. Fed. R. Evid. 801(d)(1)(B).

2. Witnesses ⚿414(2)

To be a prior consistent statement, out-of-court statement must occur before a motivation to fabricate arises. Fed. R. Evid. 801(d)(1)(B).

3. Witnesses ⚿414(2)

Prior consistent statements by a witness may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited, rather, such statements are allowable only to rebut claims of recent fabrication or improper motive. Fed. R. Evid. 801(d)(1)(B).

4. Conspiracy ⚿45
Criminal Law ⚿675

District court did not abuse its discretion in excluding evidence of defendant's compliance with local laws as repetitive and irrelevant in prosecution for conspiracy to manufacture, possess, and distribute marijuana; there was no dispute about defendant's compliance with state and local law.

5. Conspiracy ⚿45
Criminal Law ⚿675

District court did not abuse its discretion in excluding video evidence of local sheriff stating that defendant was welcome to reopen medical marijuana dispensary following raid as repetitive and irrelevant to defendant's entrapment by estoppel defense in prosecution for conspiracy to manufacture, possess, and distribute marijuana; compliance with local law was not a substantive defense to violation of federal drug law, approval from state and local authorities was neither necessary nor sufficient to demonstrate entrapment by estoppel, and defendant had already offered extensive evidence of approval from state and local authorities.

6. Criminal Law ⚿338(7)

Evidence that an employee of defendant's medical marijuana dispensary sold $3,200 worth of marijuana to a government agent, a transaction that defendant alleged he did not know about and was not involved in, was not more prejudicial than probative in prosecution for conspiracy to manufacture, possess, and distribute marijuana; a significant amount of evidence did exist on which a jury could find that defendant was linked to that transaction or that the sale was foreseeable to him. Fed. R. Evid. 403.

7. Conspiracy ⚿41

Coconspirators are criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined, whether they were aware of them or not.

8. Conspiracy ⚿48.1(1)

The nature or scope of a conspiracy is a question of fact, not of law, to be determined by the jury.

9. Criminal Law ⚿1169.1(2.1)

Any error in district court's admitting evidence that an employee of defendant's medical marijuana dispensary sold $3,200 worth of marijuana to a government agent, a transaction that defendant alleged he did not know about and was not involved in, was harmless in prosecution for conspiracy to manufacture, possess, and distribute marijuana; jury would have convicted defendant regardless, given that defendant

himself gave the jury all the necessary material to allow for his conviction.

10. Criminal Law ⚿1134.2, 1162

It is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.

11. Criminal Law ⚿1165(1)

Alleged errors are not reversible if, setting that evidence aside, it is still clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

12. Criminal Law ⚿405.18(2)

Statement by employee of defendant's medical marijuana dispensary regarding sale of $3,200 worth of marijuana to a government agent, a transaction that defendant alleged he did not know about and was not involved in, that "[defendant] didn't know anything about this deal" was not admissible as a statement against interest in prosecution for conspiracy to manufacture, possess, and distribute marijuana; that another person did not know about a crime did not inculpate the declarer, and not so clearly that a reasonable person would not say so if the statement were false. Fed. R. Evid. 804(b)(3).

13. Criminal Law ⚿405.18(1)

To be a statement against interest requires, among other things, that the statement so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true. Fed. R. Evid. 804(b)(3).

14. Criminal Law ⚿1169.1(2.1)

Any error by district court in admitting evidence of distributions by employee's of defendant's medical marijuana dispensary outside of the clinic, that an employee apparently mailed a package of marijuana, surveillance videos that included teenagers who looked healthy, and a chart showing different types of "highs" caused by different marijuana strains was harmless in prosecution for conspiracy to manufacture, possess, and distribute marijuana; none of the evidence was inappropriately inflammatory.

15. Criminal Law ⚿432, 663

District court properly admitted business check written by defendant to himself in prosecution for conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary; evidence showed that defendant controlled dispensary's accounts, and the district court took appropriate steps, including redaction of the amount of the check, to avoid any unnecessary prejudice against defendant.

16. Criminal Law ⚿1166(10.10)

Prosecutor's statement expressing priorities in prosecuting medical marijuana facilities that more clearly violated state law was not exculpatory of defendant in prosecution for conspiracy to manufacture, possess, and distribute marijuana, or otherwise relevant to the federal crimes he was charged with, and therefore reversal for nondisclosure was not warranted; prosecutor's statement never indicated that defendant's compliance or noncompliance with state law would have had any effect on his substantive guilt, and defendant would not have been entitled to acquittal even if he had shown that he was in compliance with state law, because such compliance was not relevant to the federal crimes he was charged with.

17. Criminal Law ⚿1166(10.10)

To justify reversal for nondisclosure, evidence must be of the sort that, if it had been disclosed to the defense, the result of the proceeding would have been different.

18. District and Prosecuting Attorneys ⚿8(5)

Prosecutorial decisions inevitably involve difficult choices about resource allocation, and the government possesses broad discretion to say where those resources should be deployed.

19. Criminal Law ⚿37(8)

Defendant failed to establish entrapment by estoppel defense in prosecution for conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary, based on alleged statement by Drug Enforcement Administration (DEA) that "it was up to the cities and counties to decide how they wanted to handle the matter" of marijuana dispensaries; alleged statement was not an affirmative authorization, rather, at most, it suggested that federal authorities were confused about how to handle a complex and evolving area, and it was not reasonable for defendant to believe that an anonymous and apparently confused source could have definitively resolved all legal questions relating to defendant's operations.

20. Criminal Law ⚿770(2)

While defendant is generally entitled to have the jury instructed on his or her theory of defense, this entitlement does not apply where the evidence, even if believed, does not establish all of the elements of a defense.

21. Criminal Law ⚿37(2.1), 330

To establish the defense of entrapment by estoppel, a defendant has the burden to show: (1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told the defendant the proscribed conduct was permissible, (4) that the defendant relied on the false information, and (5) that the reliance was reasonable.

22. Estoppel ⚿62.1

To invoke estoppel against the government, the party claiming estoppel must show affirmative misconduct as opposed to mere failure to inform or assist.

23. Criminal Law ⚿37(2.1)

Courts generally refuse to recognize a defense of entrapment by estoppel where a defendant shows that a government agent only failed to tell a defendant that proposed conduct was illegal, as opposed to affirmatively stating that it was legal.

24. Criminal Law ⚿37(2.1)

To establish affirmative authorization, as element of defense of entrapment by estoppel, a defendant must do more than show that the government made vague or even contradictory statements; instead, the defendant must show that the government affirmatively told him the proscribed conduct was permissible.

25. Criminal Law ⚿37(2.1)

Reasonable reliance, as required to support an entrapment by estoppel defense, occurs if a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.

26. Jury ⚿131(10)

District court did not abuse its discretion in warning against nullification at voir dire in prosecution for conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary; the need for the warning was a risk that defendant's counsel had himself invited after statements to the jury, to which one juror responded that "if you

believe the law is wrong, you don't have to convict a person."

27. Criminal Law ⚿731

Nullification is a violation of the juror's oath to apply the law as instructed by the court.

28. Criminal Law ⚿731

Jurors cannot substitute their sense of justice for their duty to follow the law.

29. Criminal Law ⚿1137(2)

An error that is caused by the actions of the complaining party will cause reversal only in the most exceptional situation.

30. Criminal Law ⚿731

While jurors have the power to nullify a verdict, they have no right to do so.

31. Criminal Law ⚿790

When a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed.

32. Criminal Law ⚿796

District court's stating that a judge sentences according to the law was not a misrepresentation, as would warrant informing the jury about the potential punishments defendant faced if convicted in prosecution for conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary.

33. Criminal Law ⚿855(7)

Messages from jurors to court clerk did not constitute improper ex parte communication; all of the messages went entirely in one direction, from jurors to court, and clerk and judge did not respond with communications to the jurors.

34. Witnesses ⚿246(1)

District court did not abuse its discretion in not allowing jurors to ask questions of witnesses in prosecution for conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary; the court had the authority to permit limited jury questioning of a witness, and the court did subsequently offer the jury chances to ask questions that the court could properly answer once presentation of evidence had concluded.

35. Criminal Law ⚿636(7), 864

District court's refusal to disclose to defendant the contents of notes received from jury in prosecution for conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary did not violate defendant's right to be present at all critical stages of his trial. Fed. R. Crim. P. 43(a).

36. Controlled Substances ⚿100(8)

Defendant convicted of conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary was not eligible for "safety valve" relief from five-year mandatory minimum sentence, given his role leading the dispensary, an organization involving more than five participants. 18 U.S.C.A. § 3553(f); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(B)(vii).

37. Sentencing and Punishment ⚿34

A statutory minimum sentence is mandatory.

38. Criminal Law ⚿1192

Reassignment on remand is highly discouraged, and such a motion will be granted only in unusual circumstances or when required to preserve the interests of justice.

39. Criminal Law ⚿1192

Factors relevant to the consideration of whether the particular circumstances of

a case meet the high standard required to justify reassignment to a new judge on remand include: (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 appearance of fairness.

40. Criminal Law ⚿1192

Reassignment to new judge on remand for resentencing defendant convicted of conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary was not warranted; there was no cause to expect that the district court would reject instructions from the appellate court, or that reassignment would otherwise be necessary to preserve the appearance of justice or ensure the efficiency of the federal courts.

41. Criminal Law ⚿1181.5(3.1)

Remand was warranted to determine whether defendant convicted of conspiracy to manufacture, possess, and distribute marijuana as well as other charges related to defendant's ownership of a medical marijuana dispensary was in compliance with state law, in which case the Department of Justice (DOJ) would be prohibited from spending any federal funds on the prosecution pursuant to congressional appropriations rider. Pub. L. 115-31, 131 Stat 135.

Appeal from the United States District Court for the Central District of California, George H. Wu, District Judge, Presiding, D.C. No. 2:07-cr-00689-GW-1

Alexandra Wallace Yates (argued), Deputy Federal Public Defender; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellant.

David P. Kowal (argued), Assistant United States Attorney; Robert E. Dugdale, Chief, Criminal Division; André Birotte Jr., United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

Joseph D. Elford, Americans for Safe Access, Oakland, California, for Amicus Curiae Americans for Safe Access.

Jenny E. Carroll, Professor of Law, Seton Hall University, Newark, New Jersey, for Amici Curiae Criminal Procedure Professors.

Paula M. Mitchell, Reed Smith LLP, Los Angeles, California, for Amici Curiae Members of Congress.

Michael V. Schafler, Benjamin B. Au, Arwen R. Johnson, and Isabel Bussarakum, Caldwell Leslie & Proctor PC, Los Angeles, California, for Amici Curiae Senators Mark Leno and Mike McGuire, and Former Senator Darrell Steinberg.

Before: John M. Rogers,* Jay S. Bybee, and Paul J. Watford, Circuit Judges.

Dissent by Judge Watford

OPINION

ROGERS, Circuit Judge:

I. Introduction

Charles Lynch ran a marijuana dispensary in Morro Bay, California, in violation

* The Honorable John M. Rogers, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

of federal law. He was convicted of conspiracy to manufacture, possess, and distribute marijuana, as well as other charges related to his ownership of the dispensary. In this appeal, Lynch contends that the district court made various errors regarding Lynch's defense of entrapment by estoppel, improperly warned jurors against nullification, and allowed the prosecutors to introduce various evidence tying Lynch to the dispensary's activities, while excluding allegedly exculpatory evidence offered by Lynch. However, Lynch suffered no wrongful impairment of his entrapment by estoppel defense, the anti-nullification warning was not coercive, and the district court's evidentiary rulings were correct in light of the purposes for which the evidence was tendered. A remand for resentencing is required, though, on the government's cross-appeal of the district court's refusal to apply a five-year mandatory minimum sentence, which unavoidably applies to Lynch.

Following the filing of this appeal and after the submission of the government's brief, the United States Congress enacted an appropriations provision, which this court has interpreted to prohibit the federal prosecution of persons for activities compliant with state medical marijuana laws. Lynch contends that this provision therefore prohibits the United States from continuing to defend Lynch's conviction. We need not reach the question of whether the provision operates to annul a properly obtained conviction, however, because a genuine dispute exists as to whether Lynch's activities were actually legal under California state law. Remand will permit the district court to make findings regarding whether Lynch complied with state law.

II. Background

The facts of this case are largely unchallenged on appeal. In 2005 and into early 2006, Charles Lynch operated a marijuana store in Atascadero, California, before neighbor complaints caused the town to shut down Lynch's operations. In 2006 Lynch moved his activities to Morro Bay, opening what he called Central Coast Compassionate Caregivers (CCCC) in April of that year. Lynch's dispensary proved to be a popular one, employing around 10 subordinates and selling $2.1 million in marijuana and marijuana-related products during the period in which the dispensary operated.

Lynch's dispensary soon also attracted the attention of federal authorities. In March 2007, the DEA obtained a search warrant and raided Lynch's home, along with the dispensary. Lynch continued to operate CCCC, but his efforts there were short-lived. On July 13, 2007, the United States indicted Lynch on five counts: conspiracy to manufacture, possess, and distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846, 856, and 859 (Count 1); aiding the distribution of marijuana to persons below 21 years, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1), 859(a) (Counts 2 and 3); marijuana possession with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) (Count 4); and maintenance of a drug-involved premise, in violation of 21 U.S.C. § 856(a)(1) (Count 5). Lynch went to trial, took the stand, and admitted what he now concedes were "sufficient facts to find him guilty of the five counts charged." The jury convicted Lynch on all counts.

Lynch's arguments on appeal largely depend on legal developments beginning over a decade before CCCC opened its doors. In 1996, California voters decriminalized the use of marijuana for medical purposes. *See* Cal. Prop. 215, codified at Cal. Health & Safety Code § 11362.5. The U.S. Supreme Court subsequently held that Congress's determination that marijuana was a Schedule I substance under the Controlled

Substances Act meant that marijuana had no medical value, *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 491, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001), and that federal prohibition of and prosecution for marijuana-related activities remained permissible. *Gonzales v. Raich*, 545 U.S. 1, 22, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). Lynch maintained a somewhat different view of the Controlled Substances Act from that of the Supreme Court, however. Lynch testified at trial that he had thought, based on the Tenth Amendment, that the 1996 referendum had overridden federal law, and thus made medical marijuana legal in California.

In accordance with this belief, Lynch claims that before opening CCCC, he had called the DEA, and reached a man, whose name or position Lynch did not know. Lynch stated that he had inquired of this person "what you guys are going to do about all of these medical marijuana dispensaries around the State of California." Lynch testified that the person responded that "it was up to the cities and counties to decide how they wanted to handle the matter." Lynch then allegedly also told the man that he intended to open a dispensary, to which the man is alleged to have repeated what he had told Lynch before, that it was "up to the cities and counties to decide."

This alleged advice did not turn out to be accurate, however. Lynch was indicted and scheduled for trial in the Central District of California. Several of the district court's actions before and during trial remain the subject of dispute in this appeal. At voir dire, the district court responded to a potential juror's invocation of jury nullification with a caution to the voir dire panel that "[n]ullification is by definition a violation of the juror's oath" and that, if selected as a juror, "you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not." Then, in its rulings in motions in limine and at trial, the district court permitted various evidence that Lynch contends should have been excluded as impermissibly inflammatory, and also excluded evidence that Lynch contends should have been allowed to support Lynch's defenses. Finally, Lynch alleges that the district court engaged in improper ex parte communications with the jury, and also did not disclose the contents of these communications to Lynch.

At trial, Lynch took the stand in his own defense, and, although forcefully defending his position that the DEA call had led him to believe that his activities were permitted, he also conceded facts sufficient to ensure his conviction if that defense failed. Lynch therefore requested that that the court give an instruction on entrapment by estoppel. The district court allowed an instruction on this defense with regard to counts 1, 4, and 5—general distribution, possession with intent to distribute, and maintaining a drug-involved premises—but refused to allow this defense as against counts 2 and 3, the distribution to minors charges, because the district court determined that Lynch's facts, even if believed, did not suffice to allow the defense as against those charges.

After a day of deliberation, the jury convicted Lynch on all counts. Lynch filed several post-conviction motions for a new trial, including, as relevant here, a fourth new-trial motion claiming a *Brady* violation. This motion stated that a prosecutor post-trial had said that the office focused its resources on targeting those marijuana dispensaries "that more clearly violated state law," and Lynch contended that this statement was exculpatory of him. The district court denied this and the other new-trial motions, however.

Following Lynch's conviction and after the failure of his new-trial motions, Lynch faced two possible mandatory-minimum sentences: a one-year mandatory minimum for distribution to persons under the age of 21, *see* 21 U.S.C. § 859(a), and a five-year mandatory minimum for the total amount of marijuana in his conspiracy, *see* 21 U.S.C. § 841(b)(1)(B)(vii). Following a lengthy sentencing process, the district court held that Lynch was not subject to the five-year minimum because, the court held, it had discretion under the so-called "safety valve," 18 U.S.C. § 3553(f), not to apply this sentence to Lynch. The court determined that the safety valve could not apply to Lynch's § 859(a) sentence, however, and so it sentenced Lynch to one year and one day in prison, suspended pending this appeal.

Lynch subsequently filed this timely appeal, challenging his conviction and objecting to the application of the one-year mandatory minimum. The government also cross-appeals, arguing for imposition of the five-year mandatory minimum.

Subsequent to Lynch's conviction, and while this appeal was pending, Congress passed an appropriations measure, which, as relevant here, states that "None of the funds made available in this Act to the Department of Justice may be used, with respect to," among others, California, "to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated and Further Continuing Appropriations Act of 2015 § 538, Pub. L. No. 113-235, 128 Stat 2130. Lynch filed a motion, claiming that the spending provision bars the government from continuing with this appeal. After a ruling by a Motions Panel of this court, and a refusal of the district court to rule on the issue while the appeal was pending, we allowed Lynch to submit these arguments as part of his third cross-appeal brief. Lynch also requested that the district court grant a hearing on whether Lynch was covered by the rider, but the district declined to do so, because Lynch's case was on appeal.

III.

A. Evidentiary Rulings

Lynch argues that there was error in three lines of evidentiary rulings made by the district court, but none of the alleged rulings was reversible error.

1. Exclusion of Lawyer Testimony and Recording

[1] Lynch objects to exclusion of testimony from a lawyer about Lynch's phone call to the DEA, as well as a recording of this lawyer discussing that call on a radio program. Lynch had sought to substantiate his entrapment by estoppel defense by having this lawyer testify that, in January 2006, Lynch had told the lawyer about the substance of Lynch's alleged phone call to the DEA. Lynch also proposed to introduce a subsequent recording of a radio interview of the lawyer recounting Lynch's description of the call. The district court did not permit the lawyer to testify about Lynch's statements to him, however, because the district court reasoned that the lawyer's statement would be hearsay, and the testimony was also not admissible as a prior consistent statement of Lynch's, because any statement Lynch made to the lawyer would have postdated Lynch's motivation to fabricate the contents of that call. The court also excluded the radio recording on those same hearsay grounds.

The district court's rejection of these pieces of evidence was correct because both pieces of evidence were hearsay to which no exception applied. In both cases Lynch sought to introduce the evidence for the same purpose: Lynch allegedly told the

lawyer that the DEA had told Lynch that CCCC would be legal if operated in accordance with state law, and Lynch sought to have the lawyer testify or play the recording to support the notion that the DEA had told Lynch this. The evidence was thus clearly hearsay—and obviously excludable—because it was an out-of-court statement offered for the truth of the matter asserted, *i.e.*, that the government agent had told Lynch this. *See* Fed. R. Evid. 801(c).

[2] Lynch nevertheless sought to permit the evidence's introduction as a prior consistent statement of Lynch's trial testimony regarding what the DEA had told him, *see* Fed. R. Evid. 801(d)(1)(B), but neither the lawyer's testimony nor the recording was admissible as a prior consistent statement. To be a prior consistent statement, a statement must occur before a motivation to fabricate arises. *Tome v. United States*, 513 U.S. 150, 156, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995); *see also United States v. Bao*, 189 F.3d 860, 864 (9th Cir. 1999) (same). Here, however, the district court correctly determined that Lynch's motivations to fabricate predated any contact he had with the lawyer. At the time he made his alleged statements to the lawyer, Lynch was running a marijuana store in Atascadero, and was also deep in plans to open CCCC. In both cases, Lynch would have been strongly incentivized to make up or misrepresent the call—directly in exculpating his work in Atascadero, and prospectively for when he began operations at CCCC. Anything Lynch told the lawyer therefore did not rebut the government's attack on Lynch's trial testimony, that Lynch fabricated or selectively remembered the contents of the DEA call, because Lynch's prior statement was subject to the same incentives for untruthfulness.

Lynch contends that his statements to the lawyer predated any motivation to fabricate, because Lynch had not yet begun operations at CCCC at the time he spoke to the lawyer. This argument takes too narrow a view of what constitutes a motivation to fabricate, however. This court has explained that a motivation to fabricate exists when such statements are inherently "self-serving;" for example, where a person was under investigation, even though not yet formally charged. *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989). That Lynch had not yet opened CCCC at the time he spoke to the lawyer did not keep his statements from being self-serving, most obviously because they planted the seeds for a defense against the obvious threat of prosecution for Lynch's intended future activities. An alibi surely does not become a prior consistent statement, just because it is proffered before a crime occurs. For instance, the Eleventh Circuit has held that a statement of innocent purpose was not admissible as a prior consistent statement because the defendant was in plans to commit the crime at the time of the statement. *See United States v. Vance*, 494 F.3d 985, 994 (11th Cir. 2007), *superseded by regulation on other grounds as recognized in United States v. Jerchower*, 631 F.3d 1181, 1186 (11th Cir. 2011).

[3] Lynch also argues that the lawyer's testimony and the recorded radio interview should have been allowed to enhance Lynch's credibility as a witness, but this was not a permissible basis for admitting that evidence. "Prior consistent statements by a witness 'may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited.' " *United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996) (quoting *Tome*, 513 U.S. at 157, 115 S.Ct. 696). Rather, as we have explained, such statements are allowable only to rebut claims of recent fabrication or improper motive. *Id.*

Because Lynch's motivation remained the same from when he made the statements to the lawyer to his testimony at trial—being able to claim authorization for CCCC's activities—the fact that Lynch has consistently told the same story was not ultimately probative of his veracity. The district court therefore did not err in excluding this testimony.

2. Exclusion of Compliance with Local Laws

[4] Lynch also argues that the district court erred in excluding evidence Lynch sought to offer about his adherence to Morro Bay local rules, as well as statements made by local authorities to Lynch about the permissibility of this operation. This exclusion fell well within a district court's substantial discretion to exclude improper defense evidence, *see Holmes v. South Carolina*, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), because the evidence was both repetitive and irrelevant.

Lynch contends that the district court erred in allegedly preventing him from showing that he complied with local regulations, but the district court did not so limit Lynch's defense. In fact, the district court allowed Lynch substantial opportunity to present evidence about how he followed what Morro Bay required of him, including testimony to this effect from the mayor and city attorney. Lynch contends that the district court erred in not allowing him to present further evidence about CCCC's attempts to follow local and state law, but Lynch did not have an unlimited right to such a presentation. Even acknowledging a defendant's right to choose his defense, exclusion for repetitiveness falls within a district court's discretion. *See United States v. Scholl*, 166 F.3d 964, 973–74 (9th Cir. 1999). Here, the district court declined to allow further testimony from the mayor and city attorney on the grounds that there was no dispute about Lynch's compliance with state and local law and that the additional proposed evidence suffered from additional deficiencies, such as being hearsay. The district court therefore did not abuse its discretion in excluding this evidence, because it clearly had the power to decline to allow otherwise-problematic evidence on an already-established and uncontested matter.

[5] Lynch also contends that that the district court erred in excluding video evidence of a local sheriff stating that Lynch was welcome to reopen CCCC following the March 2007 raid, because, according to Lynch, this video was useful for Lynch's entrapment by estoppel defense. But the district court correctly rejected this evidence as irrelevant to Lynch's defense. Compliance with local law is not a substantive defense to a violation of federal drug law. *See Raich*, 545 U.S. at 29, 125 S.Ct. 2195. In addition, as the district court determined, although approval from state and local authorities was neither necessary nor sufficient to demonstrate entrapment by estoppel, Lynch had already offered extensive evidence to that point. The district court therefore did not abuse its discretion in excluding the video, because it was repetitive of evidence already received, and not otherwise relevant to Lynch's defense.

3. Baxter Deal

Lynch also argues that it was error to permit the government's introduction of evidence that a CCCC employee, Abraham Baxter, sold $3,200 worth of marijuana to a government agent, a transaction that Lynch alleges he did not know about and was not involved in. Lynch claims the evidence was unfairly prejudicial, in violation of Fed. R. Evid. 403. The evidence was not more prejudicial than probative, however, and the evidence was also more generally

harmless, given Lynch's own concession of factual guilt.

[6–8] The evidence was not improperly prejudicial, because its tendency was to prove the nature of the conspiracy of which Lynch was charged with being a part. On the government's theory of the case, Lynch joined with Baxter and the other CCCC employees to distribute marijuana, and Baxter's sale of the marijuana to the agent was part of this conspiracy. (Indeed, the indictment identified this sale as an overt act of the conspiracy involving Lynch.) A significant amount of evidence did exist on which a jury could find that Lynch was linked to this transaction or that the sale was foreseeable to him. That Lynch might not have known about Baxter's transaction does not necessarily render the evidence inadmissible, since, under *Pinkerton v. United States*, 328 U.S. 640, 647–48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), coconspirators are "criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined, whether they were aware of them or not." *United States v. Gadson*, 763 F.3d 1189, 1214 (9th Cir. 2014) (quoting *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008)). Although the district court later stated in its sentencing memorandum that it did not believe that the government had proven Lynch's actual knowledge of this transaction, that does not bear on the question of exclusion, because determining the nature or scope of a conspiracy "is a question of fact, not of law, to be determined by the jury." *United States v. DiCesare*, 765 F.2d 890, 900 (9th Cir. 1985), amended, 777 F.2d 543 (9th Cir. 1985).[1]

[9–11] In any event, any complaints Lynch might have about the district court's treatment of the Baxter deal amount at most to harmless error. Lynch acknowledges that, when on the stand, he conceded sufficient facts to allow the jury to find him guilty of all charges. This fact severely limits Lynch's ability to complain of purported errors with regard to evidence introduced at his trial. "[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States v. Hasting*, 461 U.S. 499, 509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). Alleged errors are not reversible if, setting that evidence aside, it is still "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." *Id.* at 511, 103 S.Ct. 1974. Here, a jury would have convicted Lynch regardless of any treatment of the Baxter evidence, given that Lynch himself gave the jury all the necessary material to allow for his conviction. Lynch's complaints about the district court's handling of the Baxter-related evidence show therefore, at most, harmless error.

[12, 13] Lynch also objects to the exclusion of a statement Baxter had made to an investigator, that "Charlie didn't know anything about this deal," but the district

1. Lynch also argues that the district court had expressed concern about the foundation of this evidence, and contends that the district court had stated it would offer a limiting instruction or declare a mistrial if the government did not prove that Lynch knew about Baxter's activities, but this argument is not supported by the record. What the district court stated would justify a limiting instruction or mistrial was the use of hearsay statements by Baxter as a coconspirator admission without the government's having laid the foundation for those statements. The district court never stated that evidence about the Baxter transaction would be subject to a blanket limiting instruction if the government failed to prove Lynch's actual knowledge of that transaction, and appropriately so, because such knowledge was not necessary for the government to have offered evidence that the transaction had occurred.

court correctly excluded this evidence as hearsay. Lynch contends that this statement was nevertheless admissible as a statement against interest, *see* Fed. R. Evid. 804(b)(3), but the district court correctly held that statement was not allowable under that exception. To be a statement against interest requires, among other things, that "the statement so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true." *United States v. Paguio*, 114 F.3d 928, 932 (9th Cir. 1997). Stating the negative, that another person does not know about a crime, hardly inculpates the declarer, and certainly neither "so far" nor so clearly that a reasonable person would not say so if the statement were false. *Id.* Lynch takes the position that, because Baxter was under investigation when he made that statement, it might have been prejudicial to him in unforeseen ways, but this is exactly the sort of "mere[ ] speculation" that cannot serve as the basis for categorization as a statement against interest. *United States v. Monaco*, 735 F.2d 1173, 1176 (9th Cir. 1984). The district court therefore did not err in disallowing the introduction of this statement.

4. Other Alleged Inflammatory Evidence

[14] Lynch also objects to the admission of a number of pieces of evidence that he contends should have been excluded as impermissibly inflammatory, but there was no error in the district court's handling of this evidence, and, even were we to find error, we would consider such error harmless. Lynch claims that it was wrong to allow testimony by law enforcement about Baxter-like distributions by other CCCC employees outside the clinic, that evidence was introduced that a CCCC employee apparently mailed a package of marijuana, that the government showed surveillance videos that included "teenagers who looked healthy," that the government discussed the violent-sounding "AK47" strains of marijuana, and that the government showed a chart with the "type[s] of highs" caused by different marijuana strains. None of this evidence comes remotely close to what this court has identified as inappropriately inflammatory, like a defendant's reading of material advocating terrorism, *United States v. Waters*, 627 F.3d 345, 355 (9th Cir. 2010), or the imputation of guilt based on ethnicity, *United States v. Cabrera*, 222 F.3d 590, 596 (9th Cir. 2000). This evidence was also inconsequential in light of Lynch's own concession of guilt.

[15] Lynch further argues that the district court should not have permitted admission of a CCCC business check written by Lynch to himself. The introduction of the check is also at most harmless error, because the evidence was not responsible for Lynch's ultimate conviction. In any event, the check was correctly admitted to show that Lynch controlled CCCC's accounts, and the district took appropriate steps, including redaction of the amount of the check, to avoid any unnecessary prejudice against Lynch.

B. Nondisclosure of Reuter-Related Evidence

[16] Lynch asserts that evidence he has subsequently discovered about the United States' prosecution priorities should have been disclosed to him pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This claim is without merit, because the evidence was not exculpatory of Lynch or otherwise relevant to his case. As relevant here, Lynch's fourth new trial motion included a claim based on a statement made on March 27, 2009, by one of Lynch's prosecutors. In the context of explaining a

new Department of Justice policy discouraging medical marijuana prosecutions for facilities in compliance with state law, that prosecutor stated: "in this district we had already made the determination that in allocating our resources we would focus on those [medical marijuana facilities] that more clearly violated state law. So the attorney general's statement really for us has always been somewhat of a red herring . . . those were always factors in the investigation at the beginning." Lynch contended that this testimony demonstrated that the government possessed undisclosed exculpatory information, in that the prosecutor's statement allegedly contradicted trial testimony from a DEA agent that DEA "would be investigating the federal laws and the marijuana—illegal sales of marijuana federally. It doesn't matter what the state or local officials say or do." Lynch therefore argued that he was entitled to a new trial because the government had failed to comply with its *Brady* obligations. The court denied Lynch's new trial motion, however, because this evidence was not exculpatory of Lynch.

[17, 18] The district court was correct in rejecting Lynch's argument that this statement proved the existence of a *Brady* violation. To justify reversal for nondisclosure, evidence must be of the sort that, if it had "been disclosed to the defense, the result of the proceeding would have been different." *Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). The obvious point that the government prioritizes its resources on prosecuting those most flagrant offenders should not have been a surprising fact, and certainly would not have resulted in Lynch's acquittal. Courts have long recognized that prosecutorial decisions inevitably involve difficult choices about resource allocation, and the government possesses broad discretion to say where those resources should be deployed. *See Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). The prosecutor's statement merely expressed what those priorities were here. It never indicated that Lynch's compliance or noncompliance with state law would have had any effect on Lynch's substantive guilt. Lynch also would not have been entitled to acquittal even if he had shown that he was in compliance with state law, because such compliance was not relevant to the federal crimes he was charged with. *See Raich*, 545 U.S. at 29, 125 S.Ct. 2195.

Lynch suggests that the information about prosecutorial priorities was favorable to his defense because it suggested that testimony given by DEA Agent Reuter was perjurious and thus violative of Lynch's due process right not to be convicted by testimony known by the state to be perjurious. *See Napue v. People of State of Ill.*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). But this argument also depends on a misreading of that testimony. Agent Reuter stated that neither she nor anyone in her office would have told Lynch that dispensaries were permissible if in compliance with state and local law, because "federal law has nothing to do with state and local officials. We would be investigating the federal law. . . . It doesn't matter what the state or local officials say or do." It is entirely reconcilable—and thus not at all suggestive of perjury—to say that a dispensary is always subject to investigation when illegal under federal law, but practically most likely to be prosecuted when also committing state law violations too. Moreover, Agent Reuter was testifying about the investigative practices of her DEA office, while the prosecutor's statement explained the charging decisions of that office. It is also not suggestive of perjury that two different government agencies operate differently or explain their roles in different terms.

Lynch finally suggests that this information would have allowed him to question Agent Reuter on the proposition that, if Lynch had been in compliance with state law, he would not have been investigated or prosecuted. Such an argument would border on the frivolous, however. Lynch may be correct that his chances of being caught would have been lower if he had been in compliance with state law, but this is not the same as saying that Lynch was actually innocent of any crimes of which he was convicted.

For those reasons, then, Lynch does not demonstrate any error in the district court's handling of the evidence at his trial.

C. Entrapment by Estoppel Defense

[19] Lynch contends that the district court committed various errors with respect to Lynch's entrapment by estoppel defense. The court allegedly misinstructed the jury about this defense's elements, refused to allow the defense as against the distribution-to-minors charges, and did not permit the jury to consider evidence of Lynch's compliance with state law. All of Lynch's arguments on this point fail, however, because Lynch did not prove facts sufficient to establish a basis for entrapment by estoppel. Lynch therefore has no grounds to object to the district court's treatment of this defense, because Lynch's failure to provide a sufficient factual basis to establish the defense meant that Lynch was not entitled to any instruction on, or jury consideration of, this defense in the first place.

Lynch's proposed basis for the entrapment by estoppel defense was Lynch's trial testimony that, in September 2005 and before opening CCCC, Lynch had allegedly called the local DEA office and reached a man at the office, whose name or position Lynch did not know. Lynch stated that he had inquired of this person "what you guys are going to do about all of these medical marijuana dispensaries around the State of California." Lynch testified that the person responded that "it was up to the cities and counties to decide how they wanted to handle the matter." Lynch then allegedly specifically told the man that he intended to open a dispensary, and the man repeated that same thing that he had told Lynch before, that it was "up to the cities and counties to decide." Lynch contends that he relied on this statement in opening CCCC, and would not have commenced operations if he had been told that his proposed activities were illegal.[2] At trial, the district court allowed Lynch to seek to claim this defense with regard to counts 1, 4, and 5—general distribution, possession with intent to distribute, and maintaining a drug-involved premises—but refused to allow this defense as against counts 2 and 3—the distribution to minors charges—because it held that Lynch had not established any foundation for that defense to apply to these charges.

[20] Lynch contends that the information allegedly given to him in his phone call to the DEA sufficed to allow him a defense of entrapment by estoppel and that the district court committed various errors with respect to that defense, but this phone call was insufficient to provide a basis for the defense. Although it is true

2. The government contends that Lynch's testimony on this point is highly doubtful because, although Lynch's phone records reflected that he had in fact called the DEA, the agent whose number Lynch dialed was female rather than the man identified by Lynch, and that agent also testified at trial that neither she nor any agent in her division would have given Lynch the information Lynch claimed to have received. We do not reach the issue of the credibility of Lynch's testimony, however, because even taking his account as true, Lynch did not provide a sufficient factual basis for any instruction on entrapment by estoppel.

that a defendant is generally "entitled to have the jury instructed on his or her theory of defense," this entitlement does not apply "where the evidence, even if believed, does not establish all of the elements of a defense." *United States v. Perdomo-Espana*, 522 F.3d 983, 986–87 (9th Cir. 2008) (quoting *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (internal quotation marks omitted)). Even crediting Lynch's testimony that the phone call occurred and that he was told that "it was up to the cities and counties to decide how they wanted to handle the matter" of marijuana dispensaries, Lynch still lacked crucial elements to shield himself under the defense of entrapment by estoppel.

[21] To establish the defense of entrapment by estoppel, a defendant has the burden to show: "(1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) that [the defendant] relied on the false information, and (5) that [the] reliance was reasonable." *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010) (quoting *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004)). Assuming that Lynch's testimony could be believed to show that Lynch spoke to an authorized official and that Lynch relied on the information given to him, the other elements of the defense were missing here.

[22, 23] The statement that "it was up to the cities and counties to decide how they wanted to handle the matter" was not the affirmative authorization that Lynch needed to identify to have been entitled to any instruction or evidence introduced on entrapment by estoppel. At most, Lynch's evidence suggests that federal authorities were confused about how to handle a complex and evolving area, but this is not the same as saying that Lynch was actively told he could violate federal law. "[T]o invoke estoppel against the Government, the party claiming estoppel must show 'affirmative misconduct' as opposed to mere failure to inform or assist." *Lavin v. Marsh*, 644 F.2d 1378, 1382 (9th Cir. 1981). Even on Lynch's version of the facts, the person he talked to may have been unhelpful in failing to remind Lynch that marijuana remained illegal under federal law, but he never told Lynch that Lynch's proposed activities were legal. We generally refuse to recognize a defense of entrapment by estoppel where a defendant shows that a government agent only failed to tell a defendant that proposed conduct was illegal, as opposed to affirmatively stating that it was legal. *See United States v. Brebner*, 951 F.2d 1017, 1026 (9th Cir. 1991). Even crediting Lynch's testimony for all that it is worth, Lynch never received the sort of clear sanction that entrapment by estoppel requires.

[24] In particular, the ambiguity of the statement that it was "up to the cities and counties to decide" means that the statement lacked sufficient concreteness to have served as an affirmative authorization for Lynch's activities. To establish affirmative authorization, a "defendant must do more than show that the government made 'vague or even contradictory statements.' " *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (quoting *Raley v. Ohio*, 360 U.S. 423, 438, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959)). Instead, the defendant "must show that the government affirmatively told him the proscribed conduct was permissible." *Id.* Even if Lynch took the statement as implicit authorization for his actions, this is not the same as saying that the statement was an affirmative and unambiguous grant of permission. The statement could have meant other (and more plausible) things: that the

federal government would prioritize prosecuting those dispensaries most violative of state and local law; that, although such dispensaries were not legal, the government would generally not investigate without a state or local government requesting investigation; that, in the absence of federal prohibition, regulation would be up to the cities and states. The vagueness and ambiguity of the statement therefore did not allow it to serve as a basis for a claim of entrapment by estoppel.

[25] In addition, even to the extent that Lynch might have (improperly) understood the statement to be an affirmative authorization, any reliance on the statement was clearly unreasonable. The determination of reasonable reliance is a relatively common-sense inquiry: reasonable reliance occurs if "a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." *United States v. Batterjee*, 361 F.3d 1210, 1216–17 (9th Cir. 2004) (quoting *Ramirez-Valencia*, 202 F.3d at 1109). Thus, for example, in *Batterjee*, we held that a defendant dealing with the complicated intersection of immigration and criminal law, who had been told by a federal licensee that he was "legally purchasing and possessing a firearm," could reasonably rely on those assurances, because there was no reason for him to have believed he need inquire any further. *Id.* at 1217.

Here, by contrast, Lynch clearly should still have been on notice that any purported categorical authorization to violate the federal drug laws was incorrect, or at least demanded further inquiry into the validity of that authorization. Before he made the call, Lynch had been actively following developments of marijuana law in California and throughout the United States. Indeed, about six months before the alleged call, *Raich* had established that the federal government had the power to prosecute crimes even if legal under state law, and Lynch had testified that he was aware this case was ongoing. Even if it might be too much to say that Lynch should be charged with precisely understanding Supreme Court doctrine, a reasonable person with the knowledge Lynch had would, at minimum, have understood the relationship between state and federal regulation of marijuana to be a subject of significant legal complexity. It was not reasonable to think that two questions posed to an anonymous and apparently confused source could have definitively resolved all legal questions relating to Lynch's operations.

In particular, Lynch's alleged reliance on the call could not have been reasonable because it required Lynch to ignore vast swaths of information he had about marijuana's illegality under federal law. For example, in the controversy leading to the closure of the store in Atascadero, the city attorney had told Lynch that marijuana distribution was illegal for all purposes under federal law. Lynch also testified that before making the call to the DEA, he had gone on the DEA website and discovered the fact that marijuana was illegal under federal law, specifically that it is a Schedule One drug. In addition, Lynch collected books, legal memoranda, and other materials on the legal status of marijuana, and many of these indicated that marijuana was illegal under federal law, regardless of state legality. Nor had Lynch somehow missed the point contained in all these materials. Even after making the call, Lynch distributed forms stating that CCCC recognized "that Federal Law prohibits Cannabis," although the forms also included an incorrect statement that California legalization had created an exception to the federal prohibition through the Tenth Amendment.

It was therefore flatly unreasonable for Lynch to have relied on this purported statement from the DEA, because Lynch had ample cause to recognize that anything he took to be an authorization for his activities might have been incorrect or incomplete. A defendant's reliance on an alleged authorization is unreasonable where such reliance ignores other relevant information the defendant has about the subject. For example, we have recently held that marijuana distributors who allegedly received bad information from a state sheriff's department could not claim entrapment by estoppel, because they knew that marijuana remained illegal under federal law. *United States v. Schafer*, 625 F.3d 629, 638 (9th Cir. 2010).

The same principle applies here. Even crediting Lynch's version of the call, a reasonable person possessing all the information Lynch had would not have considered the call decisive of what the law required. Rather, a reasonable person would at least have sought to resolve the two apparently contradictory conclusions Lynch had about what the law was. In contrast, in *Batterjee*, we emphasized the reasonableness of a defendant's reliance on incorrect but apparently plausible advice on the basis that he had made further inquiries even after receiving that advice. *See Batterjee*, 361 F.3d at 1216–17. Because Lynch instead simply cut off his inquiries when he allegedly heard what he wanted to hear, ignoring all information he had to the contrary, any reliance he made on the call was unreasonable, and the call was therefore insufficient to sustain a defense of entrapment by estoppel.

In short, because Lynch did not show facts providing a basis on which a reasonable jury could find that he was entitled to this defense of entrapment by estoppel, he was not entitled to present this defense in the first place. The district court therefore did not err in any decisions it made with respect to entrapment by estoppel, because that defense simply did not apply to Lynch.

D. Caution Against Nullification

[26] Lynch assigns error to a warning against nullification given by the district court at voir dire. This warning was permissible, however, because it was an appropriate exercise of a district court's duty to ensure that a jury follows the law, and it was additionally justifiable given that the need for the warning was a risk that Lynch's counsel had himself invited.

In the run-up to Lynch's trial, Lynch's lawyer, perhaps recognizing that Lynch's guilt was clear, appears to have sought to encourage prospective jurors that they did not need to convict Lynch even if he was factually and legally guilty of his crimes. For example, on the first day of voir dire, Lynch's lawyer told prospective jurors that, among other things, "the judge is only going to tell you what the law is, and that ultimate decision about what to do in this case is for you and only you to decide," and "there is nobody above you and . . . you [are] the person that's got to decide what to do." On the second day of voir dire, the government objected that these statements seemed to be calling for jury nullification, and the district court cautioned Lynch's counsel at a sidebar not to ask questions seeking jury nullification. Within minutes of receiving this warning, however, Lynch's counsel returned to the line of statements he had been making before, asking jurors whether they agreed that "whether to find a person guilty or not guilty is your decision."

Finally, one juror got the drift and responded to Lynch's counsel, "I understand that completely. I believe there is something called jury nullification, that if you believe the law is wrong, you don't have to convict a person." The district court halted

voir dire, and, after consultation with the attorneys, gave the following caution to the prospective jurors:

> Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a ... juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.

The district court then asked each individual prospective juror if he or she could abide by that instruction. Each juror agreed to so abide.

The district court's caution against nullification was permissible. It is clear that "no juror has a right to engage in nullification," that such nullification is "a violation of a juror's sworn duty to follow the law as instructed by the court," and, to that end, "trial courts have the duty to forestall or prevent such conduct," including "by firm instruction or admonition." *Merced v. McGrath*, 426 F.3d 1076, 1079–80 (9th Cir. 2005) (quoting *United States v. Thomas*, 116 F.3d 606, 617 (2d Cir. 1997)). The district court's caution to the jurors that they should not substitute their own sense of justice for their duty to find facts pursuant to the law was entirely appropriate as a discharge of the court's own duty to forestall lawless conduct.

[27, 28] Moreover, the particular language chosen by the district court accurately stated the law. The first part of the statement, that "nullification is, by definition, a violation of the juror's oath to apply the law as instructed by the court" is a quote from *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997), a case recognized by this court as an accurate guide to a judge's duty to prevent nullification. *See Merced*, 426 F.3d at 1079. The other part of the statement, that a juror "cannot substitute your sense of justice ... for your duty to follow the law" and that it was "not your determination whether a law is just ..." comes from *United States v. Rosenthal*, 266 F.Supp.2d 1068, 1085 (N.D. Cal. 2003), *affirmed in part, reversed in part*, 454 F.3d 943 (9th Cir. 2006). This court has explicitly recognized that these sentences from *Rosenthal* are generally permissible as instructions to a jury to follow the law. *United States v. Kleinman*, *reissued as* 880 F.3d 1020, 1032 (9th Cir. 2018). The district court's caution was therefore allowable, both in the choice to have given it, as well as the language chosen to convey that message.

Lynch argues that the caution was impermissible because this court in its recent *Kleinman* opinion has determined that an anti-nullification instruction will be improper if it "state[s] or impl[ies] that (1) jurors could be punished for jury nullification, or that (2) an acquittal resulting from jury nullification is invalid." *Kleinman*, 880 F.3d at 1032. We held that one portion of the instruction given in *Kleinman* crossed this line because it "could be construed to imply that nullification could be punished, particularly since the instruction came in the midst of a criminal trial," and that another portion was also incorrect because it "could be understood as telling jurors that they do not have the power to nullify, and so it would be a useless exercise." *Id.* at 1032–33. In this case, in contrast, there was no indication that nullification would place jurors at risk of legal sanction or otherwise be invalid. The district court correctly stated that the jurors did not have any right to nullify, but it did not tell them that they lacked the actual ability to do so. It also neither said nor implied that jurors would be subject to punishment if they acquitted Lynch. Lynch identifies a post-conviction letter written by one juror stating he was concerned "we would be

breaking our promise if we did not vote to convict." This appears to be nothing more than a reflection of the fact that the evidence against Lynch was so overwhelming that a juror could not acquit Lynch without violating the juror's duty to find facts according to the law, however, given that Lynch had admitted all facts necessary and sufficient to find him guilty.

The district court's warning involved no language like that determined to be impermissible in *Kleinman*. Indeed, the strongest portion of the district court's caution in this case was specifically approved in *Kleinman*. *See Kleinman*, 880 F.3d at 1032. This case is also factually distinguishable from *Kleinman* because of the circumstances in which the anti-nullification instruction came about. In *Kleinman*, the district court issued its warning against nullification during jury instructions, sua sponte, and without any indication that nullification was on any juror's mind. *See Kleinman*, 880 F.3d at 1031. Here, by contrast, the warning directly followed from a potential juror at voir dire indicating an unwillingness to follow the law.

[29] The court's caution was, moreover, particularly justified because it occurred on the second day of Lynch's counsel's asking questions suggestive of nullification, and after the court's explicit admonishment to Lynch's lawyer not to ask such impermissible questions. As we have stated, albeit in a somewhat different context, "an error that is caused by the actions of the complaining party will cause reversal only in the most 'exceptional situation.' " *United States v. Schaff*, 948 F.2d 501, 506 (9th Cir. 1991) (quoting *Guam v. Alvarez*, 763 F.2d 1036, 1038 (9th Cir. 1985) (internal quotation marks omitted)). A legally accurate warning given in response to a potential juror proposing to disregard the law clearly is not such an exceptional situation.

[30] Lynch more generally suggests that the district court's instruction inhibited the jurors from being willing to nullify the charges against him, but this was also not a violation of any legal right. "[W]hile jurors have the power to nullify a verdict, they have no right to do so." *Merced*, 426 F.3d at 1079. The district court's admonition that nullification was a violation of a jury's duty to follow the law did not deprive the jurors of their ability to nullify, since nullification is by its nature the rejection of such duty. The district court therefore did not commit any error in issuing its caution against nullification.

E. Jury Ignorance about Mandatory Minimums

[31] Lynch argues that the district erred in not allowing him to inform the jury of the mandatory minimum sentence that he faced if convicted. This argument is without merit, however, because "[i]t is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.' " *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994) (quoting *Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975)); *see also United States v. Frank*, 956 F.2d 872, 879 (9th Cir. 1991) (same). The district court therefore did not abuse its discretion in not allowing the jury to consider information that was beyond the jury's purview.

Lynch contends that *Shannon* and the principles it embodies have been undermined by *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which Lynch argues support the very general proposition that the Sixth Amendment protects any jury power that existed at the time of the

amendment. The Second Circuit has squarely rejected this argument for reasons that are also decisive here. *See United States v. Polouizzi*, 564 F.3d 142, 160 (2d Cir. 2009). *Apprendi* and *Crawford* do not deal with jury knowledge of sentencing prospects. *See id.* To the extent that the very general principles in *Apprendi* and *Crawford* could also lead the Supreme Court to overrule *Shannon* in the future, "that is a decision we must leave to the Supreme Court." *Id.* *Shannon* remains binding law until an inconsistent decision issues from the Supreme Court, and the district court's actions were appropriate in light of *Shannon*.

[32] Lynch also argues that he was entitled to inform the jury about the mandatory minimum sentence he faced on the basis of an exception articulated in *Shannon*, that "an instruction of some form may be necessary under certain limited circumstances," such as "to counter . . . a misstatement." *Shannon*, 512 U.S. at 587, 114 S.Ct. 2419. Lynch contends that the jury instructions that "[t]he punishment provided by law for this crime is for the court to decide" was such a misstatement, in that it allegedly suggested that the district court would exercise discretion at sentencing. This argument misreads *Shannon*. *Shannon* cautioned that such correctives are "not to be given as a matter of general practice" and should only be applied to correct obvious misrepresentations, such as a statement "that a particular defendant would 'go free' if found [not guilty by reason of insanity]." *Shannon*, 512 U.S. at 587, 114 S.Ct. 2419. Stating that a judge sentences according to the law is not such a misrepresentation. It was therefore not an abuse of discretion for the district court not to have informed the jury about the potential punishments Lynch faced if convicted.

F. District Court Communications to the Jury

Lynch raises three challenges to the court's handling of jury communications—that the district court allegedly permitted ex parte communications, declined to answer juror questions, and barred jurors from asking substantive questions of witnesses—but all these challenges fail because the court did not actually permit any ex parte communications, and the other limitations were reasonable exercises of a district court's power to manage its trial proceedings.

At the start of trial, the district judge informed the jurors that they could communicate with him via the clerk by means of signed note. Jurors had asked the court clerk about the possibility of asking questions, apparently of witnesses, and the district court had informed the jury that it did not allow questions from jurors in criminal cases, owing to the potential for evidentiary misconduct. Five days into trial, the court informed the attorneys that a juror had inquired about the status of the sheriff's department and the DEA, and that question had been resolved by subsequent questioning. Later that day, a juror asked the clerk about the definitions of the terms "minor" and "hash," and, with approval from the attorneys, the district court read a definition of "minor" from the proposed jury instructions. The next day, the district court stated that several members of the jury had inquired of the clerk what Rule 403 was, and the district court answered that it would not explain the rule, because those considerations were not appropriate for the jury. Finally, a day later, the district court informed the parties that the jurors had continued to ask the clerk questions. Defense counsel asked what questions those were, but the district court declined to answer.

The district court instead summoned the jury and stated to them, pursuant to the court's first instruction, that "jurors were not going to be allowed to ask substantive questions" during trial, although the court would answer questions of procedure. After presentation of evidence concluded, the district court did permit the jury to ask questions about the instructions, and also stated that it would answer any clarifying questions if there was disagreement as to the instructions during deliberations. No jurors asked any questions then, however.

[33] Lynch places a great deal of emphasis on what he views as improper ex parte contact between jurors and the court, but there was no error in any of these circumstances, because those things about which Lynch now complains were neither ex parte, nor even communications to the jury. All of the messages went entirely in one direction: from jurors to court. Lynch's only allegations are that the court clerk received information from the jurors and conveyed that to the judge, but this is not the same as saying that either the clerk or the judge responded with communications to the jurors.

In other words, none of this contact rose to the level of communications, and so none could have been an improper ex parte communication. This court has suggested that an impermissible ex parte communication occurs only if "anything about the facts or the law" of a case has been imparted to the jury. *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000). Receiving a note and passing it along simply does not rise to this level of conveying anything about facts or law, however. Lynch appears to contend that a bright-line rule prohibits a district court from receiving any note from a juror, but such a view is clearly incorrect. The Supreme Court has held that a juror's conveying something to a judge does not justify reversal on those grounds alone, because such contact is simply part of the "day-to-day realities of courtroom life." *Rushen v. Spain*, 464 U.S. 114, 118–19, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). Lynch therefore fails to surmount the threshold hurdle to argue for the presence of improper ex parte communications between the court and the jurors.

[34] Lynch also argues that the district court had an obligation to disclose the contents of the questions asked to it by the jury, but the court's nondisclosure was within the district court's authority to manage the conduct of a trial. In this case, this district court had stated at the beginning of trial that it would not allow jurors to ask questions of witnesses, and that their responsibility was to receive evidence, rather than inquire of it for themselves. This prohibition was clearly within the court's power to impose, since a court has the authority to permit limited jury questioning of a witness, *United States v. Huebner*, 48 F.3d 376, 382 (9th Cir. 1994), or to prohibit it altogether. Lynch suggests that the district court exceeded its authorization when it subsequently told the jury that they "were not going to be allowed to ask substantive questions" during trial, although the district court would answer questions of procedure. Lynch's argument ignores the court's "broad discretion in supervising trial[ ]," subject to reversal only for abuse of discretion. *Price v. Kramer*, 200 F.3d 1237, 1252 (9th Cir. 2000). Lynch offers no reason to think that the district court abused its discretion here, especially given that the court did subsequently offer the jury chances to ask questions that the court could properly answer once presentation of evidence had concluded.

[35] Lynch most creatively contends that the district court's refusal to disclose to Lynch the contents of the notes it received from the jury violated Lynch's right

under Fed. R. Crim. P. 43(a) to be present at all critical stages of his trial. But Lynch was present during all critical stages. The fact that neither Lynch nor his counsel were told the contents of a jury note does not go to presence. Such an argument would preclude any ex parte communication during trial, no matter how warranted. Lynch provides no authority for such a rule, and this argument clearly also fails.

G. Lynch's Sentence

[36] Because Lynch was convicted of narcotics conspiracy, he was subject to a five-year mandatory-minimum sentence under 21 U.S.C. § 841(b)(1)(B)(vii), and the district court erred in not applying that sentence to Lynch. In particular, the district court declined to sentence Lynch to this mandatory-minimum because it determined that Lynch was eligible for a safety-valve provision, 18 U.S.C. § 3553(f), allowing a court to sentence a defendant below what a mandatory minimum would otherwise require. Lynch was not eligible for application of the safety valve to him, however, given his role leading CCCC, and he was therefore required to be sentenced to the five-year mandatory-minimum.

After his conviction, Lynch was potentially subject to two mandatory minimum sentences: a one-year mandatory minimum for distribution to persons under the age of 21, *see* 21 U.S.C. § 859(a), and a five-year mandatory minimum for the total amount of marijuana in his conspiracy, *see* 21 U.S.C. § 841(b)(1)(B)(vii). The district court was reluctant to sentence Lynch to these mandatory minimums, given what it reasoned was the unusual fact of Lynch's lack of clandestine activity and general intent to comply with state law.

The district court therefore took advantage of the so-called "safety-valve" provision, 18 U.S.C. § 3553(f), under which a court need not apply an otherwise-required mandatory minimum. The court recognized, however, that Lynch potentially had not satisfied a precondition for the safety valve to apply—that "the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines." *See* 18 U.S.C. § 3553(f)(4). As the Guidelines so define the terms, the "organizer or leader" and "manager or supervisor" enhancements apply to any person who plays such a role in any criminal activity involving five or more participants, U.S.S.G. § 3B1.1, and Lynch's activities clearly did involve more than five participants. The district court held, however, that "being such an organizer/leader over another participant simply qualifies a defendant for an adjustment; it does not require it." The district court cited to the Commentary to the Guidelines and stated that a larger principle applied: "when the evidence clearly shows that the defendant in question did and does not present a greater danger to the public . . . is not likely to recidivate, that individual should not be considered as falling within USSG § 3B1.1 for purposes of an upward adjustment."

The district court did, however, also determine that it could not apply the safety valve to Lynch's § 859(a) violations, because the safety valve applies only to a small number of sections of the criminal code, of which § 859 is not one. The district court therefore sentenced Lynch to one year and one day in prison.

The district court erred in applying the safety valve to Lynch. By its own terms, the safety valve does not apply to "an organizer, leader, manager, or supervisor of others in the offense as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(4). The sentencing guidelines in turn state that a four-level enhancement applies to a defendant who is "an organizer or leader of a criminal activity that involved five or more participants."

U.S.S.G. § 3B1.1(a). The relevant note further defines leadership and organizer status as involving a totality-of-the-circumstances inquiry, including:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Id. n.24.

Lynch's activities at CCCC clearly made him a leader and organizer of that enterprise, according to the Guidelines' definition. Lynch planned the venture, hired employees, ran the finances, and generally served as the primary person in the enterprise. There is also no factual dispute that Lynch's activities involved more than five participants: CCCC had about ten employees. The presence of those factors means that Lynch qualified as a leader, as defined under the sentencing guidelines, and so the safety valve was not available to reduce Lynch's sentence here.

[37] Although recognizing that "Lynch did put together CCCC's operations which had about ten employees," the district court decided that Lynch was eligible for safety-valve relief, because it determined that the atypicality of the way in which Lynch was a leader of CCCC justified a lower-than-minimum sentence. This conclusion was an error. "It is axiomatic that a statutory minimum sentence is mandatory." *United States v. Sykes*, 658 F.3d 1140, 1146 (9th Cir. 2011). Although Lynch's circumstances may have been unusual, in the sense that his was not the sort of furtive scheme typical of many drug-distribution cases, Lynch's role was clearly that of a leader, and he was thus ineligible for safety-valve relief. We have explained that the safety valve is "a narrow exception to the statutory regime established by the Mandatory Minimum Sentencing Reform Act," *United States v. Yepez*, 704 F.3d 1087, 1091 (9th Cir. 2012), and no relief exists outside of the five specific conditions for its application. Because the requirement that a defendant not be a "organizer, leader, manager, or supervisor of others" was one such precondition for operation of the safety valve, Lynch's unquestioned status as such a head of CCCC closed the door on any effort to classify him as eligible for the safety valve.

Lynch attempts to defend the district court's sentence on the grounds that a defendant's qualification for § 3B1.1 enhancement allows but does not necessarily require the rejection of safety-valve relief, but this argument fails. Courts have consistently applied the leadership guideline to defeat the safety valve without any consideration that this application is discretionary. *See United States v. Irlmeier*, 750 F.3d 759, 764 (8th Cir. 2014); *United States v. Ortiz*, 463 F. App'x 798, 800 (10th Cir. 2012); *United States v. Pena-Gonell*, 432 F. App'x 134, 137 (3d Cir. 2011); *United States v. Arroyo-Duarte*, 367 F. App'x 420, 422–23 (4th Cir. 2010); *United States v. Sainz-Preciado*, 566 F.3d 708, 715 (7th Cir. 2009); *United States v. Lopez*, 217 F. App'x 406, 408 (5th Cir. 2007); *United States v. Kerley*, 230 F. App'x 919, 923 (11th Cir. 2007); *United States v. Anglon*, 88 F. App'x 428, 432 (1st Cir. 2004); *United States v. Bazel*, 80 F.3d 1140, 1143 (6th Cir. 1996).

A remand is required because the district court erred in holding that it had discretion to apply the safety valve to Lynch, given Lynch's unquestionable status as the leader of CCCC, an organization involving more than five participants.

H. Reassignment on Remand

[38, 39] The United States requests that this case be reassigned to another district judge for resentencing, but we reject this request. Reassignment on remand is highly discouraged, and such a motion will be granted "only in unusual circumstances or when required to preserve the interests of justice." *United States v. Wolf Child*, 699 F.3d 1082, 1102 (9th Cir. 2012). Such circumstances and interests are not present here. We have articulated three factors relevant to the consideration of whether the particular circumstances of a case meet the high standard required to justify reassignment:

> (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 appearance of fairness.

Manley v. Rowley, 847 F.3d 705, 712 (9th Cir. 2017) (quoting *Wolf Child*, 699 F.3d at 1102).

[40] The facts of this case do not warrant reassignment under that standard. There is no cause to expect that the district court would reject instructions from this court, or that reassignment would otherwise be necessary to preserve the appearance of justice or ensure the efficiency of the federal courts. The district court repeatedly emphasized that its sentencing was not an act of unbounded discretion, but rather was determined by precedents from this court, as well as obligations from statute. That the district court adopted an incorrect reading of the statute does not mean that it cannot be expected to apply the correct law on remand.

The government argues that this case should be reassigned because the district court expressed views about the undesirability of the five-year mandatory minimum as applied to Lynch, but this argument is a failing one. The district court acknowledged it had a view about the sentence it would prefer to impose if granted unbounded discretion, but also made clear that it would only exercise its discretion if permitted to by law.

I. Spending Provision

[41] Following his conviction, Lynch has raised the additional issue of whether the § 538 appropriations rider applies to him and therefore requires dismissal of his conviction. The rider raises several difficult questions with respect to Lynch's case, including, among others, whether the provision operates to annul a conviction otherwise properly obtained before its passage. We need not now address the substance of how the rider operates with respect to Lynch, however, because it is not clear that the rider applies to him at all. The rider covers only persons in total compliance with state law, and it is contestable whether this so describes Lynch and his activities. Remand is therefore warranted to determine whether Lynch was in compliance with state law.

As relevant here, the appropriations rider provides that: "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to ... California ... to prevent [it] from implementing [its] own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act of 2017 § 537, Pub. L. 115-31, 131 Stat 135. Congress first passed the rider in 2014, and it has been adopted by every subsequent appropriations act, including the currently operative one. *See* Consolidated Appropriations Act of 2017

§ 537, Pub. L. 115-31, 131 Stat 135, *extended by* Continuing Appropriations Act of 2018, Division D, Pub. L. 115-56, 131 Stat 1129. Although not necessarily clear from the face of the text, we have held that this measure "prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

To say that the rider exists is therefore not enough to end Lynch's prosecution because, as the *McIntosh* court emphasized, the provision has a limited effect. The rider "does not provide immunity from prosecution for federal marijuana offenses," and, because the provision did not purport to repeal the Controlled Substances Act, even state-legal marijuana activity "remains prohibited by federal law." *Id.* at 1179 & n.5. To that end, *McIntosh* also confirmed that the government continues to possess the power to prosecute "[i]ndividuals who do not strictly comply with all state-law conditions," and that "prosecuting such individuals does not violate [the spending provision]." *Id.* at 1178; *see also United States v. Gloor*, 725 F. App'x 493, 495–96 (9th Cir. 2018) (holding that a person who does not strictly comply with state law is not covered by the rider). In short, the rider may mean that Lynch has some argument that the government cannot now spend money to prosecute him, but if and only if Lynch had been strictly compliant with California law.

It is unclear from this record whether Lynch's activities were so strictly compliant with state law. California offered two pathways for a person like Lynch to be permitted to engage in marijuana-related activities. First, California's medical marijuana statute covers certain marijuana-related activities by a patient, and by a patient's "primary caregiver." Cal. Health & Safety Code § 11362.5(d). This "primary caregiver" pathway almost certainly did not apply to Lynch and his activities. The California Supreme Court has held that a person in the position of Lynch, who acts only as a supplier of marijuana, is not a primary caregiver and is thus not in compliance with this medical marijuana statute. *People v. Mentch*, 45 Cal. 4th 274, 284–85, 85 Cal.Rptr.3d 480, 195 P.3d 1061 (2008). In consequence, the district court determined in its sentencing memorandum that "the CCCC was not operated in conformity with California state law ... as held by the California Supreme Court in *Mentch*."

On appeal, Lynch contends that his actions were in compliance with California law because there was another California statute also allowing medical marijuana collectives and cooperatives, and Lynch argues that CCCC was one of these. *See* Cal. Health & Safety Code § 11362.775(a). Although potentially closer, in the sense of not having been expressly ruled out by California Supreme Court precedent, it is questionable whether CCCC was a cooperative as that statute so defines the term. Among other things, CCCC was structured as a sole proprietorship rather than a collectively owned non-profit, *see* Cal. Health & Safety Code § 11362.765, and it is unclear whether CCCC's clientele consisted solely of patients or persons with an identity card, *see* Cal. Health & Safety Code § 11362.71. The district court also expressed its view that there was "no indication" that CCCC was a collective, and Lynch had also conceded in his response to the government's sentencing memorandum that he "does not dispute the government's assertion that he made no attempt to operate as a classic collective."

It is appropriate to remand this case for a factual determination from the district

court as to whether Lynch's activities were in compliance with state law, and particularly whether CCCC operated under the required collective form. A decision whether Lynch strictly complied with California marijuana laws may depend on specific findings of fact, as well as legal determinations, and it is proper to allow the district court to find those facts in the first instance. If Lynch was not compliant with state law, he is not covered by the rider and is subject to the penalties of his conviction. Should the district court resolve the state-law-compliance issue in Lynch's favor, the court may then rule in the first instance on the legal issues that such a determination would raise.

IV. Conclusion

We **AFFIRM** Lynch's conviction and **REMAND** the case to the district court for proceedings consistent with this opinion.

WATFORD, Circuit Judge, dissenting:

I would reverse and remand for a new trial. In my view, the district court went too far in trying to dissuade the jury from engaging in nullification. The court's actions violated Charles Lynch's constitutional right to trial by jury, and the government can't show that this error was harmless beyond a reasonable doubt.

By its very nature, a case of this sort touches a sensitive nerve from a federalism standpoint. At the time of Lynch's trial in 2008, the citizens of California had legalized the sale and use of marijuana for medicinal purposes; the federal government nonetheless sought to prosecute a California citizen for conduct that arguably was authorized under state law. Because federal law takes precedence under the Supremacy Clause, the government could certainly bring such a prosecution, notwithstanding the resulting intrusion upon state sovereignty interests. *See Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). But the Framers of the Constitution included two provisions that act as a check on the national government's exercise of power in this realm: one stating that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"; the other requiring that "such Trial shall be held in the State where the said Crimes shall have been committed." U.S. Const., Art. III, § 2, cl. 3. The Sixth Amendment further mandates that in all criminal prosecutions the accused shall enjoy the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." Thus, to send Lynch to prison, the government had to persuade a jury composed of his fellow Californians to convict.

One of the fundamental attributes of trial by jury in our legal system is the power of the jury to engage in nullification—to return a verdict of not guilty "in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138, 41 S.Ct. 53, 65 L.Ed. 185 (1920). The jury's power to nullify has ancient roots, dating back to pre-colonial England. *See* Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800, at 236–49 (1985) (discussing *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670)). It became a well-established fixture of jury trials in colonial America, perhaps most famously in the case of John Peter Zenger, a publisher in New York acquitted of charges of seditious libel. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 871–74 (1994). From ratification of the Constitution to the present, the right to trial by jury has been regarded as "essential for preventing miscarriages of justice," *Duncan v. Louisiana*, 391 U.S. 145, 158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), in part because the jury's power to nullify allows it to act as "the conscience of

the community," Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 87 (1994).

It's true that a jury has no *right* to engage in nullification and that courts are permitted to discourage a jury's exercise of this power. *Sparf v. United States*, 156 U.S. 51, 106, 15 S.Ct. 273, 39 L.Ed. 343 (1895); *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005). Hence a defendant may not insist that the jury be instructed on its ability to nullify. *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1992). But that doesn't resolve the question implicated here: May the court instruct jurors that they are *forbidden* to engage in nullification, and if so, how forcefully may the court deliver that message?

Our circuit has held that a court can seek to prevent nullification "by firm instruction or admonition." *United States v. Kleinman*, 880 F.3d 1020, 1032 (9th Cir. 2017) (internal quotation marks omitted). We have upheld an instruction that advised jurors "you cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It's not your determination whether a law is just or whether a law is unjust. That can't be your task." *United States v. Rosenthal*, 266 F.Supp.2d 1068, 1085 (N.D. Cal. 2003), *aff'd in relevant part*, 454 F.3d 943, 947 (9th Cir. 2006); *see also United States v. Navarro-Vargas*, 408 F.3d 1184, 1201–04 (9th Cir. 2005) (en banc) (upholding similar instruction given to grand jurors). I have my doubts about whether we were right to endorse such an instruction, for it affirmatively misstates the power that jurors possess. Jurors may not have the *right* to substitute their sense of justice for what the law requires, or to determine whether a law is just or unjust, but they unquestionably have the ability to exercise that power—in fact, doing so is the very essence of nullification.

Be that as it may, we held in *Kleinman* that a court crosses the constitutional line when it states or implies that jurors could be *punished* if they engage in nullification. 880 F.3d at 1032–35. A court may permissibly seek to discourage jurors from returning a verdict contrary to law or fact, but ever since *Bushell's Case*, what a court may not do is coerce jurors into obeying its instructions on the law by suggesting that those who disobey could face fine or imprisonment. Threats of punishment subvert the jury's longstanding role as a safeguard against government oppression. *See United States v. Gaudin*, 515 U.S. 506, 510–11, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Duncan*, 391 U.S. at 155–56, 88 S.Ct. 1444. Perhaps for that reason, even at the time of the Founding, "the ability of jurors to disobey judicial instructions without fear of official reprisal was not in doubt." Alschuler & Deiss, *supra*, at 912. To members of the Founding generation with fresh memories of the colonists' experience under royal judges, the jury's independence from control by the judiciary provided assurance that application of national law would rest in the hands of local citizens attuned to the concerns of their community, not in the hands of officials beholden to a distant central government.

The court in this case crossed the line we drew in *Kleinman*. During *voir dire*, the court gave prospective jurors an instruction that largely tracked the one we approved in *Rosenthal*. Critically, though, the court went further by stating: "Nullification is by definition *a violation of the juror's oath* which, if you are a juror in this case, you will take to apply the law as instructed by the court." (Emphasis added.) In *Kleinman*, we held that a materially indistinguishable instruction—stating "[y]ou would violate your oath and the law" by engaging in nullification—was not only improper but an error of "constitutional dimension," for it carried with it the

implicit threat of punishment. 880 F.3d at 1031, 1035. That implicit threat is no less present here, even though the court referred only to the jurors' oath without explicitly mentioning "the law." Telling jurors that nullification is a violation of their oath, standing alone, implies the potential for punishment because violating one's oath could be deemed either perjury or contempt, both of which are punishable by fine and imprisonment. *See* 18 U.S.C. §§ 401(3), 1621(1), 1623(a); *Clark v. United States*, 289 U.S. 1, 10, 53 S.Ct. 465, 77 L.Ed. 993 (1933). So, as in *Kleinman*, the court's instruction in this case violated Lynch's Sixth Amendment right to trial by jury.

An instructional error of this nature would appear to defy analysis for harmlessness, since "the effects of the error are simply too hard to measure." *Weaver v. Massachusetts*, —— U.S. ——, 137 S.Ct. 1899, 1908, 198 L.Ed.2d 420 (2017). The harmlessness inquiry in this context can't turn on an evaluation of the strength of the government's evidence; by definition, nullification involves a juror's decision to acquit notwithstanding the strength of the evidence. What we would have to assess, then, is whether a juror who was otherwise inclined to nullify might have been dissuaded from doing so by the court's instruction. At least in cases like this one, where nullification was an obvious possibility given the popularity of medical marijuana in California, I don't see how the government could ever prove that a court's unduly coercive anti-nullification instruction had no effect on the outcome.

Nevertheless, we held in *Kleinman* that this precise instructional error is subject to harmless error analysis. Thus, the question remains whether the government can show that the court's erroneous anti-nullification instruction was harmless beyond a reasonable doubt. *Kleinman*, 880 F.3d at 1035. The government cannot make that showing, and indeed it has not even tried. In *Kleinman*, we found the court's instruction harmless because it represented only "a small part of the court's final instructions to the jury, and was delivered without particular emphasis." *Id.* Here, in stark contrast, the court delivered the instruction as a stand-alone admonition at the outset of the case, in a manner that could not have placed greater emphasis on the coercive message the court delivered.

The court gave its anti-nullification instruction during *voir dire* because, in response to a question from defense counsel, one of the prospective jurors stated, "I believe there is something called jury nullification, that if you believe . . . the law is wrong . . . you don't have to convict a person." The court tried unsuccessfully to cut the juror off as soon as she said the words "jury nullification," and then asked to speak with counsel at sidebar. After a brief discussion at sidebar, the court ordered the jurors to leave the courtroom while it continued to discuss the matter with the lawyers. Nearly 50 minutes later, the court called the prospective jurors back in and immediately asked if anyone had discussed the topic of jury nullification while they were waiting in the hallway. None of the jurors responded affirmatively, but the court gave the contested instruction anyway, informing jurors that nullification would be a violation of the oath they were required to take. The court then polled the prospective jurors in open court and asked each of them, one by one, whether they could follow the court's instruction not to engage in nullification. All but two stated that they could, and the two who indicated that they would have difficulty following the court's instruction were dismissed for cause.

In these circumstances, I do not think we can say beyond a reasonable doubt that any juror who might have been inclined to

nullify would have done so regardless of the court's instruction. The instruction was inherently coercive because it implied that any juror who engaged in nullification could be punished for doing so. Only the hardiest of jurors would remain committed to voting her conscience when threatened with the risk of fine or imprisonment. That is particularly true here, where the court required the jurors to affirm in open court that they could follow the court's command not to engage in nullification. Although this occurred at the very outset of trial, none of the court's closing instructions counteracted the coercive effect of its earlier admonition. In fact, one of those instructions drove home the message the court conveyed during *voir dire*: "You must follow the law as I give it to you whether you agree with it or not. . . . You will recall that you took an oath promising to do so at the beginning of the case."

Nor can we say that defense counsel "invited" the court's error. The question defense counsel posed to the prospective juror who mentioned nullification merely asked whether she understood that "the ultimate decision as to whether to find a person guilty or not guilty is your decision." That question didn't call for a response mentioning jury nullification, and it accurately reflects black-letter law. *See Gaudin*, 515 U.S. at 510, 115 S.Ct. 2310. But even if defense counsel somehow goaded the prospective juror into mentioning nullification, that at most gave the court a basis for issuing the instruction we approved in *Rosenthal*. It did not by any stretch authorize the court to give an instruction that suffers from the same constitutional defect we identified in *Kleinman*.

In short, the court's erroneous anti-nullification instruction cannot be declared harmless beyond a reasonable doubt. I would therefore reverse and remand for a new trial.

Daniel CAMPBELL; et al,*
Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES,
Defendant-Appellee.

Cesar Mata, Plaintiff,

and

Richard D. Alba; et al., Plaintiffs-Appellants,

v.

City of Los Angeles, Defendant-Appellee.

No. 15-56990, No. 16-55002

United States Court of Appeals, Ninth Circuit.

Argued and Submitted November 8, 2017 Pasadena, California

Filed September 13, 2018

Background: In two related collective actions brought against city under the Fair Labor Standards Act (FLSA), approximately 2,500 police officers asserted that, despite having a written, FLSA-compliant policy prohibiting off-the-clock work, city had a pervasive, unwritten policy discouraging the reporting of overtime, including for pre-shift work, post-shift work, and work through meal breaks. Following ex-

* Due to the number of parties in these appeals, the individual parties are listed in the attached Appendix.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HONORABLE GEORGE WU, UNITED STATES DISTRICT COURT JUDGE

UNITED STATES OF AMERICA,	CA NO. 50219
Plaintiff,	
vs.	**CASE NO. CR 07-689 GW**
CHARLES C. LYNCH,	
Defendant.	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, July 24, 2008

9:45 a.m.

JURY TRIAL - DAY TWO

JOHN G. TURMAN, CSR, RMR
Official Court Reporter
233 East Temple Street
Room 181-G
Los Angeles, California 90012
(213) 626-2920

JUROR: Because I'm thinking about my own daughter, my daughter, a minor child? It would be difficult.

MR. LITTRELL: And now is the time to tell us if you just can't do it. Now is the time to tell us. And when the court said that there was no right answers, that's exactly what the court meant, which means if you feel so strongly about it that you couldn't be fair, now is the time to tell us, and it's okay to just tell others?

JUROR: Okay. I'm going to tell you it would be really hard for me to be fair.

MR. LITTRELL: You think you couldn't be fair?

JUROR: It would be really difficult because I have to keep coming back to my child, my own child. When you're talking about a minor, it's really difficult for me.

MR. LITTRELL: So you couldn't judge the case without thinking about your own child --

JUROR: My child and everyone else's child out there. I'm sorry. It would be really hard for me to tease that out.

MR. LITTRELL: So you can't be sure that you could be fair, then, given your experience and any relationship with your child?

JUROR: Yes, that's right.

MR. LITTRELL: Now, the next question is for juror

number 25. You mentioned that you felt the federal laws were seriously flawed. Why is it that you feel that way?

MR. KOWAL: Objection, Your Honor.

THE COURT: I'll sustain the objection.

MR. LITTRELL: You also mentioned that it would be difficult for you to follow the law as instructed by the judge or that -- I believe your words were, it would be hard for you to follow the court as the court would wish you to. Do you understand that the court is going to instruct you on the law but will not instruct you about the decision that you need to come to after being instructed on the law? Do you understand the difference?

MR. KOWAL: Objection. Misstates the law.

THE COURT: I'll sustain the objection. You can attempt to rephrase the question.

MR. LITTRELL: Do you understand that the ultimate decision as to whether to find a person guilty or not guilty is your decision?

JUROR: You finally said something I can relate to. I understand that completely. I believe there is something called jury nullification, that if you believe --

THE COURT: No --

JUROR: -- the law is wrong --

THE COURT: No. Let me stop you --

JUROR: -- you don't have to convict a person.

That's it.

MR. KOWAL: Your Honor, can we go sidebar?

THE COURT: Let me see counsel on sidebar.

(Sidebar)

THE COURT: Let me indicate to defense counsel, you did that and I thought if your question can come out, this is the particular point, so the question is, what do we do bit.

MR. LITTRELL: I certainly was not looking for that result. The jury instruction say over and over that the decision -- what verdict to come to is for the jury alone. It's right out of the model instructions, Your Honor. I was certainly not looking for a discussion on jury nullification.

THE COURT: Well, we have it.

MR. KOWAL: Your Honor, I believe that the record is different. The court expressly explained that this juror was not rehabilitatable. The government expressed the concern that exactly what Mr. Littrell was going to do, because what he did do is trying to get prejudicial material through.

(Open Court)

THE COURT: Let me do this. Let me -- let's clear the courtroom on this one at this point. Let me ask the jury to go outside.

THE CLERK: The public, Your Honor?

THE COURT: Not the public, just the jury.

(Jurors excused at 3:10 p.m.)

THE COURT: All right. Let me ask the government? What is your position at this point?

MR. KOWAL: Again, Your Honor believes this was intentionally done, given the discussions we had at the sidebar --

THE COURT: I didn't say it was intentionally done.

MR. KOWAL: Again, I would like to make a case for it. Based on the fact that the court had already indicated the views as to this juror. There were two objections in a row. The government had already discussed this issue of nullification. We think there should be two things done. First, that should be the end of the voir dire for defense as a result of the intentional act.

Second of all, we believe the court should give the instruction as the court gave in Rosenthal, explain to the jury that they cannot make up law; that the law -- they can't decide what's right or wrong; that what the juror said about jury nullification is incorrect; that there is no ability to do that; and that this case has to be based on the law. And we would ask that each juror be asked that they affirm that they understand and are willing to abide by

that.

THE COURT: Yes, from the defense.

MR. LITTRELL: Well, Your Honor, the question I that I asked was -- it's really taken directly from the model instructions that the court's going to give and it's not real different from a question I asked yesterday. I asked this particular jury that question, because she said --

THE COURT: Counsel, it was clear from this particular juror's responses to the court's questions that this particular juror could not be rehabilitated. And I indicated that to you on sidebar, and yet you attempted to attempt to rehabilitate this particular juror with a subject which is so close to jury nullification that it's somewhat surprising.

How did you expect to rehabilitate the juror on that particular point?

MR. LITTRELL: Your Honor, we did discuss this at sidebar. I was not under the understanding that I couldn't attempt to rehabilitate this juror. I do know that the government took the position that it wouldn't be -- that it couldn't be done, but this juror's responses to the court's question was that she didn't feel like she could follow the law as the court would want her to.

THE COURT: And why do you think that she said

that? What do you think was going on in her mind when she made that particular comment, "as the court would want?"

MR. LITTRELL: I think that most -- almost every question that has been asked of these jurors both by the court and by the government has made -- the jury venire was instructed that the possession of marijuana for any purpose violates federal law, and so the follow-up questions have been: You will be required to -- you will be given instructions as to federal law and you will be required to follow them. Early on, the question -- the follow-up question to that is: Could you convict? And I asked the court to rephrase the question, which the court did, which was: Could you come to a verdict?

Now, I think the assumption in almost every juror -- potential juror's mind is that following federal law would require them to convict, and so when juror 25 said she didn't know if she could follow the law as the court would want her to, I think what she was telling the court was that she would -- she would have a very difficult time convicting, given the assumption that federal law would prohibit the conduct.

Now, it's -- I think that -- ultimately, I think that the jurors may have felt, especially juror number 25, that the decision ultimately wasn't up to them, and that's thought true. And I think that it's worth -- and

certainly in closing I would remind the jury that it is their decision make. Now --

THE COURT: Decision to make in terms of the facts. It is not their decision to make in terms of the law, and I have continually repeated that. But the problem is, the way you phrased that particular question, you left the door open for the juror to start in on juror nullification.

MR. LITTRELL: I will tell the court I sincerely did not see that coming. I did think that she --

THE COURT: Counsel, you must be smarter than that.

MR. LITTRELL: I think that she would -- I think that when she -- I think that juror 25 was very candid. She said: Finally, I have something I can relate to. And the truth is --

THE COURT: Yes, because she would engage in nullification. It was clear that she would engage in nullification if she was allowed to stay on this jury.

MR. LITTRELL: But the point I was trying make is if there was a defense, then one could find --

THE COURT: That wasn't the question you asked her at that point in time.

MR. LITTRELL: That was the question I asked to the juror previous.

THE COURT: I agree, that was, but that wasn't the question you asked to that particular juror.

Let me put this way: What is defense' position as to what the court will do now that the issue of jury nullification is here?

MR. LITTRELL: Well, that's -- I mean, that does sound like a question for our appellate chief, but I will tell you this: I think that the issue of juror nullification is pretty tricky. I mean, there is constitutional law scholars that study it.

THE COURT: Let me put it this way: The California -- sorry -- the U.S. Supreme Court has made a statement in regards to jury nullification, haven't they?

MR. COHEN: Perhaps they have. I do not know, Your Honor, but I'm not sure -- it seems like to instruct the jury that they could not nullify -- I had agree that there is very good case for the idea that arguments that orient towards nullification shouldn't be made, but to instruct the jury that in fact it did not have --

THE COURT: I'm obviously going to instruct the jury on this point because the defense has opened the door. I pretty much have to at this point in time, don't I?

MR. LITTRELL: I think that the jury should be instructed to follow the law, Your Honor, but I think if the jury were instructed --

THE COURT: Unfortunately, a juror feels that they can't follow the law by engaging in nullification at this point in time.

MR. LITTRELL: I think that the juror who expressed that sentiment is juror number 25, and I think she has very little chance to make it on to this jury.

THE COURT: Well, what can one say at this point?

MR. KOWAL: Again, I will reiterate: The first question to this jury was: Why do you have these feelings after not once, but three times said she couldn't follow the law, Your Honor. It was intentionally done, Your Honor, and what we think should happen now, first, that should be the end of voir dire for defense.

Second of all, we have a proposed jury instruction number 35 which we believe should be given and each juror should be made to understand that they can accept that instruction and the court should specifically instruct that what the juror said was not correct and what is not proper, and that if anyone doesn't agree with that, they should come talk to you about it at sidebar so we can flesh that out.

THE COURT: Where is your proposed juror number instruction number 35?

MR. KOWAL: It is -- should we just approach with it, Your Honor?

THE COURT: Well, no. What page? Is it on your joint --

MR. KOWAL: Yes, number 40 --

MS. GERGES: No. It's actually not in the joint proposed. This is the substantive instruction that the government had previously filed. And this instruction was given in United States versus Dale C. Schaffer (phonetic) in the Eastern District of California.

THE COURT: Let me have a copy of it.

MS. GERGES: May I approach, Your Honor?

THE COURT: Yes.

MR. LITTRELL: Your Honor, may I confer with Mr. Kowal?

THE COURT: Yes.

(Pause)

THE COURT: Let me indicate: I don't understand. Jury -- your proposed jury instruction number 35 doesn't mention or relate to jury nullification. It just talks about: I told you to disregard a number of statements and arguments advanced by the lawyers which are contrary to the law.

MS. GERGES: The next sentence, Your Honor, is about following the law without allowing any personal beliefs to interfere.

MR. KOWAL: I guess we would have to probably

craft it specifically with just the words used by juror 25.

THE COURT: I would say yes, you would have to craft it such that it is applicable to the situation.

MR. KOWAL: Well, again, that was given -- that particular instruction was given in the case that deal with jury nullification so we would have that in, and I think we could strengthen it by saying juror nullification is not proper for jurors, period, and then the second sentence of the proposed instruction.

THE COURT: Why don't we do this: Let's take a break and I will allow each side to marshal up whatever they have in terms of what they want the court to do at this point in time, and I will come back in ten minutes and we'll see what happens.

(Recess taken at 3:20 p.m. until 3:45 p.m.)

THE COURT: All right. Let me hear from the parties. Anything else that the parties wish to raise in regards to this issue?

MR. KOWAL: Your Honor, we think first the court should excuse juror number 25 and perhaps also any other juror at the same time to whom stipulations having been made. We then ask by show of hands who anyone has talked about what juror number 25 has said and we'd like to find out at sidebar what was said so we get a sense of how badly tainted the jury is in this area. If we're in a position

after that where we think that it can be salvaged, we'd like instruction that we proposed and at the end of voir dire sort of figure out at that time what damage has been done.

THE COURT: From the defense.

MR. LITTRELL: Your Honor, I think that -- remember correctly, what came out was something along the lines of what about nullification or something. There was no discussion about what that is, what it means. You have instructed the jurors that they can't go research it, so I don't think we can even assume --

THE COURT: I will be informing the jury that jury nullification is improper. That it is one of the first things I'm going to be doing.

MR. LITTRELL: With that understanding, I don't think I have any objection to the government asking who has talked to juror number 25 about what she said --

THE COURT: No, they are not asking who talked to juror number 25; who talked amongst themselves about what juror number 25 said.

MR. LITTRELL: No objection at all to that. I do think it should happen in open court, though, Your Honor, not at sidebar. I think to the extent that jurors are singled out and questioned about that, they will assume that what what juror 25 said was --

THE COURT: Somehow wrong?

MR. LITTRELL: Yes, Your Honor.

THE COURT: Well, isn't, by definition, it wrong in the sense that it should not be the subject which is interjected into the process?

MR. LITTRELL: I don't know if I can agree with that, Your Honor. I think that there is -- certainly, there is very good law for the proposition that you cannot argue -- make argument solely for the purpose of jury nullification, can't introduce evidence of that, but the idea --

THE COURT: Don't they say that defendants are entitled to an instruction as regards to jury nullification?

MR. COHEN: I beg your pardon, Your Honor?

THE COURT: It's also true that defendants are not entitled to an instruction regarding the allowance of jury nullification.

MR. LITTRELL: Agreed, Your Honor. Jury nullification is sort of a product of the common law that goes back to, you know, arguably the Magna Carta. And I'm not suggesting that I have a right to argue it --

THE COURT: But the problem is that you interjected it into play at this point in time. The question is what should be done.

MR. LITTRELL: Your Honor, I would -- I don't know if it matters, but I would say I haven't. I would say juror

number 25 did that. It certainly was not the answer I was looking for, Your Honor. I think to instruct the jury on it would only draw attention to the idea.

THE COURT: Well, let me indicate to both sides: I will instruct the jury as follows unless I hear major objections, in which case I will talk about it some more. I propose to inform the jurors that jury nullification is, by definition, a violation of the jurors' oath to apply the law as instructed by the court. As society is committed to the rule of law, jury nullification is not considered to be desirable or that the courts may permit it to occur when it is within the authority of the court to prevent.

Indeed a juror who follows -- sorry -- indeed a juror who refuses to follow a court's instructions on the law can be discharged from the jury because that person is unable to perform his or her duty as a juror.

MR. KOWAL: Your Honor, I think some of that gets a little bit too legalistic, and I concur with what Judge Bryer's instruction was in Rosenthal as proposed to you or at least we would add his paragraph about you cannot substitute your sense of justice.

I think the jury should be directly and personally -- the way the court framed it was more of sort of a description of the law. I think they have to be told specifically you cannot substitute your sense of justice, et

cetera, as Judge Bryer gave the instruction in Rosenthal case, so I would add that.

THE COURT: All right. I will add the paragraph -- I will add -- I will read it as follows, then: Juror nullification is by definition a violation of the juror's oath to apply the law as instructed by the court. You cannot substitute your sense of justice, whatever that may mean, for your duty to follow the law whether you agree with it or not.

It is your duty -- sorry. It is not your duty -- it is not your determination whether a law is just or whether a law is unjust. That cannot -- sorry -- that can't be your task? That's what you've written?

MR. KOWAL: That is what it said in the paper, but I think we can make the grammatical changes.

THE COURT: Well, I don't know, there is so many grammatical problems with it, I don't know where to start.

MR. KOWAL: Bring it up with Judge Bryer. Again, I'm just quoting directly from the case.

THE COURT: All right.

MR. LITTRELL: Your Honor, the response would be this: I think that the first portion of the instruction which says that jury nullification by definition a violation of oath to follow law, I would on be to that. I don't know -- and it's -- I know it sounds out of track but I

don't know if that's necessarily true and --

THE COURT: Do you know what the oath says?

MR. COHEN: The oath requires the juror to follow law --

THE COURT: Okay.

MR. LITTRELL: -- and I think the jurors should be instructed and will be instructed to follow the law and I think that's enough to say that. And as I mentioned before, people have studied this idea and its -- you know, and I think that the idea of jury nullification --

THE COURT: Stop you. I suppose in the abstract if this had been a regular trial and the issue of jury nullification had come in, not come in, I would agree with all of you, wouldn't bother giving you an instruction of this sort, but the problem is that, you know, the topic has been interjected at this point in time.

The court warned defense counsel prior to its desire to question juror number 25 of problems in this area, and as a result, juror No. 25 has interjected the issue. I have to correct that now, don't I?

MR. LITTRELL: I'm not sure if the court has any duty to correct --

THE COURT: I do have a duty to correct it.

MR. LITTRELL: To the extent the court has a duty to correct it, I think the jury should be instructed, one,

to follow the law --

THE COURT: Let me put it this way: All of the discussion prior to this point in time has been the court asking the jurors whether or not they can follow the law. That was done ad nauseam for the last, what, six hours in this voir dire process? And so, therefore, when you asked the questions of this particular jury in the manner in which you did, what was the result going to be other than jury nullification?

MR. LITTRELL: I'll be as transparent as I can, Your Honor. When we asked -- when she said that she wasn't sure that she could follow the law the way the court would want her to, what I was trying to get her to say is that, basically, the court -- that she was the one that's got to decide. No one is going to tell her how to apply the facts.

THE COURT: Yes, which is part and parcel of jury nullification, isn't it? That nobody can instruct you as to what the law is. You are free to adopt the law as you see it.

MR. LITTRELL: That certainly wasn't what my -- I intended to suggest, Your Honor.

THE COURT: But you have already indicated that that was what you had expected that juror to particularly say, because you said you expected her to say it wasn't up to the court to inform her as to what the law was.

MR. LITTRELL: Either I misspoke or the court misunderstood. What I wanted to reaffirm, she obviously felt like following the law required her to come to a certain decision that the court wanted her to come to a certain decision. I wanted to --

THE COURT: I hardly think that since the court already informed the jury on more than one occasion the court did not want the jury come to any particular decision, as it was entirely up to them what decision the court -- sorry -- the jury could reach based upon the evidence and based on the law.

MR. LITTRELL: Yes, Your Honor. I guess if the question is remedy, I think that the jury should be instructed to follow with respect to the paragraph --

THE COURT: Too late on that particular point, because the court has already instructed the jurors that they are supposed to the follow the law, and at this point in time we have a juror who is indicating that she doesn't feel she has to follow the law --

MR. LITTRELL: And -- and --

THE COURT: -- in response to the defense questions.

MR. LITTRELL: That may well be a basis for a for-cause challenge, but all of the jurors are going to be instructed that they must --

THE COURT: Let me stop. Not only will I give the instructions I've indicated, I will also be asking each juror individually whether or not they can follow the law.

MR. KOWAL: Your Honor?

THE COURT: Yes.

MR. KOWAL: On the instruction, there was one additional sentence in our proposed instruction that I left out. That was probably just right after the court's introductory sentence right after the oath, and that would be the sentence that would say a jury must follow the law given to it by the court.

THE COURT: Well, let me just add: My first sentence would be: Jury nullification is, by definition, a violation of the jurors' oath to apply the law and instructions by the court.

MR. KOWAL: And then the next sentence that follows from it, violation of the oath and you can affirmatively saying a juror just follow the law given by the court --

THE COURT: I think it's repetitive. I will not add that sentence in.

Yes. Anything else?

MR. LITTRELL: Your Honor, I would just point out that this Ninth Circuit model instruction tells the jury that it's not to be influenced by sympathy or prejudice, and

so I think this instruction, to some extent, repetitive or redundant to that.

And finally, we intend, as the court notes, to ask the jury to follow the law, so we have no interest, really -- I mean, that's certainly not -- we didn't come to court to nullify, Your Honor, and so I just want to point that out.

THE COURT: Sometimes when you skate on the edge, you have to expect fallover, and you fell over.

Yes.

MR. KOWAL: Your Honor, we think the record is contrary on that issue, but we did want to ask is the court going to inquire of the jurors by a show of hands as to whether they discussed --

THE COURT: Yes.

MR. KOWAL: -- and then we'll proceed after that?

THE COURT: Yes.

MR. KOWAL: Okay. Thank you.

MR. LITTRELL: Your Honor, I just want to make the record, I do think that's coercive, so we object.

THE COURT: Well, given the fact that the defense caused this particular situation to exist at this point in time, I pretty much must reject that objection.

MR. LITTRELL: Yes, Your Honor.

THE CLERK: Bring the jury?

THE COURT: Yes. I guess we won't get into any witnesses today, are we?

(Jury in at 3:59 p.m.)

THE COURT: All right. Let me ask the prospective, all prospective jurors, how many of you talked about the issue of juror nullification when you were in the hallway?

JUROR: About what?

THE COURT: Juror nullification when you were in the hallway. Any of you? None of you talked about the issue?

All right. Let me indicate the following: Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a jury -- as a juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.

Do all of you understand that?

JUROR: Yes.

THE COURT: Let me ask juror in seat number 1: Could you follow that instruction?

JUROR: Yes, I can.

THE COURT: And you're juror -- seat number 1. Actually, I should say juror number 1. Could you follow that instruction.

Juror number 5, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 6, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 11, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 13, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 16, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 18, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 19, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 20, could you follow that

instruction?

JUROR: Yes.

THE COURT: Juror number 21, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 24, could you follow that instruction?

JUROR: Yes.

THE COURT: Let me ask juror number 25, do you honestly feel you could follow that instruction?

JUROR: I don't think so.

THE COURT: Juror number 26, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 27, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 28, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 29, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 30, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 31, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 32, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 33, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 34, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 35.

JUROR: It would be going against what I believe, but yes.

THE COURT: Okay. Juror number 36, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 37, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 38, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 39, could you follow that instruction?

JUROR: Yes.

THE COURT: Juror number 40, could you follow that instruction?

JUROR: Yes.

THE COURT: And juror number 41, could you follow that instruction?

JUROR: Yes.

THE COURT: All right. Let me have counsel on sidebar for just a moment, then we'll proceed.

(Sidebar)

THE COURT: All right. Any other things I forgot to do?

The defense -- the court finds the defense has completed their voir dire at this point in time.

Let me ask this at this stage: We have agreed upon for-cause challenges as to jurors No. 32, 34, 39. Let me ask: Are there any other for-cause challenges?

MR. KOWAL: Yes, there are, Your Honor.

THE COURT: Those are?

MR. KOWAL: 25.

MR. LITTRELL: No objection.

THE COURT: All right. Any others?

MR. KOWAL: One second, Your Honor.

C E R T I F I C A T E

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

DATED this 16th day of August, 2010.

_____

JOHN G. TURMAN, CSR, RMR

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE HON. GEORGE H. WU, JUDGE PRESIDING

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	NO. CR 07-689-GW
CHARLES C. LYNCH, et al., Defendants.	)	

REPORTER'S TRANSCRIPT ON APPEAL

Los Angeles, California

Thursday, July 31, 2008; 11:36 A.M.

Day 7 of Jury Trial

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THE COURT: This is my decision on the issue. I will find that the defendant can raise entrapment by estoppel in part -- sorry. I didn't notice he wasn't here.

MR. COHEN: It's okay, Your Honor.

THE COURT: Let me start over again.

MR. COHEN: Thank you.

THE COURT: I will find that the defendant can raise the defense of entrapment by estoppel in part in this case and we will have to discuss what that will mean. The basis for my decision -- I have read all the cases including the ones that now are recited in the government's latest submission and I would normally have agreed with the government, but the facts in this case are clearly distinguishable from the facts in any other situation.

The unusual factor here is that the state legalized -- purportedly legalized marijuana in this state. And this is not a situation where in other cases, for example, in the Ramirez-Valencia case it was just a simple an I -- what-do-you-call-it form, an immigration form which was purportedly relied upon by the defendant there. Again, this is entirely unusual. One might almost call it sui generis. It's unique and, therefore, on that basis I will find that the defendant can raise it based upon what he's presented.

However, the part that I will find that he cannot

raise it, however, is that I don't see any basis for him raising entrapment by estoppel in regards to the charge of sale to minors. There is nothing that he's presented which goes toward that. It is a requirement of entrapment by estoppel that he provide the historical facts, et cetera, and if he doesn't describe the crime which is -- obviously the distribution of marijuana is a crime, but also distribution of marijuana to minors is a different crime. He never gave any indication that he was going to be doing that. Not to indicate that that was his plan from the very beginning, but he didn't inquire as to that. So to my mind it would be -- well, there is a failure to indicate that to the purported DEA agent and certainly one cannot expect that the answer to that crime would be the same as the answer to the general crime. So it's a different situation.

MR. TANAKA: Just so I can clarify. So the basis that you are willing with respect to the sale of marijuana to minors is that he didn't provide enough historical facts to the DEA?

THE COURT: He didn't indicate that he was planning to sell marijuana to minors.

MR. TANAKA: Okay. He was going to sell --

THE COURT: He did indicate that he was going to open up a marijuana dispensary or sufficient information as to that which implies or a decision to establish that, one,

he's going to possess and intend to distribute marijuana. It's sufficient as to the operation of a drug premises. In other words, it's sufficient as to counts four, five and parts of count one. The question is, is that how do we deal with the court's allowance of his raising the defense as to parts of count one but not as to all of count one.

MR. TANAKA: I'd like to address the first part of that, and that is that he told them he was going to sell marijuana presumably pursuant to California law and that would be the understanding.

THE COURT: No, that's not what he said. Look at the transcript.

MR. TANAKA: Well, that's not what he said, but it was certainly the context of the question. Otherwise, selling marijuana to anyone would not be legal.

THE COURT: Let me put it this way. He has to -- in other words, we can only let him slide so far in this regard. It's entirely a different scenario if you are going to be selling marijuana to persons under 21 as opposed to opening generally a marijuana dispensary.

MR. TANAKA: Your Honor, I don't know for sure but I suspect that all marijuana dispensaries or most marijuana dispensaries sell to people under 21.

THE COURT: Why would the person at a DEA's office necessarily know that? In other words, again, all the

arguments that we've talked about come into play at this point in time insofar as the defense is concerned. I don't see any basis upon which what he's testified to so far, and apparently there is nothing more that he's going to testify to about this particular portion of his testimony that would be any different than what he's testified to already that would give rise to the basis for the court to find that there is a sufficient basis for the defense on that issue to go to the jury.

MR. TANAKA: I guess I understand. I don't want to appear ignorant, but perhaps the court could explain one more time why selling marijuana generally which is generally illegal --

THE COURT: First of all, aren't these different crimes? Isn't the sale of -- in other words, what happens if he said I plan to open my marijuana dispensary -- didn't tell the DEA I plan to open my marijuana dispensary next door to the kindergarten. Wouldn't you think that that would be -- in order for him to -- if he did open his marijuana dispensary next to a kindergarten that he should have told somebody that at the DEA before he goes ahead and opens it?

MR. TANAKA: I can see my colleague Mr. Cohen seems to think he has a pretty good answer to that, so I will defer to him.

MR. COHEN: If I may, Your Honor.

THE COURT: Yes.

MR. COHEN: Your Honor, I think what I heard the court come out and say was that this is an unusual case because the State of California has legalized medical marijuana under certain circumstances. One of the things that the state has done as well and certainly counties and municipalities I guess it would be have set a different age than the federal government insofar as who can purchase. So what the DEA -- I mean, we've heard in this case that the DEA did not know about federal law. In other words, we've heard that the entire Camarillo office does not know about the magic number of 100.

THE COURT: What does that have to do with this issue?

MR. COHEN: Well, what the court has just said is that what should the DEA have to know about medical marijuana dispensaries.

THE COURT: No, to the contrary. What it is that the defendant has to inform the DEA or any other government official of if he wants to use this defense. In other words, this defense is not supposed to allow people to violate the law willy-nilly. In other words, there has to be a serious basis for the defense.

MR. COHEN: Absolutely, otherwise if we had come

to this court, for instance, and Mr. Lynch had not complied with any of the state laws that the DEA had directed him to comply with. In other words --

THE COURT: The DEA didn't direct him.

MR. COHEN: They said it's up to the cities and counties. What Mr. Lynch then did was he went to the city and county and he figured out what their laws were and he then complied with them.

THE COURT: It doesn't work that way in terms of the -- in other words, he has to have related to the official the sufficient information for the official to have given him the correct response.

MR. COHEN: Sure, I understand that.

THE COURT: If he doesn't apprize him or her of the crimes that he plans to commit, he can't very well say I was entrapped by estoppel --

MR. COHEN: Sure.

THE COURT: -- because I wasn't so advised.

MR. COHEN: Of course. And, Your Honor, what he told them was that he -- what if I -- I think it's what if I were to open a medical marijuana dispensary. We have a lot of medical marijuana dispensaries in this state, Your Honor. All of them are operating -- well, not all of them actually, but some of them like Mr. Lynch are operating assiduously based on state law. So one of the things that Mr. Lynch did

was operate assiduously insofar as how he was directed by the counties and state. Now, the government, of course, can argue that he wasn't. That, of course, is a consideration for the jury that goes to the reasonableness of his reliance. But he said and he testified, and if I may, I think he said medical marijuana dispensary, we all know what they are, and I think the DEA knows what they are and I think that's why they tried to shut them down. I don't have -- do we have the transcript, if I may, just for a moment?

THE COURT: You can take a look at the transcript.

MR. COHEN: Your Honor, if I could refer to -- at least it's on my page 10. I think it's on line seven. Mr. Lynch -- I'll read from four to seven. He seemed a bit perturbed possibly may be the word and he slowed his words down to make sure I understood him and he said it's up to the cities and counties to decide how they want to handle the matter.

THE COURT: Yes, as to the general issue of --

MR. COHEN: Of medical marijuana.

THE COURT: -- his opening up a medical marijuana dispensary.

MR. COHEN: And I think the facts have clearly established that he in fact did open a medical marijuana dispensary, Your Honor.

THE COURT: Yes, and I've indicated that is a defense as to that.

MR. COHEN: Okay.

THE COURT: Distributing marijuana to minors is different --

MR. COHEN: Well, it is different.

THE COURT: -- and if he had an intention to do that, he has to specifically have informed the --

MR. COHEN: Well, again, Your Honor, that I think takes us back to Eaton, doesn't it? Ignorance of the law is no excuse, right?

THE COURT: Yes, it is.

MR. COHEN: Right, it is no excuse except when you are presenting an entrapment by estoppel defense.

THE COURT: No, not in the ninth circuit it's not. Let me put it this way, counsel. This is so close that I could have gone either way on this one, on the defense entirely.

MR. COHEN: Okay.

THE COURT: I'm giving the defendant the benefit of the doubt, but not on the issue of distribution of marijuana to minors. If he had really wanted to do that, he should have specifically asked that.

MR. COHEN: Thank you, Your Honor.

THE COURT: Anything from the government?

MR. KOWAL: First on a broader issue. The court talked about this being sui generis, but as the court knows we presented the court with cases in this circuit where courts have determined, Judge Matz determined, affirmed by the ninth circuit on appeal, another court in the Scarmazzo case exactly the opposite of the court's determination.

THE COURT: That entrapment by estoppel is not available in this context?

MR. KOWAL: Yes.

THE COURT: Why?

MR. KOWAL: Exactly that. Because, to quote the court in Sarmento, given numerous public statements by federal officials indicating that marijuana remained illegal under federal law even under passage of Prop 215 it was unavailable as a matter of law. Similarly, Judge Matz said, quote, the court notes that it is close to impossible for defendants to establish reasonable reliance on any federal official statements or conduct given that the federal law enforcement agencies involved in the enforcement of federal anti-narcotics laws consistently and [inaudible] pronounce their opposition to Proposition 215 and the refusal to be bound by it. Affirmed, *United States v. Osborne*, quote, given the numerous public statements -- these cases all by the way earlier in 2006, 2003, given the numerous public statements by federal officials indicating that marijuana

remained illegal under federal law even after the passage of Prop 215 defendants' purported belief in the legality of their conduct under federal law was unreasonable and they were therefore not entitled to present evidence in support of an entrapment by estoppel or public authority defense. Those courts found that as a matter of law based on the court's own just understanding of judicial notice of what was going on. So it's exactly the opposite to what the court is doing.

THE COURT: Well, no, judicial notice is exactly the same as one's knowledge of the law in general. In other words, generally ignorance of the law is no excuse and I agree with you on that. But if that were the truth of the case then you could never have entrapment by estoppel as a defense.

MR. KOWAL: You can but not under these facts.

THE COURT: What you are talking about is the question as to whether or not the reliance is reasonable whether or not the persons should have been aware of that particular situation.

MR. KOWAL: Again, either way, Your Honor, the courts have found as a matter of law -- it's exactly the opposite of what you are saying, in other words. You are saying the difference here is that California legalized marijuana. The courts in those cases said actually that's

the reason why you can't even bring this defense because you can't rely on something that's so clearly been stated in the public forum time and time again.

THE COURT: But let me just ask. In those other cases was there an inquiry with a person from a governmental agency? I don't think that was the situation.

MR. KOWAL: I believe in Judge Matz that's what they were saying. They said that they were confused about some of the case law that had come down. Again, case law is an adequate and proper basis for entrapment by estoppel. And again, Judge Matz just said this is nonsense. There is no way anyone can do this. And again, that was affirmed by the ninth circuit. We cited those cases to you both before and after.

THE COURT: Well, you cited to me Judge Matz's case -- there was nothing published in Judge Matz's case; isn't that correct?

MR. KOWAL: That is correct. We attached the opinion to it.

THE COURT: Well, but the problem is there is nothing published as to that one. As to the Scarmazzo case, I didn't think the Scarmazzo case was that situation. Let me take another look.

MR. KOWAL: Again, I don't know why the court -- again, the Judge Matz opinion which you can take judicial

notice of, as you said, these are rulings, and that was affirmed by the ninth circuit on the exact same basis. Again, unpublished but it just shows exactly the reason the court is implying here has been rejected by other courts in exactly this context.

THE COURT: All right. Let me hear from the defense. What's your response to that?

MR. TANAKA: I don't have Judge Matz's case in front of me, but as Your Honor correctly pointed out an unpublished decision by district court judges is in no way binding on this court. Second, and I don't recall the facts specifically, but I think Your Honor's recollection is correct that there was no specific inquiry there.

THE COURT: Well, let me do this. Let me look up the -- let me see if it indicates in the appellate decision.

MR. KOWAL: Your Honor, Judge Matz says -- I have a copy of his opinion and he says defendant points to several contacts with federal officials that they claim serve as a basis for an estoppel defense. First, and I can give you more, but they list several of them. In early 1999, they apply to the DEA to permit the cultivation of marijuana. Finally, they applied and received FDA labeling code for cannabis manufacture in 1999. None of these contacts with federal agencies can support an entrapment by estoppel defense for the --

THE COURT: I understand that, because in none of those was there an indication that either the conduct was otherwise lawful or that it implicitly gave permission to go ahead and do that which the defendant was inquiring which is to open up a marijuana dispensary.

MR. KOWAL: Well, again, there should be no implicit --

THE COURT: Well, there is a major difference.

MR. KOWAL: I'm sorry. Your Honor, you are saying you are relying on an implicit representation?

THE COURT: No. I'm relying on the statement that when asked whether or not when he says and then I said, well, what if I wanted to open up my own medical marijuana dispensary, and his purported -- the agent's response was something that he slowed his words down to make sure I understood him and said that it's up to the cities and counties to decide how they want to handle the matter.

MR. KOWAL: And where is the representation regarding legality there, Your Honor?

THE COURT: Regarding the what?

MR. KOWAL: Legality.

THE COURT: Well, normally it's up to the DEA to enforce the law and if they are indicating that in that particular instance they are not going to be enforcing the law because they are letting the cities and the counties

decide how to handle the matter --

MR. KOWAL: There is no even discussion that he's talking about the law. He could be talking about how do I get permits, where do I sign up, where do I go to.

THE COURT: That's not what he asked though.

MR. KOWAL: That's right. He didn't ask if it was illegal at all. He didn't even say he was exactly doing it. That's the whole point here. He didn't say will DEA go after me? Will I be violating DEA? Will I be complying with the law?

Again, Judge Matz even made his point about virtual impossibility of establishing this defense before he even got to the specific statements. He was just saying right off the bat that you can't do this.

THE COURT: But he was not presented with the same factual situation as he had.

MR. KOWAL: But even before he analyzed the factual situation as a matter of law he said, before analyzing the specific intentions the court notes it's close to impossible to establish reasonable reliance.

THE COURT: The problem is that if one took that situation then one would say that one could never establish estoppel by entrapment.

MR. KOWAL: In this context, yes.

THE COURT: Well, no. Everybody knows that unless

something else happens that these types of drugs are illegal, and so that is why when one asks the DEA as to whether or not what would happen if I open up a marijuana medical dispensary and they say it's up to the city --

MR. KOWAL: He didn't say what would happen, Your Honor. Again, you keep adding more definiteness to his statement.

THE COURT: He said what if I open up my own medical marijuana dispensary.

MR. KOWAL: First of all, look at his first question, what are you going to do about it? That could be a person asking, hey, I don't even like it.

THE COURT: I agree.

MR. KOWAL: And then he could be saying I don't like it, hey, what if I open my own? He could be saying I don't like these. Are you guys going to close them down? Or he could be saying --

THE COURT: That's why it's up to the jury to decide whether or not it's sufficient.

MR. KOWAL: That's why the case law says that you can't have ambiguous statements, Your Honor. You have to have explicit, nonambiguous statements. That's a matter of law as the ninth circuit said.

THE COURT: That's why I found it as to the medical marijuana dispensary but not as to the sale of

marijuana to minors.

MR. KOWAL: What about the cultivation of marijuana plants? How is that necessarily implied, Your Honor?

THE COURT: Well, the marijuana has to come from somewhere, I presume.

MR. KOWAL: It doesn't mean he has to grow it. In fact, he operated for several months without cultivating himself. He didn't have a nursery at the beginning and then he did not go back and seek further advice.

THE COURT: I will allow you to make the argument that you want in this regard, but my ruling is my ruling at this point.

All right. The question is how -- now that the court has made that ruling insofar as the issue because of the fact that I would find it to be a defense as to part of the conspiracy, some of the I guess underlying criminal acts alleged in the conspiracy, but not all. So I presume what we will do is have a special verdict on that particular point?

MR. KOWAL: Your Honor, I don't think you have a special verdict, you just instruct on the defense and you can instruct the defense is only applicable to these counts.

MR. LITTRELL: I think the government is correct in that point. My concern is I would like to know what the

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CERTIFICATE

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

Date: September 26, 2008

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