Case No.

IN THE

Supreme Court of the United States

Noah Kleinman

Petitioner,

v.

United States of America

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Congress has expressly directed the federal government not to interfere with states' implementation of medical marijuana laws, may the federal government nevertheless continue to prosecute and incarcerate an individual based on his operation of medical marijuana dispensaries, authorized in his state, where no state tribunal has ever found him to be noncompliant with state law?

2. Does a trial court's coercive anti-nullification instruction strip the jury of its essential power to nullify and the criminal defendant of his constitutional right to an independent jury, and does such an error constitute structural error?

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JURISDICTION

The Court of Appeals entered an Order and Amended Opinion on January 22, 2018.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] Counsel has attached a motion for extension of time to file and request for relief for filing an untimely petition for writ of certiorari.

STATUTORY PROVISIONS

- **Consolidated Appropriations Act, 2018 § 538 –** None of the funds made available under this Act to the Department of Justice may be used with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

INTRODUCTION

Since 2014, Congress has repeatedly made clear, through its appropriations legislation that the issue of the legality and regulation of medical marijuana is one that should be left to the states. Specifically, Congress has provided that "[n]one of the funds made available in this [Appropriations] Act to the Department of Justice may be used with respect to [medical marijuana states] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Appropriations Act of 2016 § 542 (now Appropriations Act of 2018 § 538 [collectively referred to as "§ 538" or the "Appropriations Rider]".) As the Ninth Circuit has appropriately recognized, the Appropriations Rider precludes federal medical marijuana prosecutions based on conduct authorized by state law. *United States v. McIntosh*, 833 F.3d 1163, 1176-77 (9th Cir. 2016).

Disregarding the Appropriations Rider's express directive, the Department of Justice has continued to prosecute and incarcerate individuals based on medical marijuana even in states that allow medical marijuana. Petitioner Noah Kleinman is one such individual. Mr. Kleinman is serving a 17-year sentence in federal prison based on his operation of medical marijuana dispensaries in California, notwithstanding that medical marijuana has been legal in California since 1996 and that the state declined to pursue charges against him.

This Court should grant certiorari on this important question of federal law implicating fundamental issues regarding separation of powers and federalism. The Department of Justice

continues to thumb its nose at Congress while the Ninth Circuit has imposed federal judicial control over what Congress has dictated should be left to the states.

The Ninth Circuit's implementation of § 538 in *McIntosh*, and adopted in the instant case, creates an unworkable procedure that allows precisely what the Congressional rider prohibits: federal interference with states' regulation of medical marijuana. Specifically, *McIntosh* held that "if DOJ wishes to continue these prosecutions, [defendants] are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana." *Id*. at 1179. The *Kleinman* court went one step further and concluded that no evidentiary hearing was even required based on the Ninth Circuit's own determination that Mr. Kleinman's conduct was not "fully compliant with state medical marijuana laws." *Kleinman*, 880 F.3d at 1027.

The Ninth Circuit overlooks that having federal courts in federal prosecutions determine state law compliance defeats the whole purpose of the Appropriations Rider. The Department of Justice continues to expend federal funds to prosecute medical marijuana cases in states that allow medical marijuana, and indeed now expends even more federal funds to conduct the requisite evidentiary hearings. Moreover, having federal courts determine state law compliance is directly at odds with the intention of the Appropriations Rider to defer decisions regarding enforcement of medical marijuana laws to the states.

Further, the Ninth Circuit's "strict compliance" standard finds no support in the Appropriations Rider and imposes a federal, judicially created standard on states such as California that have a lower "substantial compliance" standard. Tellingly, since *McIntosh* was decided, not a single federal court has found a defendant to be "strictly compliant" with state medical marijuana laws so as to preclude federal prosecution under the Rider. In this case, the Ninth Circuit concluded it need not even remand for an evidentiary hearing because it decided on its own that Mr. Kleinman failed to meet the strict compliance standard. In effect, the federal executive and judiciary branches have overridden the federal legislative branch's directive to respect states' rights to regulate medical marijuana.

This Court needs to step in to untangle the twisted branches of government and develop an appropriate process to give effect to Congress's express decision to reserve rights to the states. The way to give such effect is to have determinations of state law compliance made by state courts pursuant to state law. Only where a state court has made a determination of noncompliance with state medical marijuana laws should the federal government be permitted to proceed with federal prosecution.

In addition, the Court should grant certiorari in this case to resolve important and unsettled issues regarding the jury's power to nullify. Well aware of the support for medical marijuana in California and the tension between state and federal law, the district court gave a coercive jury instruction warning jurors that they would be "violating the law" if they engaged in jury nullification. The district court disregarded that the power to nullify is an inherent and

critical part of our jury system. Jury nullification has long historical roots and was one of the primary protections giving rise to the right to a trial by jury. By instructing the jurors that they could not lawfully exercise their inherent power, the district court not only stripped them of their power but effectively directed a guilty verdict in violation of Mr. Kleinman's right to a fair and impartial jury.

Nowhere is the need for jury nullification more pointed than in the medical marijuana context. As scholars have pointed out, the jury acts as something of a fourth branch of government. Where, as here, the traditional checks and balances of the three branches of government have failed, the jury is the last line of defense against an overreaching federal government. This Court has provided little guidance on the issue of jury nullification, and this case provides the perfect vehicle for the Court to provide that guidance and protect the independence of the jury as it carries out its essential function.

STATEMENT OF THE CASE

A. Legal History

In the mid 1990s, California citizens overwhelming voted to legalize medical marijuana. In 2014, President Barack Obama signed into law a bipartisan Congressional appropriations bill. Section 538 of the bill, also known as the Rohrabacher-Farr Amendment, listed thirty-three jurisdictions, including California, that had enacted medical marijuana laws and provided that "[n]one of the funds made available by this Act to the Department of Justice may be used … to prevent such States from implementing their own State laws that authorize the use, distribution,

possession, or cultivation of medical marijuana." *See* Consolidated and Furthering Continuing Appropriations Act, 2015, Pub. L. No. 113-235 § 538, 128 State. 2130 (2014). Since 2014, Congress has included essentially the same rider in every new appropriations act, merely adding additional states and Guam and Puerto Rico to the list.

B. Factual Background

Some years after California legalized medical marijuana, Noah Kleinman and others opened and operated medical marijuana collectives. (PSR ¶ 110.) The various collectives supplied medical marijuana to patients who, after demonstrating they had a valid identification card and doctor recommendation, would sign an agreement that the medical marijuana is jointly owned by all the members. (ER 484, 541; 05/30/2014 RT 118; 06/04/2014 RT 112.) Some of these patients who signed these agreements were individuals who also formed collectives, and would purchase medical marijuana at wholesale. (ER 499-500; 05/30/2014 RT 154-55.)

As part owner in the collectives, Mr. Kleinman kept accountings for the management of the collectives on his laptop, using Excel spreadsheets to balance the books and record the amounts of medical marijuana purchased and provided through the collectives. Mr. Kleinman and others coordinated the purchasing of marijuana so that the collective could provide medical marijuana to collective members. They then began to grow operations so that the collectives cultivated medical marijuana to provide to its members. (ER 455-66; 05/29/2014 RT 101-112.)

C. Procedural History of this Case

1. Underlying Investigation and Federal Indictment

After a 2010 state investigation of Mr. Kleinman's collectives led to no criminal charges, the federal government swept in with federal drug distribution charges.

On September 21, 2011, a federal grand jury in the Central District of California indicted Mr. Kleinman and others with one count of conspiracy to distribute and possess with intent to distribute marijuana in violation of 21 U.S.C. §846 (Count 1), three counts of distribution of marijuana in violation of 21 U.S.C. §841(a)(1) (Counts 2-4), one count of maintaining a drug-involved premises in violation of 21 U.S.C. §856(a)(1) (Count 5), and one count of conspiracy to commit money laundering in violation of 18 U.S.C. §1956(h) based on the proceeds of the conspiracy charged in count 1 (Count 6). (CR 1; ER 43-70.) The grand jury returned a superseding indictment on December 7, 2011 with identical charges, but with an additional co-defendant. (*Id*.)

2. District Court Proceedings

At the pretrial hearing on May 9, 2014, the district court concluded that any reference to medical marijuana was not relevant. (ER 126; 05/09/2014 RT 22.) When defense counsel attempted to explain that the relevance was that the jurors "have a right to understand what the essential facts were, how this sales operation worked," the district court remarked, "[y]ou are looking for nullification, aren't you?" (ER 128; 05/09/2014 RT 24.) During jury selection, the district court repeatedly questioned jurors regarding whether they could follow federal law even

if they disagreed with it and informed the jurors not to question the conflicts in state and federal law. (ER 445-448.) During the fifth day of trial, the district court spoke with each juror individually regarding whether protestors outside of the courthouse had an effect on them. (ER 507, 513-16.) Upon completion of trial, the district court gave an anti-nullification instruction over Mr. Kleinman's objection. (ER 21-22). The instruction stated:

> 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 is not your determination whether a law is just or whether a law is unjust. That cannot be your task. There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.

Mr. Kleinman objected that such an instruction erroneously suggested that jurors may be punished for nullifying. (ER 15.)

After a seven-day trial, the jury found Mr. Kleinman guilty on all counts and that he possessed with intent to distribute over 1,000 kilograms of marijuana.

3. Sentencing Proceedings

Based on a total quantity of approximately 1,668 kilograms of marijuana, the Presentence Investigation Report ("PSR") determined the base offense level to be 32, with a 2-level upward adjustment for money laundering. (PSR¶¶ 48, 49, 52.)[2] Of the 1,668 kilograms, only approximately 85 kilograms were involved in out-of-state shipments. (PSR ¶ 43.) The remaining quantity was based on the records of purchases and sales by the dispensaries. (PSR §

[2] Although the PSR calculated the base offense level at 32, due to changes in the Guidelines, at the time of sentencing the base offense level was 30.

53.) As to that conduct, Mr. Kleinman has consistently maintained that he was compliant with California law. The PSR did not consider whether or not any of the conduct was state authorized. Thus, Mr. Kleinman's sentence was driven by his participation in operating medical marijuana dispensaries, the prosecution of which would have been barred by the Appropriations Rider in the absence of a finding of state law noncompliance.

The district court adopted the PSR's quantity calculations, (ER 661-62) and, adopting the government's sentencing recommendation, on December 4, 2014, the court sentenced Mr. Kleinman to a term of 211 months. (ER 697.)

4. Mr. Kleinman's Appeal and the Ninth Circuit's McIntosh *Decision*

On November 18, 2015, Mr. Kleinman appealed his conviction, arguing that his continued federal prosecution and incarceration involving operation of California medical marijuana dispensaries unconstitutionally contravenes the express congressional directive in § 538 prohibiting federal interference with state laws permitting possession, distribution, and cultivation of medical marijuana. Mr. Kleinman also argued, among other things, that the district court violated Mr. Kleinman's due process and Sixth Amendment jury trial rights by giving a coercive anti-nullification jury instruction that effectively directed a guilty verdict.

While Mr. Kleinman's appeal was pending, the Ninth Circuit published an opinion in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), holding that, at minimum, the Rider prohibited DOJ from spending funds for prosecution of individuals who engaged in conduct permitted by state medical marijuana laws. 833 F.3d at 1177. However, the Ninth Circuit held

that prosecution of individuals who were not in "strict compliance" with state law did not violate §538. *Id*. at 1179. Finally, the Ninth Circuit held that if DOJ wished to continue these prosecutions, defendants are entitled to a hearing in district court to determine whether their conduct was completely authorized by state law. *Id*. In response to *McIntosh*, Mr. Kleinman argued that § 538 barred DOJ from continued prosecution and that, at minimum, he was entitled to an evidentiary hearing under *McIntosh*.

On June 16, 2017, the Ninth Circuit Panel issued a published opinion affirming Mr. Kleinman's convictions and sentence. *United States v. Kleinman*, 859 F.3d 825 (9th Cir. 2017). On October 23, 2017, Mr. Kleinman filed a petition for rehearing and/or rehearing en banc. On January 22, 2018, the Ninth Circuit filed a superseding published opinion affirming the conviction and sentence. *United States v. Kleinman*, 880 F.3d 1020, 1028 (2017).

In its opinion, The Ninth Circuit held, notwithstanding *McIntosh*, that it could affirm without remanding for an evidentiary hearing regarding state law compliance. *Id*. at 1027. The Ninth Circuit explained that the Rider only prohibits expenditure of DOJ funds in connection with a specific charge yet reasoned that DOJ could continue to prosecute the conspiracy and money laundering charges (Counts 1 and 6) because they swept in, together with the years of apparently legitimate medical marijuana operations, two isolated instances of out-of-state shipments that defense counsel at sentencing had conceded were noncompliant with state law. *Id*. at 1029-30. Disregarding that Mr. Kleinman's sentence was based on the aggregation of quantities associated with all the state-authorized medical marijuana operations, not just the 85

kilos involved in the out-of-state shipments, the Ninth Circuit concluded that the 211-month sentence could be sustained, notwithstanding Congress's expressed intent not to interfere with states' implementation of their medical marijuana laws. *Id*.

The Ninth Circuit also held that the district court erred by providing the jury with the anti-nullification instruction because the instruction conveyed, falsely, to the jurors that they do not have the power to nullify and that they would be breaking the law if they voted to acquit based on their conscience. *Id*. at 1031-33. In the amended opinion, the Ninth Circuit clarified that because the anti-nullification instruction implied that a particular decision might result in some type of punishment and "might be perceived as coercive with regard to the jury's ultimate verdict[,]" it was error that took on a constitutional dimension. *Id*. at 1035. Nevertheless, the Ninth Circuit found the error harmless beyond a reasonable doubt, explaining that the jurors had no right to nullify. *Id*. at 1031.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION OF WHETHER CONTINUED FEDERAL PROSECUTION AND PUNISHMENT OF STATE-AUTHORIZED MEDICAL MARIJUANA CONDUCT CONTRAVENES CONGRESSIONAL INTENT AND VIOLATES SEPARATION OF POWERS AND FEDERALISM PRINCIPLES

The Appropriations Clause of the Constitution explicitly states that no money can be paid out of the Treasury unless appropriated by an act of Congress. *See* U.S. Const. art. I § 9, cl. 7; *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990); *see also Boumediene v. Bush*, 553 U.S. 723, 738-39 (2008). Further, it is "emphatically … the exclusive province of the

Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Tenn. Valley Auth. V. Hill*, 437 U.S. 153, 194 (1978). Critical to constitutional separation of powers principles, "any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Richmond*, 496 U.S. at 425.

Congress has exercised its appropriations power by providing in § 538 that "[n]one of the funds made available in this [Appropriations] Act to the Department of Justice may be used with respect to [medical marijuana states] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Nevertheless, in stunning defiance of the separation of powers, the Department of Justice publicly announced it would continue to prosecute medical marijuana cases, even in states that have legalized medical marijuana, prompting an open letter from the sponsors of § 538 to the Attorney General stating that continuing with such prosecutions exceeds the department's spending authority pursuant to § 538. *See* Letter from Dana Rohrabacher and Sam Farr, U.S. House of Representatives, to Eric Holder, Attorney General (Apr. 8, 2015), *available at* http://farr.house.gov/images/pdf/RohrabacherFarrDOJletter.pdf. The Ninth Circuit agreed with the sponsors and appropriately recognized that the Appropriations Rider precludes federal medical marijuana prosecutions based on conduct authorized by state law. *United States v. McIntosh*, 833 F.3d 1163, 1176-77 (9th Cir. 2016).

Nevertheless, the Ninth Circuit came up with an unworkable process for implementing § 538 that robs it of any practical effect. By allowing federal prosecutions to proceed, subject only to federal evidentiary hearings (or, in this case a decision by a federal appellate court), the court has allowed the federal government to continue spending federal funds without congressional authorization and to continue federal interference with states' implementation of their medical marijuana laws. Moreover, the Ninth Circuit's "strict compliance" standard finds no support in either the text of the Appropriations Rider or in state law, and instead imposes a federal standard that interferes with state medical marijuana laws in just the way Congress acted to prevent.

A. Allowing the Federal Government to Bring Federal Prosecutions and Federal Courts to Decide Compliance with State Medical Marijuana Laws Defeats the Purpose of the Appropriations Rider

Given the Legislative Branch's clear prohibition on federal spending in § 538, the DOJ's continued efforts to establish noncompliance through federal judicial evidentiary hearings, prosecutions and incarceration of individuals where compliance may not be "strict" creates serious concerns that such spending "infringe[s] the constitutional principle of the separation of governmental powers." *Bowsher v. Synar*, 478 U.S. 714, 724 (1986) (quoting *Myers v. United States*, 272 U.S. 52, 161 (1925)).

Under *McIntosh*, to evaluate strict compliance with state law, district courts must hold evidentiary hearings, at which federal prosecutors will expend federal funds and, as discussed below, federal judges will be asked to interpret a wide variety of ambiguous and conflicting state laws that are in flux. The costs of conducting hearings and prosecuting cases to determine

whether conduct is strictly compliant with a state's law is substantial. The issues of state law compliance in the area of medical marijuana are often highly complex, requiring detailed factual development and legal analysis that can be achieved only through lengthy evidentiary proceedings. *See* Brief of Federal Public Defender for the Central District of California as *Amicus Curiae* in Support of Petition for Rehearing in *United States v. McIntosh* at p.7, Case No. 15-10117; *see also* Letter from Kamala D. Harris, Att'y Gen. of Cal. To Darrell Steinberg, Senate President Pro-Tempore, and John A. Perez, Speaker of the Assembly (Dec. 2011), *available at* https://oag.ca.gov/news/pressreleases/attorney-general-kamala-d-harris-sends-letters-regarding-medicalmarijuana-law.

Indeed, the authors of the Rider have explained that "the purpose of our amendment was to prevent the Department from wasting its limited law enforcement resources on prosecutions … against medical marijuana patients and providers … state law enforcement agencies are best suited to investigate and determine free from federal interference." Letter from Dana Rohrabacher and Sam Farr, U.S. House of Representatives, to Eric Holder, Attorney General (Apr. 8, 2015), *available at* http://farr.house.gov/images/pdf/RohrabacherFarrDOJletter.pdf.

Before the DOJ is permitted to continue to spend funds in these evidentiary hearings and prosecutions, this Court should clarify whether such spending unconstitutionally ignores the clear delineations of the branches of government.

B. The Ninth Circuit's Interpretation of § 538, Requiring a Finding of "Strict Compliance" Contradicts Congress's Express Intent to Allow States to Regulate Medical Marijuana Laws and Has Caused Substantial Confusion Among Lower Courts

The means by which the DOJ may implement this practical approach have been completely muddled by the Ninth Circuit's "strict compliance" standard. The concept of "strict compliance" finds no support in the text or legislative history of § 538. To the contrary, the stated intent of § 538 is for the federal government to defer to the states on matters involving medical marijuana. Yet in the case of California, the "strict compliance" standard set forth by the Ninth Circuit is directly at odds with the state's own standard, which requires only a showing of "substantial compliance" with medical marijuana laws. *See* Cal. Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use at 11 (Aug. 2008), *available at* https://oag.ca.gov/system/files/attachments/press_releases/n1160_medicalmarijuanaguidelines.pdf. *See also People v. Hochanadel*, 176 Cal.App.4th 997, 1017 (2009); *People v. Urziceanu*, 132 Cal.App.4th 747, 786 (2005); *People v. Anderson* 232 Cal.App.4th 1259, 1275 (2015). In fact, California law remains unresolved, and California courts ask for "good faith" attempts to comply with the complex and changing law. Therefore, as a practical matter, few if any federal defendants will meet a "strict compliance" standard. The only way for the appropriations rider to serve a purpose is for the federal government to allow California to regulate its citizens.

This Court should clarify whether the use of federal funds allowing federal prosecutors and district courts to interpret state laws is lawful under § 538. As it stands, the Ninth Circuit

law, by allowing the federal government to conduct evidentiary hearings regarding individuals' strict compliance with state laws, allows federal prosecutors and courts to do so irrespective of determinations made by California legislators, courts, and law enforcement officials. *Kleinman*, The holding in *Kleinman*, 880 f.3d at 1028. goes one step further and allows the federal government to sweep large quantities of lawful medical marijuana into prosecution and sentencing calculations.

This case makes clear that the "strict compliance" standard allows for intrusive federal prosecutions of medical marijuana conduct. Such federal oversight creates, at minimum, the perception that the federal government is second-guessing states' law enforcement efforts, which in turn prevents states from giving practical effects to its laws.[3] Individuals are left to speculate regarding their criminal exposure associated with medical marijuana activities. This lack of clarity creates serious risks that individuals may face federal prosecution when engaged in state-sanctioned conduct. If and when such private individuals do face prosecution, because the federal government misinterprets California state law, such prosecution removes any real right to access medical marijuana in California and other states.

[3] This concern that the federal government is second-guessing state law enforcement is exacerbated by the fact that the DOJ has decided to prosecute cases when states have declined to do so. *See, e.g. United States v. Charles Lynch*, CR No. 07-689-GW (C.D. Cal.) (pending before 9th Circuit); *United States v. Aaron Sandusky*, 564 Fed. Appx. 282 (9th Cir. 2014) (CR No. 12-548-PA (C.D. Cal.)); *United States v. Nicholas Martin Butier et al.*, CR No. 12-240-JVS (C.D. Cal.).

Three California State Senators – including the MMPA's primary author – have explained that "federal law enforcement officials have severely undermined California's regulatory framework through various means, including criminal raids, property seizures and forfeitures, and felony prosecutions of law-abiding Californians." Brief of Senator Mark Leno et al., as *Amici Curiae* in Support of Charles C. Lynch's Motion for Rehearing En Banc at 4, *United States v. Lynch*, Nos. 10-50219, 10-50264 (9th Cir. May 7, 2015).

Although addressing anticommandeering principles under the Tenth Amendment, this Court's very recent opinion stressed the importance of evaluating Congressional intent in determining the legality of federal intervention in state laws. *Murphy v. National Collegiate Athletic Assn*., No. 16-476, 2018 WL 2186168, at *9 (U.S. May 14, 2018). Similar to the Third Circuit's interpretation of the Professional and Amateur Sports Protection Act (PASPA) in *Murphy*, here the Ninth Circuit's "strict compliance" interpretation of the appropriations rider precludes states from passing laws authorizing conduct. Like the erroneous Third Circuit result in *Murphy*, the Ninth Circuit's interpretation of the appropriations rider "leads to results that Congress is most unlikely to have wanted." *Id*. Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities, specifically from interfering with states' policy choices. The confusing and chilling result flies in the face of Congress's intent to prohibit federal intrusion on states' rights to authorize and regulate medical marijuana and to respect the policy choices of the people of each state on the issue of legalizing medical marijuana. As this Court rightly pointed out, while an issue or policy choice may be

controversial, that choice "is not [the Court's] to make. Congress can regulate … directly, but if it elects not to do so, each State is free to act on its own." *Id*. at *20. The plain language of Congress's directive here is clear: the DOJ must cease using federal funds to prosecute cases involving medical marijuana.

This Court should grant review to provide lower courts with guidance as to the interpretation of the appropriations rider to ensure that the federal government is complying with Congressional intent.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF WHETHER IT IS STRUCTURAL ERROR TO STRIP A DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO AN INDEPENDENT JURY WITH THE POWER TO NULLIFY

A. This Court Should Clarify Whether the Constitutional Right to An Independent Jury Includes the Right to A Jury with the Power to Nullify

Jury nullification, at its core, is a jury's right to reach a verdict according to conscience, and is a power deeply rooted in American history. In drafting the Constitution, the Framers recognized as much. *See* Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 Santa Clara L. Rev. 775, (782 2011); *quoting* 2 John Adams, Works, 253 (1850) ("[i]t is not only [the juror's] right but his duty … to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."); Thomas Jefferson to Samuel Kerchevel, 1816, ME 15:35 ("juries [are] our judges of fact, and of the law when they choose it."); *People v. Croswell*, 3 Johns. Cas. 337, 361-62 (N.Y. Sup. Ct. 1804) Alexander Hamilton, arguing ("in criminal cases, the law and fact being

always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are intrusted with the power of deciding both law and fact.")

This Court has long recognized that the Sixth Amendment right to an independent and impartial jury is "a basic and fundamental feature of our system of federal jurisprudence." *Bailey v. Central V. Ry.*, 319 U.S. 350, 354 (1943). As the Fourth Circuit so aptly stated, "nothing is more fundamental to the provision of a fair trial than the right to an impartial jury. The impartiality of the jury must exist at the outset of the trial and it must be preserved throughout the entire trial." *Miller v. State of North Carolina*, 583 F.2d 701, 706 (4th Cir. 1978). In fact, this Court has defined a primary purpose of the right to jury trial as "to prevent oppression by the [g]overnment … [and f]ear of unchecked power." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *see also Jones v. United States*, 526 U.S. 227, 244-48 (the jury would serve as "the grand bulwark" to protect defendants from overzealous prosecutions by the government). Consistent with the Framers, this Court has held that the "historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue" includes "find[ing] a verdict of guilty or not guilty as their own consciences may direct." *United States v. Gaudin*, 515 U.S. 506, 513-15 (1995). The Sixth Amendment right to a jury determination of guilt or innocence is so inviolable that a judge is absolutely barred from directing a verdict in favor of guilt "no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

There is hardly a context more fitting for ensuring that a jury "decide guilty or not guilty as their own consciences may direct" than federal medical marijuana prosecutions. *Gaudin*, 515 U.S. at 514. There has been "an overwhelming shift in public opinion" regarding the use of medical marijuana, *See* 160 Cong. Rec. H4982-83 (Statement of Rep. Rohrabacher), a vast majority of states have decided to legalize the sale and distribution of medical marijuana, and through bipartisan leadership and support, Congress issued a statutory directive instructing the DOJ to stop interfering with state implementation of medical marijuana laws. In this context, where federal criminal law is inconsistent with state law, as well as public policy and sentiment, the jury's ability to spare those whom federal law would treat too harshly must be protected. S*ee Duncan*, 391 U.S. at 157 ("when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."). Yet courts have backed away from this inherent jury power, holding that courts need not advise the jury of its power to nullify and may even advise against it. *See, e.g. United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *see also Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005) ("courts have the duty to forestall or prevent [nullification], whether by firm instruction or admonition[.]").

In affirming Mr. Kleinman's conviction, the Ninth Circuit went one step further in allowing courts to preclude nullification and concluded that the district court's error in instructing the jury that "[t]here is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this

case" was coercive, but harmless. *Kleinman*, 880 F.3d at 1031. As the Ninth Circuit explained, these two sentences "could be construed to imply that nullification could be punished, particularly since the instruction came in the midst of a criminal trial" and that the statement "could be understood as telling jurors that they do not have the power to nullify, and so it would be a useless exercise."[4] *Id*. at 1032-33. The Ninth Circuit even noted that the instruction "might be perceived as coercive with regard to the jury's ultimate verdict." *Id*. at 1035. Significantly though, the Ninth Circuit found that while the error "took on a constitutional dimension[,]" a defendant does not have the Constitutional right to jury nullification. The Ninth Circuit found that the error did not affect the framework of the trial and therefore, was not structural in nature.

This finding by the Ninth Circuit is indicative of a pattern across lower courts to limit a jury's power to nullify, and thereby limit a defendant's rights to an independent jury – as an implication that a conviction might result in some type of punishment clearly has an impact on the ability for a jury to remain completely independent. [5] While this Court has found that it is the

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[4] It is clear that courts can give firm instructions that a jury must follow the law without expressly stripping the jury of its power to nullify or implying that the jury would be subject to punishment for doing so. In *Kleinman*, the Ninth Circuit found that the first three sentences of the district court's jury instruction would have adequately informed the jury of its duty. 880 F.3d at 1031 ("You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree to it or not. It is not for you to determine whether the law is unjust. That cannot be your task.")

[5] *See, e.g. United States v. Krzyske*, 836 F.2d 1013 (6th Cir. 1988) (holding that jury nullification undermines an impartial determination of justice based on law.); *see also United States v. Thomas*, 116 F.3d 606, 616 n. 9 (2d Cir. 1997); *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005) ("courts have the duty to forestall or prevent [nullification], whether by firm instruction or admonition[.]")

duty of the jury to take the law from the court, (*See Sparf v. United States*, 156 U.S. 51 (1895),) this Court has not provided guidance on the effects that an instruction stripping the jury of its power to nullify – and implying that a jury may be subject to punishment for using this power – has on the framework of the Sixth Amendment right to trial by an independent jury. This Court should grant certiorari to address the competing principles of a judge's duty to forestall nullification and a defendant's a constitutional right to an independent and uninfluenced jury. In doing so, the Court should clarify the extent to which a defendant's constitutional right to an independent jury includes a defendant's constitutional right to a jury with the power to decide a verdict as their conscience may direct or, in other words, nullify.

B. This Court Should Clarify Whether a Coercive Jury Instruction Affects the Entire Trial Framework Such that It Rises to the Level of Structural Error

Just last year, this Court held that "[t]he purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). This Court has found that structural error exists when the error cannot be quantitatively assessed because its "precise effects are unmeasurable." *Rose v. Clark*, 478 U.S. 570, 577-78 (1986). "Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver*, 137 S.Ct. at 1907; *quoting Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Structural errors, subject to automatic reversal, deprive defendants of "basic protections," without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no

criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310; quoting *Rose v. Clark*, 478 U.S. at 577–78.

An independent and unbiased jury certainly "defines the framework of any criminal trial." *Weaver*, 137 S.Ct. at 1907. For this reason, "the trial judge is … barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." *Martin Linen Supply*, 430 U.S. at 573. While structural errors are neither common nor numerous, this Court has routinely found that errors that call into question the independence and impartiality of the jury are structural. For example, structural error analysis applies when members of a petit tor grant jury are deliberately discharged on the basis of race. *See, e.g. Batson v. Kennedy*, 476 U.S. 79 (1986); *see also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). As this Court explained in *Vasquez*, "[w]hen a constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. 474 U.S. at 263. In *Witherspoon v. Illinois*, 391 U.S. 510, 520-21 (1968), this Court held that trial courts could not exclude prospective jurors who stated that they opposed capital punishment because such exclusion crossed the line of neutrality and risked entrusting "the determination of whether a man is innocent or guilty to a tribunal organized to convict." In these instances, where there are serious concerns regarding the neutrality and organization of the jury, the Court has repeatedly found that courts must presume the process was impaired, specifically because juries' actual motives for making a judgment are hidden from review. *Vasquez*, 474 U.S. at 263. The

risk of an influenced jury has a fundamental impact on the framework of the trial, regardless of the outcome, thereby defying analysis by harmless error standards. *Fulminante*, 499 U.S. at 309.

Here, the Ninth Circuit found that because the coercive instruction did not fall under one of the three rationales articulated by this Court in *Weaver*, structural error did not apply. However, this conclusion is in tension with the precedence of this Court. Notably, in *Weaver*, this Court stated, not that lower courts were limited to the three rationales presented, but that "there appear to *be at least three broad* rationales … these categories are not rigid." *Id*. at 1908. Certainly, therefore, this Court has not precluded lower courts from finding structural error in other instances where the error clearly defies harmless error standards. Additionally, this Court should address the breadth of the three categories addressed, as it appears that the independence of the jury falls into at least the first two. Most importantly, stripping a defendant of his right to an independent jury is fundamentally different from the jury instruction errors subject to harmless- error review.[6] A jury instruction which, by its very nature, removes a jury's ability to

[6] The cases upon which the Ninth Circuit relied to demonstrate harmless error analysis involve erroneous jury instructions regarding the law of the underlying crime, not instructions that fundamentally alter the jury's role in the trial. None of the cases to which it cited call into question the independence or impartiality of the jury. *See Neder v. United States*, 527 U.S. 1, 9 (1999) (Court provided erroneous instruction omitting an element of the offense); *Yates v. Evatt*, 500 U.S. 391, 402-04 (1991) (Court provided erroneous instruction shifting burden of proof on malice from prosecution to defendant); *Carella v. California*, 491 U.S. 263, 265-66 (1989) (Court provided erroneous instructions imposing conclusive presumptions); *Pope v. Illinois*, 481 U.S. 497, 503 (1987) (court provided erroneous standard for determining "obscenity"); *Rose v. Clark*, 478 U.S. 570, 577-79 (1986) (erroneous malice instruction). When a judge's instructions threaten the jury with the possibility of punishment for an acquittal, the judge creates a situation where the jurors have a direct interest in the outcome of the case as they entered into

be fully independent infects the entire trial process, because a trial cannot reliably serve its function as required by the Sixth Amendment. Such a coercive and erroneous instruction therefore falls under both the first and second categories of structural error addressed in *Weaver*.

First, a defendant's right to an independent jury with the ability to "find a verdict of guilty or not guilty as their own consciences may direct," is a fundamental legal principle subject to protection independent of an erroneous conviction in this case. *Gaudin*, 51 U.S. at 513-15. The right to an independent jury is not a "trial error" which may be quantitatively assessed in the context of other evidence presented. *See Fulminante*, 499 U.S. at 307-08. As such, the harm from a potentially tainted jury extends beyond that inflicted on the defendant in any particular case. The Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided[.]" *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (addressing the right to select counsel of one's choice). Like the right to counsel of choice, the right to trial by an impartial jury is one of the basic elements provided through the Sixth Amendment. Thus, it cannot be said that "the right does not exist unless its denial renders the trial unfair." *Id*. at 147 n.3. Deprivation of the right is "complete" when a judge compromises a jury's independence, regardless of the outcome, and a violation of the right to an impartial jury

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deliberation. To the extent that any juror relies upon the trial court's instruction to believe that he or she may be punished for their strongly held belief, the framework of the trial is unconstitutionally and immeasurably altered by their direct and personal interest in the outcome of the case. As this Court has stated, "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Turner v. State of Louisiana*, 379 U.S. 466, 471-42 (1965); *citing In re Oliver*, 333 U.S. 257 (1948).

occurs *whenever* the jury is wrongfully tainted. Therefore, a coercive jury instruction stripping a jury of its full independence is a violation for which no additional showing of prejudice should be required. *Id*. at 146. As the Court stated in *Vasquez*, "when constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge in a presumption of regularity nor evaluate resulting harm." 474 U.S. at 263.

Second, the threat of punishment jury nullification taints the entire deliberation process as it strips the jury of its fundamental power of independence. As discussed, a jury's independence is central to the framework of a fair trial. Further, such a threat leaves the jury with no meaningful choice but to convict, regardless of its views of the evidence. Just as in *Witherspoon*, in this context, the coercive instruction risked entrusting "the determination of whether a man is innocent or guilty to a tribunal organized to convict. 391 U.S. at 520-21. The Ninth Circuit's opinion in *United States v. Rosenthal*, 454 F.3d 943, 950 (9th Cir. 2006) illustrates this point. In *Rosenthal*, a juror spoke with an attorney friend who informed her that a juror "could get into trouble if [she] tried to do something outside those instructions." *Id*. The Ninth Circuit found the juror had been exposed to such statement, the conviction warranted reversal. The *Rosenthal* court held that "jurors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors." *Id*. The independence of a jury to fairly determine the outcome of a case is all the more compromised when it is the trial judge, rather than an outside influence, instructing the jury that "you would violate your oath and the law" for

a conclusion they reach as jurors. Because the rationale for a jury verdict is "hidden from review," the precise effects of an erroneous jury instructions informing the jury that it may be punished for an acquittal – when the reason for the acquittal is hidden from review – cannot be ascertained. *Vasquez,* 474 U.S. at 263.

Further, there is no meaningful way to evaluate the damage of a jury instruction precluding jury nullification because such an instruction may place in the jury's mind the impression that the judge believes there is sufficient evidence for a conviction. If the evidence may be on its own insufficient, there would be no purpose for such an instruction. In such an instance, a reviewing court cannot measure the harm nor weigh the possibility that a jury substituted its impression of the judge's determination for its own judgment.

This Court should grant review to provide clarity on whether the Ninth Circuit's and Sixth Circuit's opinions regarding the harmlessness of a coercive anti-jury nullification can be reconciled with this Court's recent analysis on structural error. *Weaver*, 137 S.Ct. at 1908. Given the extent to which anti-nullification instructions affect the framework of any trial, this Court should grant review to expand structural error analysis to include such error.

CONCLUSION

For the foregoing reasons, Petitioner Noah Kleinman respectfully requests that the court grant his petition for writ of certiorari.

DATED: May 23, 2018

GREENBERG GROSS LLP

By: _____

Becky S. James
Counsel for Petitioner
Noah Kleinman

INDEX TO APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. NOAH KLEINMAN, AKA Chuckles, *Defendant-Appellant.*	No. 14-50585 D.C. No. 2:11-cr-00893- ODW-2 ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted April 4, 2017
Pasadena, California

Filed June 16, 2017
Amended January 22, 2018

Before: DAVID M. EBEL,* MILAN D. SMITH, JR., and N. RANDY SMITH, Circuit Judges.

* The Honorable David M. Ebel, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

Order;
Opinion by Judge Milan D. Smith, Jr.

SUMMARY**

Criminal Law

The panel granted a petition for panel rehearing, withdrew an opinion filed June 16, 2017, filed a superseding opinion affirming a conviction and sentence arising out of the operation of purported medical-marijuana collective storefronts in California, and denied on behalf of the court a petition for rehearing en banc.

The defendant argued that a congressional appropriations rider enjoining use of United States Department of Justice funds in certain medical marijuana cases prohibits continued prosecution of his case, and that he is entitled to an evidentiary hearing under *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), to determine whether he strictly complied with all relevant conditions imposed by state law.

The panel held that the rider only prohibits the expenditure of DOJ funds in connection with a specific charge involving conduct that is fully compliant with state laws regarding medical marijuana; that the rider does not require a court to vacate convictions that were obtained before the rider took effect; and that the rider, if it applies to this case at all, might operate to bar the DOJ from continuing

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to defend the prosecution on appeal insofar as it relates to those counts that may be determined to involve only conduct that wholly complies with California medical marijuana law.

The panel concluded that the defendant is not entitled to a *McIntosh* remand in this case because (1) his conviction and sentence were entered before the rider took effect; (2) the rider does not bar the DOJ from spending funds in connection with Counts 1 and 6, which definitively involved conduct that violated state law; (3) even if the rider applied to Counts 2 through 5, an open question, the panel's rulings on Counts 1 and 6 are dispositive of all counts since the defendant's substantive appellate claims concern all counts equally; and (4) the defendant does not win relief on any of his other arguments, so a *McIntosh* remand on Counts 2 through 5 is unnecessary.

The panel held that the district court erred by instructing the jury that "[t]here is no such thing as valid jury nullification," and that it "would violate [its] oath and the law if [it] willfully brought a verdict contrary to the law given to [it] in this case." The panel held that because there is no right to jury nullification, the error was harmless.

The panel held that the district court did not err by denying the defendant's motion to suppress, because the dispensary's practice, as described in the warrant affidavit, of requiring members to designate the dispensary as their primary caregiver and then allowing members to purchase marijuana immediately after, provided probable cause to believe that the dispensary was operating illegally. The panel held that the district court did not err by denying the defendant a *Franks* hearing, or by declining to instruct the jury on the defendant's joint-ownership defense.

The panel held that the district court did not abuse its discretion by considering the government's late-filed objections to the presentence report, and that the sentence is substantively and procedurally reasonable.

COUNSEL

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Alexandra W. Yates, Deputy Federal Public Defender; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Amici Curiae Federal Public and Community Defenders for Alaska; Arizona; The Central, Eastern, Northern, and Southern Districts of California; Guam; Hawaii; Idaho; Montana; Nevada; Oregon; and the Eastern and Western Districts of Washington.

ORDER

Defendant-Appellant's petition for panel rehearing is GRANTED. The opinion filed June 16, 2017, and reported at 859 F.3d 825, is hereby withdrawn. A superseding opinion will be filed concurrently with this order.

Judge M. Smith and Judge N.R. Smith vote to deny the petition for rehearing en banc, and Judge Ebel so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed the same date, is DENIED. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

M. SMITH, Circuit Judge:

Noah Kleinman appeals his jury conviction and 211 month sentence for conspiracy to distribute and possess marijuana, distribution of marijuana, maintaining a drug-involved premises, and conspiracy to commit money laundering. His offenses arose out of purported medical marijuana collective storefronts that he operated with his co-defendants in California, which he alleges complied with state law. On appeal, Kleinman argues that (1) a congressional appropriations rider enjoining use of United States Department of Justice (DOJ) funds in certain medical marijuana cases prohibits continued prosecution of his case; (2) the district court gave an anti-nullification jury instruction that effectively coerced a guilty verdict; (3) the district court erroneously denied Kleinman's motion to

suppress evidence seized pursuant to a faulty search warrant; (4) the district court erred by not granting an evidentiary hearing on the validity of the affidavit supporting the search warrant; (5) the district court erred by refusing to instruct the jury on Kleinman's defense theory; and (6) the 211 month sentence was substantively and procedurally unreasonable. For the reasons described herein, we AFFIRM Kleinman's conviction and sentence.

FACTS AND PRIOR PROCEEDINGS

Kleinman, along with defendant Paul Montoya and others, began operating purported medical marijuana collectives in California around 2006. In 2007 or 2008 they opened their fourth store, NoHo Caregivers (NoHo), which the government alleged was the hub of a large conspiracy to distribute marijuana. At trial, witnesses testified that Kleinman and his associates sold 90% of their marijuana outside of their storefronts, used encrypted phones and burner phones to communicate, drove rented cars to escape detection, hid drugs and money in "stash apartments" rented for that purpose, and shipped marijuana hidden in hollowed-out computer towers to customers in New York and Philadelphia.

In 2010, pursuant to a Los Angeles Police Department (LAPD) investigation of medical marijuana collectives, two undercover officers entered Kleinman's dispensary Medco Organics (Medco) and purchased marijuana. The LAPD then obtained a search warrant and seized evidence, and California initiated criminal proceedings against Kleinman. He moved to dismiss the case, arguing that he had complete immunity from prosecution pursuant to California medical marijuana laws. The state did not file an objection. During a preliminary hearing on the dismissal motion, the deputy district attorney stated that he did not see a basis on which to

deny Kleinman's motion, and the state court dismissed the charges. After the case was dismissed, the United States Drug Enforcement Administration (DEA) seized the evidence in the LAPD's custody.

In 2011, a federal grand jury indicted Kleinman, Montoya, and five others for conspiracy to distribute and possess marijuana, distribution of marijuana, maintaining a drug-involved premises, and conspiracy to commit money laundering. Kleinman moved to suppress the evidence seized by the DEA on the ground that it was obtained pursuant to a search warrant that lacked probable cause. In the alternative, Kleinman moved for an evidentiary hearing on the validity of the affidavit supporting the warrant due to alleged material omissions in the affidavit. The district court denied the motions.

At a pretrial hearing, the district court concluded that any references to medical marijuana would be irrelevant at trial because state law compliance is not a defense to federal charges. During jury selection, the district court emphasized that jurors should not question any purported conflict between federal and state law, and should consider the case under federal law only.

The jury convicted Kleinman on all counts and found that the amount of marijuana involved in the offenses exceeded 1,000 kilograms. The district court held a sentencing hearing on December 8, 2014, determined that the applicable United States Sentencing Guidelines (Guidelines) range was 188 to 235 months, and sentenced Kleinman to 211 months. Shortly after Kleinman's convictions and sentence, on December 16, 2014, Congress enacted an appropriations rider that prohibits the DOJ from expending funds to prevent states from implementing their laws authorizing the use, distribution, possession, and

cultivation of medical marijuana. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217 (2014).

ANALYSIS

I. Kleinman is not entitled to remand for an evidentiary hearing on his state law compliance.

In 1996, California voters approved the Compassionate Use Act (CUA), which decriminalized possession and cultivation of marijuana for medical use. Cal. Health & Safety Code § 11362.5. In 2003, the California legislature enacted the Medical Marijuana Program (MMP), permitting qualified patients to form collectives for the cultivation and distribution of medical marijuana. *Id.* §§ 11362.7–11362.9. Federal law, however, still prohibits the use or sale of marijuana, even if distributed and possessed pursuant to state-approved medical marijuana programs. *See United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016) ("Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime.").

Since December 16, 2014, congressional appropriations riders have prohibited the use of any DOJ funds that prevent states with medical marijuana programs (including California) from implementing their state medical marijuana laws. Consolidated and Further Continuing Appropriations Act, 2015, 128 Stat. at 2217; Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 542, 129 Stat. 2242, 2332–33 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 135, 228 (2017). All of these riders are "essentially the same," *see United States v. Nixon*, 839 F.3d 885, 887 (9th Cir. 2016) (per curiam), and

the current rider will remain in effect until at least September 30, 2017. *See* Consolidated Appropriations Act, 2017, 131 Stat. at 135. In this opinion we refer to the riders collectively as § 542.

In *McIntosh* we determined that, pursuant to § 542, federal criminal defendants who were indicted in marijuana cases had standing to file interlocutory appeals seeking to enjoin DOJ expenditure of funds used to prosecute their cases. 833 F.3d at 1172–74. We held that "§ 542 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." *Id.* at 1177. However, § 542 does not prohibit prosecuting individuals for conduct that is *not* fully compliant with state medical marijuana laws. *Id.* at 1178. We remanded, holding that the DOJ could only continue the prosecutions if the defendants were given "evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on . . . medical marijuana." *Id.* at 1179. Kleinman asks us to remand for an evidentiary hearing as we did in *McIntosh*. We decline to do so.

Preliminarily, we clarify that the government's approach to this case is mistaken. Kleinman was convicted and sentenced shortly before § 542 was enacted. The government therefore claims that § 542 is inapplicable to Kleinman's prosecution for two reasons, neither of which is availing. First, it asserts that application of § 542 after judgment is entered would be a retroactive application of that law, when the statute was not intended to apply retroactively. However, Kleinman does not seek retroactive application of § 542. Rather, he argues that § 542 prohibits

continued DOJ expenditures on his case since its enactment, which in this case refers to the DOJ's ongoing litigation *on appeal*. We determined in *McIntosh* that § 542 can prohibit continued DOJ expenditures even though a prosecution was properly initiated prior to § 542's enactment, *see id.* ("The government had authority to initiate criminal proceedings, and it merely lost funds to continue them."), and the same reasoning applies to continued expenditures on a direct appeal after conviction.

Second, the government argues that under the federal savings statute, 1 U.S.C. § 109, the repeal of a statute generally does not repeal liability incurred when that statute was in effect. However, § 542 does not concern the repeal of any statute, and *McIntosh* made clear that § 542 did not change the legality of marijuana under federal law. 833 F.3d at 1179 n.5. Section 542 merely enjoins certain DOJ expenditures while it is in effect.

We make two holdings that support our conclusion that a *McIntosh* hearing is not necessary in this case. First, § 542 only prohibits the expenditure of DOJ funds in connection with a *specific charge* involving conduct that is fully compliant with state laws regarding medical marijuana. Thus, the applicability of § 542 focuses on the conduct forming the basis of a particular charge, which requires a count-by-count analysis to determine which charges, if any, are restricted by § 542. The prosecution cannot use a prosecutable charge (for conduct that violates state medical marijuana law) to bootstrap other charges that rely solely upon conduct that would fully comply with state law. Otherwise, the DOJ could sweep into its prosecution other discrete acts involving medical marijuana that fully complied with state law. That would contradict the plain meaning of § 542, which prevents the DOJ from spending

funds in a manner that would prevent the listed states "from implementing their own laws that authorize . . . medical marijuana." Consolidated Appropriations Act, 2016, 129 Stat. at 2332–33.

Second, § 542 does not require a court to vacate convictions that were obtained before the rider took effect. In other words, when a defendant's conviction was entered before § 542 became law, a determination that the charged conduct was wholly compliant with state law would *not* vacate that conviction. It would only mean that the DOJ's continued expenditure of funds pertaining to that particular state-law-compliant conviction *after* § 542 took effect was unlawful. That is because, as we explained in *McIntosh*, § 542 did not change any substantive law; it merely placed a temporary hold on the expenditure of money for a certain purpose. 833 F.3d at 1179. When § 542 took effect, the DOJ was obligated to stop spending funds in connection with any charges involving conduct that fully complied with state law, but that temporary spending freeze does not spoil the fruits of prosecutorial expenditures made before § 542 took effect. Instead, as it pertains to this case, because § 542 became law after Kleinman's conviction and sentence, but before this appeal, § 542 (if it applies at all) might operate to bar the DOJ from continuing to defend this prosecution on appeal insofar as it relates to those counts that may be determined to involve only conduct that wholly complies with California medical marijuana law.

With these two principles in mind, we conclude that a *McIntosh* hearing is not necessary in this case. We made clear in *McIntosh* that "[i]ndividuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and

prosecuting such individuals does not violate § 542." 833 F.3d at 1178. In this case, § 542 does not apply to at least two of the charges against Kleinman because the conduct alleged therein does not fully comply with state law: conspiracy to distribute marijuana (Count 1), and conspiracy to commit money laundering (Count 6). Both counts involved marijuana sales to out-of-state customers in violation of California law.

The CUA and the MMP make clear that Kleinman has no state-law defense for his sales of approximately 85 kilograms of marijuana to out-of-state customers. The stated purpose of the CUA is "[t]o ensure that seriously ill *Californians* have the right to obtain and use marijuana for medical purposes." Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis added). The MMP provides immunity from prosecution for possession and distribution of marijuana to qualified patients and their primary caregivers "who associate *within the State of California* in order collectively or cooperatively to cultivate cannabis for medical purposes." *Id.* § 11362.775(a) (emphasis added). The MMP further provides that a person seeking a medical marijuana identification card must show "proof of his or her residency *within the county*." *Id.* § 11362.715(a)(1) (emphasis added). The California Attorney General's guidelines for implementing the CUA and MMP (AG Guidelines) provide that medical marijuana collectives must only sell to those within the collective, and specifically lists as "indicia of unlawful operation" sales to non-members and out-of-state distribution. Cal. Att'y Gen. Edmund G. Brown, Jr., *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, Cal. Dep't of Justice, at 8–11 (August 2008), *available at* http://www.ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguide

lines.pdf; *accord People v. London*, 175 Cal. Rptr. 3d 392, 402–03 (Cal. Ct. App. 2014).

Counts 1 and 6 allege overt acts that violate the CUA and MMP; i.e., sales to out-of-state customers. Additionally, Kleinman conceded that the government presented evidence that his Philadelphia and New York customers never joined his collective, and he never argued that these customers and out-of-state sales were part of his purported medical marijuana collectives. First, he affirmed at trial that he was not going to argue that sales to out-of-state customers were "legitimate in any way in any state." Then, in his sentencing memorandum, he argued that he should only be sentenced based on the quantity of marijuana shipped to Philadelphia and New York because his *in-state transactions* were compliant with state law. Finally, at sentencing, when asked if he was "trying to defend those shipments to New York and Philadelphia" as state-law compliant medical marijuana transactions, he replied that he was "not trying to say there's any legal defense that would apply to those out-of-state shipments." Kleinman now seeks to introduce evidence that his in-state transactions complied with California law, but makes no attempt to refute that the out-of-state transactions did not. Rather, his position is that those "questionable" sales should not taint his entire marijuana operation. Thus, the record clearly demonstrates that he violated the CUA and the MMP, is not entitled to a *McIntosh* hearing in connection with Counts 1 and 6, and is not entitled to the benefits of § 542 as to those counts.

There may be some legitimate question, however, as to whether Counts 2 through 5 involved conduct that strictly

complied with California law.[1] But there is no need to remand for a *McIntosh* hearing on those charges because even a favorable determination regarding state law compliance on Counts 2 through 5 would mean only that the DOJ was disabled from defending those specific charges on appeal. However, Kleinman did not make any appellate arguments that were tied to those specific charges; he made only global attacks on his convictions and sentence. Because he made no substantive arguments pertaining to Counts 2 through 5 that are not resolved by our rulings as to Counts 1 and 6, our rulings on those counts are dispositive of all charges. Counts 1 and 6 were definitively prosecutable; thus, § 542 does not preclude the DOJ from defending against any of Kleinman's arguments on appeal, and we need not remand for a *McIntosh* hearing on Counts 2 through 5.

In summary, we decline to remand for a *McIntosh* hearing because of the unique circumstances of this case. First, Kleinman's conviction and sentence were entered *before* § 542 took effect, so § 542 had no effect on his trial and sentencing. Thus, the only possible disability imposed on the DOJ here is the prohibition on defending the conviction and sentence *on appeal* after § 542 took effect. Second, § 542 does not bar the DOJ from spending funds in

[1] Counts 2, 3, 4 in the First Superseding Indictment alleged discrete marijuana transactions on certain dates, but those counts do not allege that the referenced transactions involved out-of-state customers or were otherwise conducted in violation of California law. Count 5 alleged the operation of a drug-involved premises (NoHo), and while it might be inferred that such conduct violated California law because the same act was alleged as an overt act in furtherance of the conspiracy in Count 1, that conclusion is not obvious. In any event, we need not decide whether there is enough uncertainty on these counts for a *McIntosh* hearing because, as we explain, it would not make a difference in the outcome of this case.

connection with Counts 1 and 6 because those charges definitively involved conduct that violated state law. Third, whether § 542 bars the DOJ's expenditure of funds to defend Counts 2 through 5 is an open question because we cannot definitively conclude that those counts involved conduct that violated State law. Fourth, *even if* § 542 applied to Counts 2 through 5—and thus the DOJ could not defend those specific counts on appeal—our rulings on Counts 1 and 6 are dispositive of *all* counts, including Counts 2 through 5, because Kleinman's substantive appellate claims concern all counts equally. Fifth, as we explain below, Kleinman does not win relief on any of his other arguments, so it is unnecessary for us to remand for a *McIntosh* hearing on Counts 2 through 5 because we would affirm those convictions regardless of whether § 542 applies to them.[2]

[2] Kleinman challenges the substantive reasonableness of his sentences, which he argues are disproportionate to the seriousness of his offenses. However, because all sentences run concurrently, and sentences for Counts 1 and 6 are 211 months each, any change in sentences for Counts 2 through 5 would not result in any reduction of Kleinman's 211 month sentence.

Kleinman separately argues that § 542 compels the Bureau of Prisons, as a subdivision of the DOJ, to stop spending money to incarcerate persons for medical marijuana convictions based on activity that fully complies with state law. We need not resolve this issue in this case. As we have explained, at least two of Kleinman's convictions fall outside the scope of § 542 because they involved conduct that violates California law. Those two convictions (Counts 1 and 6) carried the longest terms of imprisonment (211 months) and all terms for each count were sentenced to run concurrently. Thus, even if the DOJ could not separately continue to expend funds to incarcerate Kleinman on the remaining counts because of § 542, Kleinman's custodial status would not be changed because § 542 does not bar his continued incarceration for his conspiracy convictions. Further, Kleinman makes no argument that the Bureau of Prisons would calculate his credit for early release any

II. The district court erred by giving an overly strong anti-nullification jury instruction, but the error was harmless.

Kleinman claims that the anti-nullification jury instruction the district court gave prior to deliberations misstated the law and impermissibly divested the jury of its power to nullify. While we generally "review the language and formulation of a jury instruction for an abuse of discretion, . . . [w]hen jury instructions are challenged as misstatements of law, we review them *de novo*." *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014).

Jury nullification occurs when a jury acquits a defendant, even though the government proved guilt beyond a reasonable doubt. *United States v. Powell*, 955 F.2d 1206, 1212–13 (9th Cir. 1992). It is well established that jurors have the *power* to nullify, and this power is protected by "freedom from recrimination or sanction" after an acquittal. *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005). However, juries do not have a *right* to nullify, and courts have no corresponding duty to ensure that juries are able to exercise this power, such as by giving jury instructions on the power to nullify. *Id.* at 1079–80. On the contrary, "courts have the duty to forestall or prevent [nullification], whether by firm instruction or admonition or . . . dismissal of an offending juror," because "it is the duty of juries in criminal cases to take the law from the court, and apply that

differently without those concurrent sentences. Thus, we do not decide in this case the impact of § 542 on the Bureau of Prisons' expenditure of funds to incarcerate persons who were convicted only of federal drug offenses involving conduct that was fully compliant with state medical marijuana laws.

law to the facts as they find them to be from the evidence." *Id*.

In this case, in instruction number 27, out of a total of 34 jury instructions, the court instructed the jurors as follows:

> 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 is not for you to determine whether the law is just or whether the law is unjust. That cannot be your task. There is no such thing as valid jury nullification[.] You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.[3]

Kleinman argues that these instructions implied that jurors would break the law, and possibly be punished, if they did not convict, and thus divested the jury of its power to nullify.

This portion of the court's instructions was taken nearly verbatim from two cases. The first three sentences came from *United States v. Rosenthal*, 266 F. Supp. 2d 1068, 1085

[3] The court noted that it planned to give the instruction because, during trial, protesters in front of the courthouse were urging the jury to disregard the law. The protestors' signs said "smart jurors are hung jurors," "no victim of crime," and "judges have the law, jury has the power." During trial, the court spoke to the jurors one-by-one to determine what impact the protestors had, if any. Some jurors had not seen the signs, and for the jurors that had, the court asked if the signs influenced them, and reiterated that they should not be influenced by anything outside of the courtroom. All of the jurors were agreeable and none was dismissed. Kleinman argues that the court's individual questioning of the jurors contributed to the coercive effect of the anti-nullification instructions.

(N.D. Cal. 2003), *affirmed in part, reversed in part*, 454 F.3d 943 (9th Cir. 2006), where the district court instructed the jury "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." The defendant argued that this instruction erroneously divested the jury of its power to nullify, and the district court held that the instruction was proper. *Id.* at 1085–87. The district court reasoned that, while it must instruct the jury to follow the law and it must dismiss jurors who express intent to nullify, it cannot entirely divest the jury of its power to nullify with an anti-nullification instruction. *Id.* at 1086–87. Jury nullification is, by its very definition, a jury's choice to ignore court instructions, which may include an anti-nullification instruction. *Id.* at 1087. On appeal, we agreed with the district court's analysis of the jury instruction claim and adopted its reasoning in full. *Rosenthal*, 454 F.3d at 947.[4]

The last two sentences of the instruction came from *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988), a case in which the defendant mentioned jury nullification in his closing argument, and during deliberations the jury asked the court about the doctrine. "The court responded, 'There is no such thing as valid jury nullification. . . . You would violate your oath and the law if you willfully brought in a verdict contrary to the law given

[4] Our discussion of juror misconduct in *Rosenthal* is also relevant. A juror in Rosenthal's trial spoke to an attorney friend who said that the juror "could get into trouble" if she did not follow the court's instructions, and the juror shared this outside perspective during deliberations. 454 F.3d at 950. We held that reversal was necessary because "[j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors." *Id.*

you in this case.'" *Id.* The Sixth Circuit rejected the defendant's argument that the instruction was coercive, noting that "[a] jury's 'right' to reach any verdict it wishes does not . . . infringe on the duty of the court to instruct the jury only as to the correct law." *Id.* The Sixth Circuit did not discuss whether the court's instructions implied that the jury would be punished for nullification, or that an acquittal that resulted from jury nullification would be void.[5]

The first three sentences of the court's anti-nullification instruction were not erroneous, and it is not generally erroneous for a court to instruct a jury to do its job; that is, to follow the court's instructions and apply the law to the facts. If Kleinman's jury had exercised its power to nullify, it presumably would have disregarded the court's instructions on federal drug law *and* the court's anti-nullification instructions. The court had no duty to make the jury aware of its power to nullify, and properly instructed the jury that it could not (1) substitute its sense of justice for its duty to follow the law, or (2) decide whether a law is just or unjust.

Although a court has "the duty to forestall or prevent [nullification]," including "by firm instruction or admonition," *Merced*, 426 F.3d at 1080, a court should *not* state or imply that (1) jurors could be punished for jury nullification, or that (2) an acquittal resulting from jury nullification is invalid. More specifically, the court's statement that the jury "would violate [its] oath and the law

[5] The court's statement in *Krzyske* was made in response to a question from a jury that had been urged to nullify by the defendant, and may have been an off-the-cuff answer, rather than a fully considered statement of the law. Here, on the other hand, the anti-nullification instruction was proposed by the government in advance and adopted by the court in its entirety.

if [it] willfully brought a verdict contrary to the law given to [it] in this case," could be construed to imply that nullification could be punished, particularly since the instruction came in the midst of a criminal trial. Moreover, the statement that "[t]here is no such thing as valid jury nullification" could be understood as telling jurors that they do not have the power to nullify, and so it would be a useless exercise.

As noted, in accordance with its own precedents, the Sixth Circuit found that the referenced instructions were not coercive. However, our precedents require that courts should "generally avoid[] such interference as would divest juries of their power to acquit an accused, even though the evidence of his guilt may be clear." *United States v. Simpson*, 460 F.2d 515, 520 (9th Cir. 1972). Accordingly, we find that the last two sentences of the trial court's nullification instructions were erroneous.

Kleinman argues that the last two sentences of the instruction were structural error, not subject to review for harmlessness, because they deprived him of his right to trial by an independent and impartial jury. *See Arizona v. Fulminante*, 499 U.S. 279, 306–10 (1991). In other words, Kleinman contends the district court left him to be tried by something less than a fully independent and impartial jury when the court effectively stripped the jury of its power (if not its right) to nullify. This argument fails.

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (alteration in

original) (quoting *Fulminante*, 499 U.S. at 310). Structural errors, subject to automatic reversal, deprive defendants of "basic protections," without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)). Accordingly, they are neither common nor numerous. *See Neder v. United States*, 527 U.S. 1, 8 (1999) (recognizing that most constitutional errors are harmless and that structural errors arise in a very limited number of cases). Moreover, where a "defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis," rather than structural. *Id.* (alteration omitted) (quoting *Rose*, 478 U.S. at 579).

Recently, the Supreme Court identified three kinds of errors that may be considered structural. *See Weaver*, 137 S. Ct. at 1908. A comparison of the error in this case with those discussed by the Court demonstrates that they are not of the same kind.

First, the Court indicated that an error may be structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* For example, the Court indicated that a structural error could arise if a defendant were denied his right to conduct his own defense, even though his exercise of that right might increase the likelihood of his conviction. *Id.* Plainly, the instant error was not of this kind, as the jury-trial right it implicated is designed precisely to protect defendants from erroneous conviction.

Second, the Court noted that an error may be structural "if the effects of the error are simply too hard to measure."

Id. This kind of error arises, for example, where "a defendant is denied the right to select his or her own attorney," and "the precise 'effect of the violation cannot be ascertained.'" *Id.* (quoting *United States v. Gonzalez–Lopez*, 548 U.S. 140, 149, n.4 (2006)). The Court reasoned that in such cases, "[b]ecause the government will . . . find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' the efficiency costs of letting the government try to make the showing are unjustified." *Id.* (citation omitted) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The error in this case does not fit within this category either. In most cases involving improper jury instruction, the Supreme Court has affirmed the appropriateness of harmless-error review, distinguishing a case like *Sullivan v. Louisiana*, 508 U.S. 275 (1993), where there was *no* verdict to subject to harmless-error review, from cases where there *is* a verdict, but it is somehow deficient. *See, e.g.*, *Neder*, 527 U.S. at 8–13 (collecting cases where elements of an offense were misdescribed in or omitted from jury instructions and harmless-error review was applied); *Yates v. Evatt*, 500 U.S. 391, 402–04 (1991); *Carella v. California*, 491 U.S. 263, 265–66 (1989) (per curiam); *Pope v. Illinois*, 481 U.S. 497, 503 (1987); *Rose*, 478 U.S. at 578–80. There is no reason to distinguish the instant case from the many cases involving jury instruction error in which the Court has found harmless error review appropriate. Here, we have a jury verdict, and a record of both the trial evidence and jury instructions. Nothing precludes our determination of the harmlessness (or not) of the erroneous jury-nullification instruction.

Third, the *Weaver* Court held that an error may be structural "if the error always results in fundamental unfairness." 137 S. Ct. at 1908. The Court noted, for example, that "if an indigent defendant is denied an attorney

or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one." *Id.* The error here was not of this kind for at least three reasons: (1) It was not an error of the same magnitude as, for example, the denial of an attorney to an indigent defendant. *See id.* (2) The error did not leave us with "no object, so to speak, upon which harmless-error scrutiny can operate," *Sullivan*, 508 U.S. at 280–81 (emphasis omitted), since we still have a proper jury verdict and may determine whether the nullification instruction played any significant role in the jury's finding of guilt beyond a reasonable doubt. And (3) Kleinman has no constitutional right to jury nullification, in contrast to indigent defendants who have a right to an attorney, and all defendants who have a right to be convicted only upon a finding of guilt beyond a reasonable doubt. Indeed, if a jury nullification instruction "always results in fundamental unfairness," then we and our sister circuits have allowed structural errors to go unchecked for decades.

Having determined that the district court's jury nullification instruction did not amount to a structural error, we next proceed to the second step of our analysis, at which we must determine whether the district court's error was constitutional in nature. If an error is constitutional, the rule announced in *Chapman* applies and an error may only be deemed harmless if its harmlessness is clear beyond a reasonable doubt. *See United States v. Perkins*, 937 F.2d 1397, 1407 n.2 (9th Cir. 1991) (O'Scannlain, J., dissenting) (describing three possible levels of harmless-error scrutiny in the criminal context); *United States v. Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977). By contrast, "nonconstitutional errors are measured against the more-probable-than-not standard." *Valle-Valdez*, 554 F.2d at 916 (9th Cir. 1977); *see also Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (holding that nonconstitutional error is

reversible "if one cannot say, with fair assurance, . . . that the judgment is not substantially swayed by the error"); *United States v. Hernandez*, 476 F.3d 791, 801 (9th Cir. 2007).

As we previously stated, there is no constitutional right to jury nullification, and it is not a constitutional error to give a "firm instruction or admonition," in an attempt to "forestall or prevent" nullification. *Merced*, 426 F.3d at 1079–80 (quoting *United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1997)). However, to the extent the district court's erroneous instruction improperly infringed on "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts," *United States v. Gaudin*, 515 U.S. 506, 513 (1995), implying that a particular decision might result in some type of punishment, *see Merced*, 426 F.3d at 1079, the error took on a constitutional dimension. While it is permissible under our law for judges to attempt to forestall or prevent nullification by use of a firm instruction or admonition, it was not proper here for the district court to do so in a way that might be perceived as coercive with regard to the jury's ultimate verdict.

In light of that fact, we will evaluate the trial court's two-sentence instructional error according to *Chapman*'s beyond-a-reasonable-doubt standard. The question we must answer is whether the Government has proved beyond a reasonable doubt that the district court's erroneous two-sentence instruction, which implied that jurors could face a legal consequence for nullification, did not contribute to the guilty verdict. *See Chapman*, 386 U.S. at 24.

In this case, the Government has made the required showing. There is no dispute regarding the adequacy of the district court's jury instructions as a whole, and the

Government has demonstrated that the erroneous two-line nullification instruction was an anomaly, as the district judge's other instructions appropriately explained the jurors' role, powers, and responsibilities. The erroneous two-sentence nullification instruction was a small part of the court's final instructions to the jury, and was delivered without particular emphasis. Moreover, the court's other instructions informed the jurors that the ultimate-verdict decision was entirely theirs to make, that a guilty verdict required a finding of guilt beyond a reasonable doubt after a careful and impartial consideration of the evidence, that they should not be afraid to change their minds, and that they should reach their own conscientious decisions.

Given this context, the nullification instruction was a harmless error. If the two-sentence instruction was coercive at all, it was only coercive insofar as it implied recrimination in the event a verdict was reached contrary to the law. Because the Government has shown that the verdict here was reached in a manner consistent with the law, we are confident that the instruction had no effect on the jury's verdict. The verdict would have been the same absent the district court's error, because the evidence of Kleinman's guilt would have been the same, the judge's instructions on the law would have been the same, and the jury would have had no more right to reach a nullifying verdict than it did here. *See, e.g.*, *United States v. Conti*, 804 F.3d 977, 981 (9th Cir. 2015) ("Where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (alteration omitted) (quoting *Neder*, 527 U.S. at 8)); *Merced*, 426 F.3d at 1079 ("[W]hile jurors have the power to nullify a verdict, they have no right to do so."); *see also Rose*,

478 U.S. at 580 (noting that erroneous presumption regarding malice only attached if the jury already found predicate facts to exist beyond a reasonable doubt).[6] The district court's error was harmless.

III. The district court did not err by denying Kleinman's motion to suppress evidence seized pursuant to a state search warrant.

The LAPD seized evidence pursuant to a search warrant and supporting affidavit dated March 16, 2010, and the DEA later seized that evidence. Kleinman moved to suppress the evidence, arguing that the seizure violated his Fourth Amendment rights because the affidavit supporting the search warrant did not support the magistrate's probable cause finding. The district court denied the motion. We review the denial de novo, and any underlying factual findings for clear error. *United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011).

"[P]robable cause means a fair probability that contraband or evidence is located in a particular place. Whether there is a fair probability depends upon the totality of the circumstances, including reasonable inferences, and is a commonsense, practical question. Neither certainty nor a preponderance of the evidence is required." *United States v. Kelley*, 482 F.3d 1047, 1050 (9th Cir. 2007) (internal citations and quotation marks omitted). We give a

[6] Kleinman asserts that if the error is not structural, "[w]e apply a 'totality of the circumstances' analysis when examining whether a judge's statements to a jury were impermissibly coercive." *United States v. Berger*, 473 F.3d 1080, 1090 (9th Cir. 2007). However, the framework that Kleinman identifies is inapplicable here; it applies when we assess whether an *Allen* charge was impermissibly coercive. *Id.* at 1089; *see also Allen v. United States*, 164 U.S. 492, 501–02 (1896).

magistrate's determination that probable cause exists "great deference." *Id.*

The affidavit supporting the search warrant described the LAPD officers' undercover visit to Medco in 2010. Officer Cecil Mangrum stated that, after he and his partner entered Medco, a Medco employee said that to participate in the collective Officer Mangrum "did not have to do anything except show [his] ID and doctor recommendation every time [he] came in," and that not everyone in the collective was required to grow marijuana. The officers purchased marijuana at Medco that day using United States currency. Officer Mangrum alleged the following probable violations of California law: (1) Medco did not require members to participate in the collective, in violation of the CUA and MMP; (2) the Medco employee exchanged marijuana solely for money, in violation of California Health and Safety Code § 11360; and (3) Medco requires collective members to designate Medco as their primary caregiver, in violation of *People v. Mentch*, 195 P.3d 1061 (Cal. 2008).

California Health and Safety Code § 11360 prohibits selling marijuana, except as authorized by law. Thus, selling marijuana is illegal under § 11360 *unless* the MMP authorized such sales. While the MMP does not "authorize any individual or group to cultivate or distribute marijuana for profit," *id.* § 11362.765(a), it also does not prohibit exchanging money for marijuana among members of a collective. Consistent with the MMP, "a primary caregiver [may] receive compensation for actual expenses and reasonable compensation for services rendered to an eligible qualified patient, i.e., conduct that would constitute sale under other circumstances." *People v. Urziceanu*, 33 Cal. Rptr. 3d 859, 883 (Cal. Ct. App. 2005); *see also* AG Guidelines at 10. Further, the MMP does not require that

collective members grow marijuana in order to be considered participants of the collective. *See People v. Anderson*, 182 Cal. Rptr. 3d 276, 277 (Cal. Ct. App. 2015). Thus, the statements in the affidavit that Medco exchanged marijuana solely for money and did not require members to grow marijuana do not support the inference that Medco was operating in violation of state law.

However, the affidavit *did* establish probable cause to believe that Medco was violating state law because it stated that marijuana purchasers were required to designate Medco as their primary caregiver. Although Officer Mangrum's description of the Medco visit did not specifically state that he designated Medco as his primary caregiver, this designation can reasonably be inferred because he averred that Medco required such a designation from its members, and that he purchased marijuana from Medco that day.[7]

Primary caregiver is defined by the CUA and MMP as an individual "who has consistently assumed responsibility for the housing, health, or safety of" a medical marijuana patient who designated said individual as her primary caregiver. Cal. Health & Safety Code §§ 11362.5(e), 11362.7(d). While the general definition is the same in the CUA and MMP, the MMP "provides an expanded definition of what constitutes a primary caregiver" by including examples of qualifying primary caregivers. *Urziceanu*,

[7] Indeed, even if it could not reasonably be inferred from the affidavit that the officers designated Medco as their primary caregiver when they purchased marijuana, a probable violation of California law would still be apparent, because the officers would have purchased from a purported collective without even nominally becoming members of that collective.

33 Cal. Rptr. 3d at 881–82; *see also* Cal. Health & Safety Code § 11362.7(d).

The California Supreme Court held that to be a primary caregiver under the CUA, a person "must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana." *Mentch*, 195 P.3d at 1067. The court in *People v. Hochanadel*, 98 Cal. Rptr. 3d 347, 361–62 (Cal. Ct. App. 2009), further explained that, under the MMP, collective owners "do not, [merely] by providing medical patients with medicinal marijuana, consistently assume responsibility for the health of those patients" sufficient to be considered a primary caregiver. Rather, "[t]here must be evidence of an existing, established relationship, providing for housing, health or safety independent of the administration of medical marijuana." *Id.* at 362 (internal quotation marks omitted). Moreover, the AG Guidelines state that, although a lawful medical marijuana collective may use a storefront to dispense medical marijuana, dispensaries "are likely unlawful" if they "merely require patients to complete a form summarily designating the business owner as their primary caregiver." AG Guidelines at 11.

As described in the affidavit, Medco's practice of requiring members to designate Medco as their primary caregiver and then allowing members to purchase marijuana immediately after, with no preexisting or other relationship beyond the distribution of marijuana, provides probable cause to believe that Medco was operating illegally. When the warrant was issued in 2010, the CUA, MMP, California state court decisions, and the AG Guidelines all supported the conclusion that Medco's "primary caregiver"

designation practice was unlawful. Thus, the district court did not err by denying Kleinman's motion to suppress.

IV. The district court did not err by denying Kleinman's motion for a *Franks* hearing.

Kleinman requested, and was denied, a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) (i.e., a *Franks* hearing). We review the court's denial de novo. *United States v. Flyer*, 633 F.3d 911, 915–16 (9th Cir. 2011). A *Franks* hearing is "an evidentiary hearing on the validity of the affidavit underlying a search warrant" that a defendant is entitled to if he "can make a substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit cannot support a finding of probable cause without the allegedly false information"; i.e., the challenged statements or omissions are material. *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000). "If both requirements are met, the search warrant must be voided and the fruits of the search excluded." *United States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017) (internal quotation marks omitted).

Kleinman argues that Officer Mangrum's affidavit contained misleading omissions of facts that would have demonstrated that Kleinman complied with state law. The affidavit did not mention that, when the officers entered Medco, security guards checked their ID cards and doctors' recommendations, verified the doctors' recommendations, and had the officers complete membership applications. Officer Mangrum revealed these details when he testified at a state court hearing.

Regardless of whether Kleinman made a substantial preliminary showing that Officer Mangrum's omissions were made recklessly or intentionally, a *Franks* hearing is

not warranted because the omissions were not material to the probable cause determination. In considering the materiality of an alleged omission, we ask "whether probable cause remains once the evidence presented to the magistrate judge is supplemented with the challenged omissions." *Id.* at 1119.

If the affidavit stated the omitted information about IDs, doctors' recommendations, and membership applications, the probable cause finding would still be valid. The affidavit stated that a Medco employee told Officer Mangrum that he would have to show IDs and doctors' recommendations every time he came in, and that Medco requires collective members to designate Medco as their primary caregiver. Since the officers purchased marijuana from Medco that day, one can reasonably infer that the omitted acts occurred, and the affidavit does not suggest that they did not. In addition, regardless of whether Medco properly verified the officers' IDs and doctors' recommendations, the probable cause finding was supported because the affidavit stated that Medco required members to designate Medco as their primary caregiver, in violation of state law. *See* Part III, *supra.* Thus, Kleinman cannot make a substantial preliminary showing that the omitted facts were material, and thus is not entitled to a *Franks* hearing.

V. The district court did not err by declining to instruct the jury on Kleinman's joint ownership defense.

Based on *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), Kleinman sought a jury instruction that "[w]here a group of individuals jointly purchase and then simultaneously and jointly acquire possession of a drug for their own use intending only to share it together, they cannot be found guilty of the offense of distribution of the drug." The district court refused to give the instruction, and Kleinman argues that this refusal deprived the jury

instruction on his theory of defense. "We review whether a trial court's instructions adequately covered a defendant's proffered defense de novo." *United States v. Morsette*, 622 F.3d 1200, 1201 (9th Cir. 2010) (per curiam).

The court did not err by refusing to instruct the jury on the joint ownership defense because, although "a defendant is entitled to have the judge instruct the jury on his theory of defense," the defense must be "supported by law and [have] some foundation in the evidence." *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007). We have expressly declined to adopt or reject the *Swiderski* joint ownership defense in this circuit. *See United States v. Wright*, 593 F.2d 105, 108 (9th Cir. 1979). Even if we had accepted the defense, it would only apply "where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together," *Swiderski*, 548 F.2d at 450, and no reasonable jury could conclude that this defense fits the facts of Kleinman's case. Thus, the court did not err by declining to instruct the jury on a defense theory that is not supported in the law of our circuit, and, even if it was, has no foundation in the evidence. *See Kayser*, 488 F.3d at 1073.

VI. The district court did not abuse its discretion by considering the government's late-filed objections to the presentence report.

Kleinman argues that the court failed to comply with Federal Rule of Criminal Procedure 32(f)(1), which provides that "[w]ithin 14 days after receiving the presentence report [PSR], the parties must state in writing any objections." The Probation Office filed its revised PSR on September 17, 2014, and, although the government requested and was granted an extension of time to file objections by October

27, 2014, it did not file its objections until December 4, 2014. Sentencing was on December 8, 2014.

We have stated that we review a district court's compliance with Rule 32 de novo, and that Rule 32 "requires strict compliance." *United States v. Thomas*, 355 F.3d 1191, 1194, 1200 (9th Cir. 2004). However, this was in the context of determining if a district court made required Rule 32 findings on objections to the PSR that are unresolved at sentencing. *See, e.g.*, *id.* at 1200; *United States v. Carter*, 219 F.3d 863, 866 (9th Cir. 2000); *United States v. Houston*, 217 F.3d 1204, 1206–07 (9th Cir. 2000). We have not stated the standard of review for an alleged Rule 32(f)(1) violation.

Rule 32(i)(1)(D) allows a court at sentencing to, "for good cause, allow a party to make a new objection at any time before sentence is imposed," and the "good cause" standard has been understood as a grant of discretion to district courts. *See, e.g.*, *United States v. Angeles-Mendoza*, 407 F.3d 742, 749 (5th Cir. 2005). Although Rule 32(i)(1)(D) applies at sentencing, the discretion it gives for a court to consider late-raised sentencing objections logically extends to allowing a court to consider late-filed written objections for good cause. Thus, we review for abuse of discretion the court's decision to consider the government's late-filed objections.

The court did not abuse its discretion by considering the government's objections to the PSR. First, the court was within its discretion to determine that the government showed good cause. The government took issue with the PSR's determination that Kleinman was not eligible for a leadership role enhancement, and requested additional time to review hundreds of pages of trial transcripts to fully respond to the PSR. At sentencing, the court acknowledged

that the PSR contained numerous errors and that the government needed time to fully respond.

Second, even if the government did not show sufficient good cause, Kleinman was not prejudiced by the court's consideration of late-filed objections. Kleinman was put on notice that the government planned to object to the PSR's leadership role enhancement conclusion months before sentencing. The day after the Probation Office filed its revised PSR, the government filed an ex parte motion for extension of time, specifically stating that it took issue with the leadership role conclusion, and had ordered transcripts to adequately respond to the PSR and Kleinman's sentencing position. Additionally, the court stated at sentencing that its conclusion that there was "no question" that the leadership role enhancement applied was primarily based on its own memory and notes from trial, rather than the PSR or the parties' sentencing positions.

VII. Kleinman's 211 month sentence is substantively and procedurally reasonable.

Kleinman argues that his 211 month sentence is procedurally and substantively unreasonable. We review a sentence for procedural and substantive reasonableness, and sentencing decisions for abuse of discretion. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008). Although we have "decline[d] to embrace a presumption" of reasonableness for in-Guideline sentences, when a sentence is within Guidelines, it is generally "probable that the sentence is reasonable." *Id.* at 994. Kleinman does not dispute that his sentence was within Guidelines.

First, Kleinman argues that he was punished at sentencing for going to trial, as evidenced by the shorter sentences of his co-defendants, who did not go to trial. "It

is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial," and "courts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice." *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982). In *Medina-Cervantes*, for example, we held that the court's statements criticizing the defendant for going to trial and estimating the costs of the trial warranted vacating the sentence. *Id.* at 716–17.

Five of Kleinman's six co-defendants were sentenced to probation, and Montoya was sentenced to 37 months. All six co-defendants pleaded guilty and cooperated with the government during trial. Additionally, all but Montoya had a lesser role in the conspiracy than Kleinman. While the sentencing disparities are apparent, Kleinman has offered no evidence to warrant the inference that the longer sentence was imposed to punish Kleinman for going to trial. There are clear reasons for the sentencing disparities, and the court stated during sentencing that it "analyzed the sentences imposed on others who have either pled or been found guilty in this case in order to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."

Kleinman additionally argues that the court procedurally erred because it did not state with sufficient specificity its reason for imposing a significantly disparate sentence. We review for plain error because Kleinman failed to raise this procedural objection before the district court. *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010). "[A] sentencing judge does not abuse [its] discretion when [it] listens to the defendant's arguments and then simply [finds the] circumstances insufficient to warrant a sentence

lower than the Guidelines range." *Id*. (internal quotation marks omitted). The court listened to Kleinman's arguments, stated that it reviewed the statutory sentencing criteria, and imposed a within-Guidelines sentence; "failure to do more does not constitute plain error." *Id.*

Finally, Kleinman argues that his sentence is substantively unreasonable because it "is far greater than necessary to reflect the seriousness of this medical marijuana offense," when there is now "overwhelming public opinion that medical marijuana is not a danger to the public." Even if this were properly considered a medical marijuana case, the court did not err by imposing a within-Guidelines sentence based on violations of federal law. Although a court may have the discretion to depart from Guidelines based on policy disagreements, it is not obligated to do so. *See, e.g.*, *United States v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011).

CONCLUSION

We conclude that the district court erred by instructing the jury that "[t]here is no such thing as valid jury nullification," and that it "would violate [its] oath and the law if [it] willfully brought a verdict contrary to the law given to [it] in this case." However, because there is no right to jury nullification, the error was harmless. We find that Kleinman's remaining challenges on appeal are without merit, and AFFIRM his conviction and sentence.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. NOAH KLEINMAN, AKA Chuckles, *Defendant-Appellant.*	No. 14-50585 D.C. No. 2:11-cr-00893- ODW-2 OPINION

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted April 4, 2017
Pasadena, California

Filed June 16, 2017

Before: DAVID M. EBEL,* MILAN D. SMITH, JR., and N. RANDY SMITH, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

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* The Honorable David M. Ebel, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed a conviction and sentence for conspiracy to distribute and possess marijuana, distribution of marijuana, maintaining a drug-involved premises, and conspiracy to commit money laundering, arising out of the operation of purported medical-marijuana collective storefronts in California.

The defendant argued that a congressional appropriations rider enjoining use of United States Department of Justice funds in certain medical marijuana cases prohibits continued prosecution of his case, and that he is entitled to an evidentiary hearing under *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), to determine whether he strictly complied with all relevant conditions imposed by state law.

The panel held that the rider only prohibits the expenditure of DOJ funds in connection with a specific charge involving conduct that is fully compliant with state laws regarding medical marijuana; that the rider does not require a court to vacate convictions that were obtained before the rider took effect; and that the rider, if it applies to this case at all, might operate to bar the DOJ from continuing to defend the prosecution on appeal insofar as it relates to those counts that may be determined to involve only conduct that wholly complies with California medical marijuana law.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel concluded that the defendant is not entitled to a *McIntosh* remand in this case because (1) his conviction and sentence were entered before the rider took effect; (2) the rider does not bar the DOJ from spending funds in connection with Counts 1 and 6, which definitively involved conduct that violated state law; (3) even if the rider applied to Counts 2 and 5, an open question, the panel's rulings on Counts 1 and 6 are dispositive of all counts since the defendant's substantive appellate claims concern all counts equally; and (4) the defendant does not win relief on any of his other arguments, so a *McIntosh* remand on Counts 2 through 5 is unnecessary.

The panel held that the district court erred by instructing the jury that "[t]here is no such thing as valid jury nullification," and that it "would violate [its] oath and the law if [it] willfully brought a verdict contrary to the law given to [it] in this case." The panel held that because there is no right to jury nullification, the error was harmless.

The panel held that the district court did not err by denying the defendant's motion to suppress, because the dispensary's practice, as described in the warrant affidavit, of requiring members to designate the dispensary as their primary caregiver and then allowing members to purchase marijuana immediately after, provided probable cause to believe that the dispensary was operating illegally. The panel held that the district court did not err by denying the defendant a *Franks* hearing, or by declining to instruct the jury on the defendant's joint-ownership defense.

The panel held that the district court did not abuse its discretion by considering the government's late-filed objections to the presentence report, and that the sentence is substantively and procedurally reasonable.

COUNSEL

Becky S. James (argued) and Jessica W. Rosen, James & Associates, Los Angeles, California, for Defendant-Appellant.

Julie Shemitz (argued) and David P. Kowal (argued), Assistant United States Attorneys; Lawrence S. Middleton, Chief, Criminal Division; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

Paula M. Mitchell, Ninth Circuit Appellate Clinic, Alarcón Advocacy Center, Loyola Law School, Los Angeles, California, for Amici Curiae Members of Congress.

Roger I. Roots, Livingston, Montana, for Amicus Curiae Fully Informed Jury Association.

OPINION

M. SMITH, Circuit Judge:

Noah Kleinman appeals his jury conviction and 211 month sentence for conspiracy to distribute and possess marijuana, distribution of marijuana, maintaining a drug-involved premises, and conspiracy to commit money laundering. His offenses arose out of purported medical marijuana collective storefronts that he operated with his co-defendants in California, which he alleges complied with state law. On appeal, Kleinman argues that (1) a congressional appropriations rider enjoining use of United States Department of Justice (DOJ) funds in certain medical marijuana cases prohibits continued prosecution of his case; (2) the district court gave an anti-nullification jury instruction that effectively coerced a guilty verdict; (3) the district court erroneously denied Kleinman's motion to suppress evidence seized pursuant to a faulty search warrant; (4) the district court erred by not granting an evidentiary hearing on the validity of the affidavit supporting the search warrant; (5) the district court erred by refusing to instruct the jury on Kleinman's defense theory; and (6) the 211 month sentence was substantively and procedurally unreasonable. For the reasons described herein, we AFFIRM Kleinman's conviction and sentence.

FACTS AND PRIOR PROCEEDINGS

Kleinman, along with defendant Paul Montoya and others, began operating purported medical marijuana collectives in California around 2006. In 2007 or 2008 they opened their fourth store, NoHo Caregivers (NoHo), which the government alleged was the hub of a large conspiracy to distribute marijuana. At trial, witnesses testified that Kleinman and his associates sold 90% of their marijuana

outside of their storefronts, used encrypted phones and burner phones to communicate, drove rented cars to escape detection, hid drugs and money in "stash apartments" rented for that purpose, and shipped marijuana hidden in hollowed-out computer towers to customers in New York and Philadelphia.

In 2010, pursuant to a Los Angeles Police Department (LAPD) investigation of medical marijuana collectives, two undercover officers entered Kleinman's dispensary Medco Organics (Medco) and purchased marijuana. The LAPD then obtained a search warrant and seized evidence, and California initiated criminal proceedings against Kleinman. He moved to dismiss the case, arguing that he had complete immunity from prosecution pursuant to California medical marijuana laws. The state did not file an objection. During a preliminary hearing on the dismissal motion, the deputy district attorney stated that he did not see a basis on which to deny Kleinman's motion, and the state court dismissed the charges. After the case was dismissed, the United States Drug Enforcement Administration (DEA) seized the evidence in the LAPD's custody.

In 2011, a federal grand jury indicted Kleinman, Montoya, and five others for conspiracy to distribute and possess marijuana, distribution of marijuana, maintaining a drug-involved premises, and conspiracy to commit money laundering. Kleinman moved to suppress the evidence seized by the DEA on the ground that it was obtained pursuant to a search warrant that lacked probable cause. In the alternative, Kleinman moved for an evidentiary hearing on the validity of the affidavit supporting the warrant due to alleged material omissions in the affidavit. The district court denied the motions.

At a pretrial hearing, the district court concluded that any references to medical marijuana would be irrelevant at trial because state law compliance is not a defense to federal charges. During jury selection, the district court emphasized that jurors should not question any purported conflict between federal and state law, and should consider the case under federal law only.

The jury convicted Kleinman on all counts and found that the amount of marijuana involved in the offenses exceeded 1,000 kilograms. The district court held a sentencing hearing on December 8, 2014, determined that the applicable United States Sentencing Guidelines (Guidelines) range was 188 to 235 months, and sentenced Kleinman to 211 months. Shortly after Kleinman's convictions and sentence, on December 16, 2014, Congress enacted an appropriations rider that prohibits the DOJ from expending funds to prevent states from implementing their laws authorizing the use, distribution, possession, and cultivation of medical marijuana. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217 (2014).

ANALYSIS

I. Kleinman is not entitled to remand for an evidentiary hearing on his state law compliance.

In 1996, California voters approved the Compassionate Use Act (CUA), which decriminalized possession and cultivation of marijuana for medical use. Cal. Health & Safety Code § 11362.5. In 2003, the California legislature enacted the Medical Marijuana Program (MMP), permitting qualified patients to form collectives for the cultivation and distribution of medical marijuana. *Id.* §§ 11362.7–11362.9. Federal law, however, still prohibits the use or sale of

marijuana, even if distributed and possessed pursuant to state-approved medical marijuana programs. *See United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016) ("Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime.").

Since December 16, 2014, congressional appropriations riders have prohibited the use of any DOJ funds that prevent states with medical marijuana programs (including California) from implementing their state medical marijuana laws. Consolidated and Further Continuing Appropriations Act, 2015, 128 Stat. at 2217; Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 542, 129 Stat. 2242, 2332–33 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 135, 228 (2017). All of these riders are "essentially the same," *see United States v. Nixon*, 839 F.3d 885, 887 (9th Cir. 2016) (per curiam), and the current rider will remain in effect until at least September 30, 2017. *See* Consolidated Appropriations Act, 2017, 131 Stat. at 135. In this opinion we refer to the riders collectively as § 542.

In *McIntosh* we determined that, pursuant to § 542, federal criminal defendants who were indicted in marijuana cases had standing to file interlocutory appeals seeking to enjoin DOJ expenditure of funds used to prosecute their cases. 833 F.3d at 1172–74. We held that "§ 542 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." *Id.* at 1177. However, § 542 does not prohibit prosecuting individuals for conduct that is *not* fully compliant with state medical marijuana laws.

Id. at 1178. We remanded, holding that the DOJ could only continue the prosecutions if the defendants were given "evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on . . . medical marijuana." *Id.* at 1179. Kleinman asks us to remand for an evidentiary hearing as we did in *McIntosh*. We decline to do so.

Preliminarily, we clarify that the government's approach to this case is mistaken. Kleinman was convicted and sentenced shortly before § 542 was enacted. The government therefore claims that § 542 is inapplicable to Kleinman's prosecution for two reasons, neither of which is availing. First, it asserts that application of § 542 after judgment is entered would be a retroactive application of that law, when the statute was not intended to apply retroactively. However, Kleinman does not seek retroactive application of § 542. Rather, he argues that § 542 prohibits *continued* DOJ expenditures on his case since its enactment, which in this case refers to the DOJ's ongoing litigation *on appeal*. We determined in *McIntosh* that § 542 can prohibit continued DOJ expenditures even though a prosecution was properly initiated prior to § 542's enactment, *see id.* ("The government had authority to initiate criminal proceedings, and it merely lost funds to continue them."), and the same reasoning applies to continued expenditures on a direct appeal after conviction.

Second, the government argues that under the federal savings statute, 1 U.S.C. § 109, the repeal of a statute generally does not repeal liability incurred when that statute was in effect. However, § 542 does not concern the repeal of any statute, and *McIntosh* made clear that § 542 did not change the legality of marijuana under federal law. 833 F.3d

at 1179 n.5. Section 542 merely enjoins certain DOJ expenditures while it is in effect.

We make two holdings that support our conclusion that a *McIntosh* hearing is not necessary in this case. First, § 542 only prohibits the expenditure of DOJ funds in connection with a *specific charge* involving conduct that is fully compliant with state laws regarding medical marijuana. Thus, the applicability of § 542 focuses on the conduct forming the basis of a particular charge, which requires a count-by-count analysis to determine which charges, if any, are restricted by § 542. The prosecution cannot use a prosecutable charge (for conduct that violates state medical marijuana law) to bootstrap other charges that rely solely upon conduct that would fully comply with state law. Otherwise, the DOJ could sweep into its prosecution other discrete acts involving medical marijuana that fully complied with state law. That would contradict the plain meaning of § 542, which prevents the DOJ from spending funds in a manner that would prevent the listed states "from implementing their own laws that authorize . . . medical marijuana." Consolidated Appropriations Act, 2016, 129 Stat. at 2332–33.

Second, § 542 does not require a court to vacate convictions that were obtained before the rider took effect. In other words, when a defendant's conviction was entered before § 542 became law, a determination that the charged conduct was wholly compliant with state law would *not* vacate that conviction. It would only mean that the DOJ's continued expenditure of funds pertaining to that particular state-law-compliant conviction *after* § 542 took effect was unlawful. That is because, as we explained in *McIntosh*, § 542 did not change any substantive law; it merely placed a temporary hold on the expenditure of money for a certain

purpose. 833 F.3d at 1179. When § 542 took effect, the DOJ was obligated to stop spending funds in connection with any charges involving conduct that fully complied with state law, but that temporary spending freeze does not spoil the fruits of prosecutorial expenditures made before § 542 took effect. Instead, as it pertains to this case, because § 542 became law after Kleinman's conviction and sentence, but before this appeal, § 542 (if it applies at all) might operate to bar the DOJ from continuing to defend this prosecution on appeal insofar as it relates to those counts that may be determined to involve only conduct that wholly complies with California medical marijuana law.

With these two principles in mind, we conclude that a *McIntosh* hearing is not necessary in this case. We made clear in *McIntosh* that "[i]ndividuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542." 833 F.3d at 1178. In this case, § 542 does not apply to at least two of the charges against Kleinman because the conduct alleged therein does not fully comply with state law: conspiracy to distribute marijuana (Count 1), and conspiracy to commit money laundering (Count 6). Both counts involved marijuana sales to out-of-state customers in violation of California law.

The CUA and the MMP make clear that Kleinman has no state-law defense for his sales of approximately 85 kilograms of marijuana to out-of-state customers. The stated purpose of the CUA is "[t]o ensure that seriously ill *Californians* have the right to obtain and use marijuana for medical purposes." Cal. Health & Safety Code § 11362.5(b)(1)(A) (emphasis added). The MMP provides

immunity from prosecution for possession and distribution of marijuana to qualified patients and their primary caregivers "who associate *within the State of California* in order collectively or cooperatively to cultivate cannabis for medical purposes." *Id.* § 11362.775(a) (emphasis added). The MMP further provides that a person seeking a medical marijuana identification card must show "proof of his or her residency *within the county*." *Id.* § 11362.715(a)(1) (emphasis added). The California Attorney General's guidelines for implementing the CUA and MMP (AG Guidelines) provide that medical marijuana collectives must only sell to those within the collective, and specifically lists as "indicia of unlawful operation" sales to non-members and out-of-state distribution. Cal. Att'y Gen. Edmund G. Brown, Jr., *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, Cal. Dep't of Justice, at 8–11 (August 2008), *available at* http://www.ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf; *accord People v. London*, 175 Cal. Rptr. 3d 392, 402–03 (Cal. Ct. App. 2014).

Counts 1 and 6 allege overt acts that violate the CUA and MMP; i.e., sales to out-of-state customers. Additionally, Kleinman conceded that the government presented evidence that his Philadelphia and New York customers never joined his collective, and he never argued that these customers and out-of-state sales were part of his purported medical marijuana collectives. First, he affirmed at trial that he was not going to argue that sales to out-of-state customers were "legitimate in any way in any state." Then, in his sentencing memorandum, he argued that he should only be sentenced based on the quantity of marijuana shipped to Philadelphia and New York because his *in-state transactions* were compliant with state law. Finally, at sentencing, when asked if he was "trying to defend those shipments to New York and

Philadelphia" as state-law compliant medical marijuana transactions, he replied that he was "not trying to say there's any legal defense that would apply to those out-of-state shipments." Kleinman now seeks to introduce evidence that his in-state transactions complied with California law, but makes no attempt to refute that the out-of-state transactions did not. Rather, his position is that those "questionable" sales should not taint his entire marijuana operation. Thus, the record clearly demonstrates that he violated the CUA and the MMP, is not entitled to a *McIntosh* hearing in connection with Counts 1 and 6, and is not entitled to the benefits of § 542 as to those counts.

There may be some legitimate question, however, as to whether Counts 2 through 5 involved conduct that strictly complied with California law.[1] But there is no need to remand for a *McIntosh* hearing on those charges because even a favorable determination regarding state law compliance on Counts 2 through 5 would mean only that the DOJ was disabled from defending those specific charges on appeal. However, Kleinman did not make any appellate arguments that were tied to those specific charges; he made only global attacks on his convictions and sentence. Because he made no substantive arguments pertaining to Counts 2

[1] Counts 2, 3, 4 in the First Superseding Indictment alleged discrete marijuana transactions on certain dates, but those counts do not allege that the referenced transactions involved out-of-state customers or were otherwise conducted in violation of California law. Count 5 alleged the operation of a drug-involved premises (NoHo), and while it might be inferred that such conduct violated California law because the same act was alleged as an overt act in furtherance of the conspiracy in Count 1, that conclusion is not obvious. In any event, we need not decide whether there is enough uncertainty on these counts for a *McIntosh* hearing because, as we explain, it would not make a difference in the outcome of this case.

through 5 that are not resolved by our rulings as to Counts 1 and 6, our rulings on those counts are dispositive of all charges. Counts 1 and 6 were definitively prosecutable; thus, § 542 does not preclude the DOJ from defending against any of Kleinman's arguments on appeal, and we need not remand for a *McIntosh* hearing on Counts 2 through 5.

In summary, we decline to remand for a *McIntosh* hearing because of the unique circumstances of this case. First, Kleinman's conviction and sentence were entered *before* § 542 took effect, so § 542 had no effect on his trial and sentencing. Thus, the only possible disability imposed on the DOJ here is the prohibition on defending the conviction and sentence *on appeal* after § 542 took effect. Second, § 542 does not bar the DOJ from spending funds in connection with Counts 1 and 6 because those charges definitively involved conduct that violated state law. Third, whether § 542 bars the DOJ's expenditure of funds to defend Counts 2 through 5 is an open question because we cannot definitively conclude that those counts involved conduct that violated State law. Fourth, *even if* § 542 applied to Counts 2 through 5—and thus the DOJ could not defend those specific counts on appeal—our rulings on Counts 1 and 6 are dispositive of *all* counts, including Counts 2 through 5, because Kleinman's substantive appellate claims concern all counts equally. Fifth, as we explain below, Kleinman does not win relief on any of his other arguments, so it is unnecessary for us to remand for a *McIntosh* hearing on Counts 2 through 5 because we would affirm those convictions regardless of whether § 542 applies to them.[2]

[2] Kleinman challenges the substantive reasonableness of his sentences, which he argues are disproportionate to the seriousness of his offenses. However, because all sentences run concurrently, and

II. The district court erred by giving an overly strong anti-nullification jury instruction, but the error was harmless.

Kleinman argues that the anti-nullification jury instruction the district court gave prior to deliberations misstated the law and impermissibly divested the jury of its power to nullify. While we generally "review the language and formulation of a jury instruction for an abuse of discretion, . . . [w]hen jury instructions are challenged as misstatements of law, we review them *de novo*." *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014).

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sentences for Counts 1 and 6 are 211 months each, any change in sentences for Counts 2 through 5 would not result in any reduction of Kleinman's 211 month sentence.

Kleinman separately argues that § 542 compels the Bureau of Prisons, as a subdivision of the DOJ, to stop spending money to incarcerate persons for medical marijuana convictions based on activity that fully complies with state law. We need not resolve this issue in this case. As we have explained, at least two of Kleinman's convictions fall outside the scope of § 542 because they involved conduct that violates California law. Those two convictions (Counts 1 and 6) carried the longest terms of imprisonment (211 months) and all terms for each count were sentenced to run concurrently. Thus, even if the DOJ could not separately continue to expend funds to incarcerate Kleinman on the remaining counts because of § 542, Kleinman's custodial status would not be changed because § 542 does not bar his continued incarceration for his conspiracy convictions. Further, Kleinman makes no argument that the Bureau of Prisons would calculate his credit for early release any differently without those concurrent sentences. Thus, we do not decide in this case the impact of § 542 on the Bureau of Prisons' expenditure of funds to incarcerate persons who were convicted only of federal drug offenses involving conduct that was fully compliant with state medical marijuana laws.

Jury nullification occurs when a jury acquits a defendant, even though the government proved guilt beyond a reasonable doubt. *United States v. Powell*, 955 F.2d 1206, 1212–13 (9th Cir. 1992). It is well established that jurors have the *power* to nullify, and this power is protected by "freedom from recrimination or sanction" after an acquittal. *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005). However, juries do not have a *right* to nullify, and courts have no corresponding duty to ensure that juries are able to exercise this power, such as by giving jury instructions on the power to nullify. *Id.* at 1079–80. On the contrary, "courts have the duty to forestall or prevent [nullification], whether by firm instruction or admonition or . . . dismissal of an offending juror," because "it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence." *Id*.

The court instructed the jurors as follows:

> 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 is not for you to determine whether the law is just or whether the law is unjust. That cannot be your task. There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.[3]

[3] The court noted that it planned to give the instruction because, during trial, protesters in front of the courthouse were urging the jury to disregard the law. The protestors' signs said "smart jurors are hung

Kleinman argues that these instructions implied that jurors would break the law, and possibly be punished, if they did not convict, and thus divested the jury of its power to nullify.

The court's instruction was taken nearly verbatim from two cases. The first three sentences came 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), where the district court instructed the jury "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." The defendant argued that this instruction erroneously divested the jury of its power to nullify, and the district court held that the instruction was proper. *Id.* at 1085–87. The district court reasoned that, while it must instruct the jury to follow the law and it must dismiss jurors who express intent to nullify, it cannot entirely divest the jury of its power to nullify with an anti-nullification instruction. *Id.* at 1086–87. Jury nullification is, by its very definition, a jury's choice to ignore court instructions, which may include an anti-nullification instruction. *Id.* at 1087. On appeal, we agreed with the district court's analysis of the jury instruction claim

jurors," "no victim of crime," and "judges have the law, jury has the power." During trial, the court spoke to the jurors one-by-one to determine what impact the protestors had, if any. Some jurors had not seen the signs, and for the jurors that had, the court asked if the signs influenced them, and reiterated that they should not be influenced by anything outside of the courtroom. All of the jurors were agreeable and none was dismissed. Kleinman argues that the court's individual questioning of the jurors contributed to the coercive effect of the anti-nullification instructions.

and adopted its reasoning in full. *Rosenthal*, 454 F.3d at 947.[4]

The last two sentences of the court's instructions came from *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988), a case in which the defendant mentioned jury nullification in his closing argument, and during deliberations the jury asked the court about the doctrine. "The court responded, 'There is no such thing as valid jury nullification . . . You would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case.'" *Id.* The Sixth Circuit rejected the defendant's argument that the instruction was coercive, noting that "[a] jury's 'right' to reach any verdict it wishes does not . . . infringe on the duty of the court to instruct the jury only as to the correct law." *Id.* The Sixth Circuit did not discuss whether the court's instructions implied that the jury would be punished for nullification, or that an acquittal that resulted from jury nullification would be void.[5]

The first three sentences of the court's anti-nullification instructions were not erroneous, and it is not generally

[4] Our discussion of juror misconduct in *Rosenthal* is also relevant. A juror in Rosenthal's trial spoke to an attorney friend who said that the juror "could get into trouble" if she did not follow the court's instructions, and the juror shared this outside perspective during deliberations. 454 F.3d at 950. We held that reversal was necessary because "[j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors." *Id.*

[5] The court's statement in *Krzyske* was made in response to a question from a jury that had been urged to nullify by the defendant, and may have been an off-the-cuff answer, rather than a fully considered statement of the law. Here, on the other hand, the anti-nullification instruction was proposed by the government in advance and adopted by the court in its entirety.

erroneous for a court to instruct a jury to do its job; that is, to follow the court's instructions and apply the law to the facts. If Kleinman's jury had exercised its power to nullify, it presumably would have disregarded the court's instructions on federal drug law *and* the court's anti-nullification instructions. The court had no duty to make the jury aware of its power to nullify, and properly instructed the jury that it could not (1) substitute its sense of justice for its duty to follow the law, or (2) decide whether a law is just or unjust.

Although a court has "the duty to forestall or prevent [nullification]," including "by firm instruction or admonition," *Merced*, 426 F.3d at 1080, a court should *not* state or imply that (1) jurors could be punished for jury nullification, or (2) an acquittal that results from jury nullification is invalid. Neither proposition is correct, and these are the only legal principles that protect a jury's power to nullify.

The last two sentences of the district court's instructions could reasonably imply that the jury could be punished for nullification, or that nullification is a moot exercise because the verdict would be invalid. The court's statement that the jury "would violate [its] oath and the law if [it] willfully brought a verdict contrary to the law given to [it] in this case," may imply punishment for nullification, because "violate your oath and the law," coming from the court in a criminal trial, could be understood as warning of a possible violation with associated sanctions. Additionally, the statement that "[t]here is no such thing as valid jury nullification" could reasonably be understood as telling jurors that they do not have the power to nullify, and so it would be a useless exercise. While jurors undoubtedly should be told to follow the law, the statement that there is

no valid jury nullification misstates the role of nullification because an acquittal is valid, even if it resulted from nullification.

Thus, the last two sentences of the instruction were erroneous. The *Krzyske* instruction should not become the go-to instruction in trials where jury nullification is a concern, and courts should "generally avoid[] such interference as would divest juries of their power to acquit an accused, even though the evidence of his guilt may be clear." *United States v. Simpson*, 460 F.2d 515, 520 (9th Cir. 1972).

Kleinman argues that the jury instructions were structural error, not subject to review for harmlessness, because they deprived him of his right to trial by jury. *See Arizona v. Fulminante*, 499 U.S. 279, 306–10 (1991). However, for the error to be structural, it must have deprived Kleinman of a constitutional right. *See id*. There is no constitutional right to jury nullification, so depriving a defendant of a jury that is able to nullify is plainly not a constitutional violation. Although an erroneous jury instruction that does not otherwise violate a defendant's constitutional rights may rise to the level of constitutional error when it "so infected the entire trial that the resulting conviction violates due process," the Supreme Court has defined such errors "very narrowly," and noted that due process "has limited operation" "[b]eyond the specific guarantees enumerated in the Bill of Rights." *Estelle v. McGuire*, 502 U.S. 62, 72–73 (1991); *see also Brewer v. Hall*, 378 F.3d 952, 956 (9th Cir. 2004) (noting, in a habeas case, "no Supreme Court precedent holds that an antinullification instruction . . . violates due process").

It is not fundamentally unfair for a defendant to be tried by a jury that is not fully informed of the power to nullify,

or even that is stripped of the power to nullify, because there is no right to nullification. Although a jury should not be led to believe that jury nullification will result in punishment or an invalid acquittal, the court's misstatement by implication does not rise to the level of denial of Kleinman's due process rights. Thus, the error was not structural and was harmless.[6]

III. The district court did not err by denying Kleinman's motion to suppress evidence seized pursuant to a state search warrant.

The LAPD seized evidence pursuant to a search warrant and supporting affidavit dated March 16, 2010, and the DEA later seized that evidence. Kleinman moved to suppress the evidence, arguing that the seizure violated his Fourth Amendment rights because the affidavit supporting the search warrant did not support the magistrate's probable cause finding. The district court denied the motion. We review the denial de novo, and any underlying factual findings for clear error. *United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011).

"[P]robable cause means a fair probability that contraband or evidence is located in a particular place. Whether there is a fair probability depends upon the totality of the circumstances, including reasonable inferences, and is a commonsense, practical question. Neither certainty nor a preponderance of the evidence is required." *United States v.*

[6] Kleinman asserts that if the error is not structural, "[w]e apply a 'totality of the circumstances' analysis when examining whether a judge's statements to a jury were impermissibly coercive." *United States v. Berger*, 473 F.3d 1080, 1090 (9th Cir. 2007). However, the framework that Kleinman identifies is inapplicable here; it applies when we assess whether an *Allen* charge was impermissibly coercive. *Id.* at 1089; *see also Allen v. United States*, 164 U.S. 492, 501–02 (1896).

Kelley, 482 F.3d 1047, 1050 (9th Cir. 2007) (internal citations and quotation marks omitted). We give a magistrate's determination that probable cause exists "great deference." *Id.*

The affidavit supporting the search warrant described the LAPD officers' undercover visit to Medco in 2010. Officer Cecil Mangrum stated that, after he and his partner entered Medco, a Medco employee said that to participate in the collective Officer Mangrum "did not have to do anything except show [his] ID and doctor recommendation every time [he] came in," and that not everyone in the collective was required to grow marijuana. The officers purchased marijuana at Medco that day using United States currency. Officer Mangrum alleged the following probable violations of California law: (1) Medco did not require members to participate in the collective, in violation of the CUA and MMP; (2) the Medco employee exchanged marijuana solely for money, in violation of California Health and Safety Code § 11360; and (3) Medco requires collective members to designate Medco as their primary caregiver, in violation of *People v. Mentch*, 195 P.3d 1061 (Cal. 2008).

California Health and Safety Code § 11360 prohibits selling marijuana, except as authorized by law. Thus, selling marijuana is illegal under § 11360 *unless* the MMP authorized such sales. While the MMP does not "authorize any individual or group to cultivate or distribute marijuana for profit," *id.* § 11362.765(a), it also does not prohibit exchanging money for marijuana among members of a collective. Consistent with the MMP, "a primary caregiver [may] receive compensation for actual expenses and reasonable compensation for services rendered to an eligible qualified patient, i.e., conduct that would constitute sale under other circumstances." *People v. Urziceanu*, 33 Cal.

Rptr. 3d 859, 883 (Cal. Ct. App. 2005); *see also* AG Guidelines at 10. Further, the MMP does not require that collective members grow marijuana in order to be considered participants of the collective. *See People v. Anderson*, 182 Cal. Rptr. 3d 276, 277 (Cal. Ct. App. 2015). Thus, the statements in the affidavit that Medco exchanged marijuana solely for money and did not require members to grow marijuana do not support the inference that Medco was operating in violation of state law.

However, the affidavit *did* establish probable cause to believe that Medco was violating state law because it stated that marijuana purchasers were required to designate Medco as their primary caregiver. Although Officer Mangrum's description of the Medco visit did not specifically state that he designated Medco as his primary caregiver, this designation can reasonably be inferred because he averred that Medco required such a designation from its members, and that he purchased marijuana from Medco that day.[7]

Primary caregiver is defined by the CUA and MMP as an individual "who has consistently assumed responsibility for the housing, health, or safety of" a medical marijuana patient who designated said individual as her primary caregiver. Cal. Health & Safety Code §§ 11362.5(e), 11362.7(d). While the general definition is the same in the CUA and MMP, the MMP "provides an expanded definition of what constitutes a primary caregiver" by including examples of qualifying primary caregivers. *Urziceanu*,

[7] Indeed, even if it could not reasonably be inferred from the affidavit that the officers designated Medco as their primary caregiver when they purchased marijuana, a probable violation of California law would still be apparent, because the officers would have purchased from a purported collective without even nominally becoming members of that collective.

33 Cal. Rptr. 3d at 881–82; *see also* Cal. Health & Safety Code § 11362.7(d).

The California Supreme Court held that to be a primary caregiver under the CUA, a person "must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana." *Mentch*, 195 P.3d at 1067. The court in *People v. Hochanadel*, 98 Cal. Rptr. 3d 347, 361–62 (Cal. Ct. App. 2009), further explained that, under the MMP, collective owners "do not, [merely] by providing medical patients with medicinal marijuana, consistently assume responsibility for the health of those patients" sufficient to be considered a primary caregiver. Rather, "[t]here must be evidence of an existing, established relationship, providing for housing, health or safety independent of the administration of medical marijuana." *Id.* at 362 (internal quotation marks omitted). Moreover, the AG Guidelines state that, although a lawful medical marijuana collective may use a storefront to dispense medical marijuana, dispensaries "are likely unlawful" if they "merely require patients to complete a form summarily designating the business owner as their primary caregiver." AG Guidelines at 11.

As described in the affidavit, Medco's practice of requiring members to designate Medco as their primary caregiver and then allowing members to purchase marijuana immediately after, with no preexisting or other relationship beyond the distribution of marijuana, provides probable cause to believe that Medco was operating illegally. When the warrant was issued in 2010, the CUA, MMP, California state court decisions, and the AG Guidelines all supported the conclusion that Medco's "primary caregiver"

designation practice was unlawful. Thus, the district court did not err by denying Kleinman's motion to suppress.

IV. The district court did not err by denying Kleinman's motion for a *Franks* hearing.

Kleinman requested, and was denied, a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) (i.e., a *Franks* hearing). We review the court's denial de novo. *United States v. Flyer*, 633 F.3d 911, 915–16 (9th Cir. 2011). A *Franks* hearing is "an evidentiary hearing on the validity of the affidavit underlying a search warrant" that a defendant is entitled to if he "can make a substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit cannot support a finding of probable cause without the allegedly false information"; i.e., the challenged statements or omissions are material. *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000). "If both requirements are met, the search warrant must be voided and the fruits of the search excluded." *United States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017) (internal quotation marks omitted).

Kleinman argues that Officer Mangrum's affidavit contained misleading omissions of facts that would have demonstrated that Kleinman complied with state law. The affidavit did not mention that, when the officers entered Medco, security guards checked their ID cards and doctors' recommendations, verified the doctors' recommendations, and had the officers complete membership applications. Officer Mangrum revealed these details when he testified at a state court hearing.

Regardless of whether Kleinman made a substantial preliminary showing that Officer Mangrum's omissions were made recklessly or intentionally, a *Franks* hearing is

not warranted because the omissions were not material to the probable cause determination. In considering the materiality of an alleged omission, we ask "whether probable cause remains once the evidence presented to the magistrate judge is supplemented with the challenged omissions." *Id.* at 1119.

If the affidavit stated the omitted information about IDs, doctors' recommendations, and membership applications, the probable cause finding would still be valid. The affidavit stated that a Medco employee told Officer Mangrum that he would have to show IDs and doctors' recommendations every time he came in, and that Medco requires collective members to designate Medco as their primary caregiver. Since the officers purchased marijuana from Medco that day, one can reasonably infer that the omitted acts occurred, and the affidavit does not suggest that they did not. In addition, regardless of whether Medco properly verified the officers' IDs and doctors' recommendations, the probable cause finding was supported because the affidavit stated that Medco required members to designate Medco as their primary caregiver, in violation of state law. *See* Part III, *supra.* Thus, Kleinman cannot make a substantial preliminary showing that the omitted facts were material, and thus is not entitled to a *Franks* hearing.

V. The district court did not err by declining to instruct the jury on Kleinman's joint ownership defense.

Based on *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), Kleinman sought a jury instruction that "[w]here a group of individuals jointly purchase and then simultaneously and jointly acquire possession of a drug for their own use intending only to share it together, they cannot be found guilty of the offense of distribution of the drug." The district court refused to give the instruction, and Kleinman argues that this refusal deprived the jury

instruction on his theory of defense. "We review whether a trial court's instructions adequately covered a defendant's proffered defense de novo." *United States v. Morsette*, 622 F.3d 1200, 1201 (9th Cir. 2010) (per curiam).

The court did not err by refusing to instruct the jury on the joint ownership defense because, although "a defendant is entitled to have the judge instruct the jury on his theory of defense," the defense must be "supported by law and [have] some foundation in the evidence." *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007). We have expressly declined to adopt or reject the *Swiderski* joint ownership defense in this circuit. *See United States v. Wright*, 593 F.2d 105, 108 (9th Cir. 1979). Even if we had accepted the defense, it would only apply "where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together," *Swiderski*, 548 F.2d at 450, and no reasonable jury could conclude that this defense fits the facts of Kleinman's case. Thus, the court did not err by declining to instruct the jury on a defense theory that is not supported in the law of our circuit, and, even if it was, has no foundation in the evidence. *See Kayser*, 488 F.3d at 1073.

VI. The district court did not abuse its discretion by considering the government's late-filed objections to the presentence report.

Kleinman argues that the court failed to comply with Federal Rule of Criminal Procedure 32(f)(1), which provides that "[w]ithin 14 days after receiving the presentence report [PSR], the parties must state in writing any objections." The Probation Office filed its revised PSR on September 17, 2014, and, although the government requested and was granted an extension of time to file objections by October

27, 2014, it did not file its objections until December 4, 2014. Sentencing was on December 8, 2014.

We have stated that we review a district court's compliance with Rule 32 de novo, and that Rule 32 "requires strict compliance." *United States v. Thomas*, 355 F.3d 1191, 1194, 1200 (9th Cir. 2004). However, this was in the context of determining if a district court made required Rule 32 findings on objections to the PSR that are unresolved at sentencing. *See, e.g., id.* at 1200; *United States v. Carter*, 219 F.3d 863, 866 (9th Cir. 2000); *United States v. Houston*, 217 F.3d 1204, 1206–07 (9th Cir. 2000). We have not stated the standard of review for an alleged Rule 32(f)(1) violation.

Rule 32(i)(1)(D) allows a court at sentencing to, "for good cause, allow a party to make a new objection at any time before sentence is imposed," and the "good cause" standard has been understood as a grant of discretion to district courts. *See, e.g.*, *United States v. Angeles-Mendoza*, 407 F.3d 742, 749 (5th Cir. 2005). Although Rule 32(i)(1)(D) applies at sentencing, the discretion it gives for a court to consider late-raised sentencing objections logically extends to allowing a court to consider late-filed written objections for good cause. Thus, we review for abuse of discretion the court's decision to consider the government's late-filed objections.

The court did not abuse its discretion by considering the government's objections to the PSR. First, the court was within its discretion to determine that the government showed good cause. The government took issue with the PSR's determination that Kleinman was not eligible for a leadership role enhancement, and requested additional time to review hundreds of pages of trial transcripts to fully respond to the PSR. At sentencing, the court acknowledged

that the PSR contained numerous errors and that the government needed time to fully respond.

Second, even if the government did not show sufficient good cause, Kleinman was not prejudiced by the court's consideration of late-filed objections. Kleinman was put on notice that the government planned to object to the PSR's leadership role enhancement conclusion months before sentencing. The day after the Probation Office filed its revised PSR, the government filed an ex parte motion for extension of time, specifically stating that it took issue with the leadership role conclusion, and had ordered transcripts to adequately respond to the PSR and Kleinman's sentencing position. Additionally, the court stated at sentencing that its conclusion that there was "no question" that the leadership role enhancement applied was primarily based on its own memory and notes from trial, rather than the PSR or the parties' sentencing positions.

VII. Kleinman's 211 month sentence is substantively and procedurally reasonable.

Kleinman argues that his 211 month sentence is procedurally and substantively unreasonable. We review a sentence for procedural and substantive reasonableness, and sentencing decisions for abuse of discretion. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008). Although we have "decline[d] to embrace a presumption" of reasonableness for in-Guideline sentences, when a sentence is within Guidelines, it is generally "probable that the sentence is reasonable." *Id.* at 994. Kleinman does not dispute that his sentence was within Guidelines.

First, Kleinman argues that he was punished at sentencing for going to trial, as evidenced by the shorter sentences of his co-defendants, who did not go to trial. "It

is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial," and "courts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice." *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982). In *Medina-Cervantes*, for example, we held that the court's statements criticizing the defendant for going to trial and estimating the costs of the trial warranted vacating the sentence. *Id.* at 716–17.

Five of Kleinman's six co-defendants were sentenced to probation, and Montoya was sentenced to 37 months. All six co-defendants pleaded guilty and cooperated with the government during trial. Additionally, all but Montoya had a lesser role in the conspiracy than Kleinman. While the sentencing disparities are apparent, Kleinman has offered no evidence to warrant the inference that the longer sentence was imposed to punish Kleinman for going to trial. There are clear reasons for the sentencing disparities, and the court stated during sentencing that it "analyzed the sentences imposed on others who have either pled or been found guilty in this case in order to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."

Kleinman additionally argues that the court procedurally erred because it did not state with sufficient specificity its reason for imposing a significantly disparate sentence. We review for plain error because Kleinman failed to raise this procedural objection before the district court. *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010). "[A] sentencing judge does not abuse [its] discretion when [it] listens to the defendant's arguments and then simply [finds the] circumstances insufficient to warrant a sentence

lower than the Guidelines range." *Id*. (internal quotation marks omitted). The court listened to Kleinman's arguments, stated that it reviewed the statutory sentencing criteria, and imposed a within-Guidelines sentence; "failure to do more does not constitute plain error." *Id.*

Finally, Kleinman argues that his sentence is substantively unreasonable because it "is far greater than necessary to reflect the seriousness of this medical marijuana offense," when there is now "overwhelming public opinion that medical marijuana is not a danger to the public." Even if this were properly considered a medical marijuana case, the court did not err by imposing a within-Guidelines sentence based on violations of federal law. Although a court may have the discretion to depart from Guidelines based on policy disagreements, it is not obligated to do so. *See, e.g*., *United States v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011).

CONCLUSION

We conclude that the district court erred by instructing the jury that "[t]here is no such thing as valid jury nullification," and that it "would violate [its] oath and the law if [it] willfully brought a verdict contrary to the law given to [it] in this case." However, because there is no right to jury nullification, the error was harmless. We find that Kleinman's remaining challenges on appeal are without merit, and AFFIRM his conviction and sentence.