CA NOS. 10-50219, 10-50264

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee/Cross-Appellant, v. CHARLES C. LYNCH, Defendant-Appellant/Cross-Appellee.	DC NO. CR 07-689-GW

APPELLANT'S FIRST CROSS-APPEAL BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE GEORGE H. WU
United States District Judge

SEAN K. KENNEDY
Federal Public Defender
ALEXANDRA W. YATES
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5059
Facsimile: (213) 894-0081
E-mail: Alexandra_Yates@fd.org

Attorneys for
Defendant-Appellant/Cross-Appellee

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES

FEDERAL STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS — **PAGE(S)**

I. INTRODUCTION

Charlie Lynch was prosecuted by the federal government for operating a medical marijuana dispensary in Morro Bay, California. Before he opened, Lynch placed four phone calls to the Drug Enforcement Administration ("DEA") to confirm his understanding that medical marijuana dispensaries were not illegal. He was told that it was a matter for local government. At trial, Lynch attempted to raise an entrapment by estoppel defense based on his calls to the DEA. But the district court's evidentiary rulings and instructions prevented the jury from considering much of his defense, and the Government failed to disclose exculpatory evidence material to that defense. Equally troubling, the court stripped the jury of its historical right to exercise its conscience in rendering a verdict and refused to answer jury questions during the trial or share those questions with defense counsel. After the jury returned a guilty verdict, the court carefully explained why a sentence of imprisonment was unjust and unnecessary. But the court mistakenly believed it was bound to impose a one-year mandatory minimum sentence. Lynch appeals.

II. QUESTIONS PRESENTED

A. Whether Lynch was denied his right to present a defense and to a fair trial where (1) the court excluded evidence crucial to his affirmative defense; (2) the Government presented inflammatory evidence that Lynch was not allowed to rebut; (3) the instructions prevented the jury from considering the evidence Lynch *was* allowed to present and prevented the jury from considering Lynch's defense at all for some counts; and (4) the Government withheld exculpatory evidence and failed to correct a key witness's

misleading testimony.

B. Whether Lynch was denied his right to trial by jury when the district court gave a coercive anti-nullification instruction and refused to instruct the jury on the mandatory minimum sentences he faced if convicted.

C. Whether Lynch was denied his constitutional and statutory rights when the court refused to divulge ex parte jury communications and refused to answer questions from the jury.

D. Whether these errors, together, deprived Lynch of a fair trial and resulted in a verdict in which this Court can have no confidence.

E. Whether Lynch should receive a new sentencing hearing because the district court incorrectly believed it was bound to impose a one-year mandatory minimum sentence and expressed its intent to sentence Lynch to time served if permitted by law.

III. STATEMENT OF JURISDICTION

This appeal is from a final judgment rendered by the Honorable George H. Wu, United States District Judge, on April 29, 2010, sentencing Defendant-Appellant Charles C. Lynch to twelve months and one day in prison followed by four years of supervised release for conspiracy to manufacture and to possess with intent to distribute and to distribute marijuana, distribution of marijuana to a person under the age of twenty-one, possession with intent to distribute marijuana, and maintaining a drug-involved premises, in violation of 21 U.S.C. §§ 841, 846, 856, and 859, as well as 18 U.S.C. § 2 (aiding and abetting or causing an act to be done). (ER 432-36; CR 328.) Judgment was entered on April 30, 2010, and an amended judgment was entered on May 4, 2010. (ER 3826.) Lynch filed a timely

notice of appeal on May 6, 2010. (ER 3691; CR 330.) *See* Fed. R. App. P. 4(b)(1)(A)(I).

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

IV. STATEMENT OF ADDENDUM

Pertinent constitutional provisions, treaties, statutes, ordinances, regulations, and rules are set forth in the addendum to this brief.

V. STATEMENT OF THE CASE

A. Bail Status

Lynch is on bond pending appeal. (ER 353.)

B. Course of Proceedings

On July 13, 2007, the Government filed an indictment charging Lynch with five counts of violations of federal marijuana laws. (ER 437-49; CR 1.) A sixth forfeiture count was charged but later dismissed. (ER 833.) Lynch was arrested and, two days later, released on bond. (ER 450-51.)

Both parties filed numerous pretrial motions; those that are relevant to this appeal are discussed below. Following pretrial hearings on these motions (CR 105, 128, 132), a jury was empaneled on July 23 and 24, 2008 (CR 133, 143). Lynch's trial lasted ten days, with the jury reaching guilty verdicts on all counts of a redacted indictment on August 5. (CR 119-1, 169, 175.) The jury, however, found a lesser quantity of marijuana than was charged in Count Four. (ER 3770.)

Lynch filed four motions for new trial, which the district court denied. (ER 332-39, 353, 3213-47, 3261-83, 3527-45.) After holding five sentencing hearings (CR 268, 282, 320, 324, 325), the court sentenced Lynch to one year and one day

in prison on Counts One, Two, and Three and time served on Counts Four and Five. (ER 432.) The court allowed Lynch to remain on bond pending appeal. (ER 353.)

Lynch filed a notice of appeal, and the Government cross-appealed. (ER 3691-99; CR 330, 338.)

C. Statement of Facts

1. Medical Marijuana in California

In 1996, California citizens voted to decriminalize the use of marijuana for medical purposes, when recommended by a licensed physician. Cal. Prop. 215 (1996). Known as the Compassionate Use Act ("CUA"), the proposition was codified at California Health and Safety Code section 11362.5. *See* Cal. Health & Safety Code § 11362.5 ("ensur[ing] that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician").

In 2003, the California legislature formally acknowledged the right of patients and their primary caregivers to the collective and cooperative cultivation of medical marijuana. *See* Cal. Health & Safety Code §§ 11362.7-.83 (codifying the Medical Marijuana Program Act ("MMPA")). California is one of seventeen states, plus the District of Columbia, that have legalized the medical use of marijuana. *See* Mary Ellen Clark, *Medical Marijuana Legalized in Connecticut*, Reuters, June 1, 2012, available at http://www.reuters.com/article/2012/06/01/us-usa-marijuana-connecticut-idUSBRE85018X20120601. The federal government, however, does not recognize a medical exception to federal drug laws criminalizing possession or distribution of

marijuana. *See Gonzales v. Raich*, 545 U.S. 1, 10-15 (2005).

2. The Government's Case

At trial, the Government introduced evidence that Lynch opened and ran the Central Coast Compassionate Caregivers ("CCCC") in Morro Bay, California, beginning in April 2006. (ER 1902, 1979-80.) The DEA raided the CCCC and Lynch's home, pursuant to a federal search warrant, in March 2007. (ER 1743, 1781.) Between April 2006 and March 2007, the CCCC sold approximately $2.1 million worth of marijuana, hashish, and other forms of concentrated cannabis. (ER 1982, 3737-38.) The CCCC had more than 2300 members, including 277 members under the age of twenty-one. (ER 1786, 2005.)

3. Lynch's Entrapment by Estoppel Defense

Lynch took the stand and admitted sufficient facts to find him guilty of the five counts charged. (ER 2345-46, 2471, 2483, 2498-99, 2749-58.) He raised the affirmative defense of entrapment by estoppel.

"Entrapment by estoppel applies when an official tells the defendant that certain conduct is legal and the defendant believes the official." *United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987). "The doctrine depends on the unfairness of prosecuting one who has been led by the conduct of government agents to believe his acts were authorized." *United States v. Abcasis*, 45 F.3d 39, 44 (2d Cir. 1995). "The defendant must show (1) that he relied on the false information and (2) that his reliance was reasonable." *United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir. 1991) (alterations and internal quotation marks omitted). In Lynch's case, the defense was based on a series of phone calls he made to the DEA several months before he opened the CCCC.

Lynch testified that in September 2005, he placed four phone calls to the DEA in an effort to clarify whether it would be legal to open a medical marijuana dispensary in his home county. (ER 2367-74.) A copy of his phone bill confirmed that he had, in fact, made the calls. (ER 3702.) Lynch testified that, on the fourth call, he finally reached someone who was willing to answer his questions:

> Q . . . What did you do with the gentleman who came back on the phone?
>
> A Well, I asked my question again, I was calling to find out what you guys are going to do about all of these medical marijuana dispensaries around the State of California.
>
> Q What did he say?
>
> A He told me it was up to the cities and counties to decide how they wanted to handle the matter.
>
> Q And what did you say in response, if anything?
>
> A Yes. Actually, then I said, well, what if I wanted to open up my own medical marijuana dispensary.
>
> Q And did he say anything in response to your next question?
>
> A Yes. Actually, he seemed a little bit perturbed, possibly may be the word, and he slowed his words down to make sure I understood him and he said

> it's up to the cities and counties to decide how they want to handle the matter.

(ER 2374.)

This made sense to Lynch. (ER 2374, 2458.) He had researched state and federal law and concluded on his own that, although marijuana is illegal under federal law, the Tenth Amendment carved out an exception for the medical use of marijuana legalized by the State of California. (ER 2458-59.) Lynch contacted city and county officials and opened his business under the rules they provided. (ER 2460.)

Faced with Lynch's telephone records, the Government could not credibly argue that the 2005 phone calls did not occur. Instead, the Government aggressively cross-examined Lynch, in an effort to show the jury that he was lying about what was said. (ER 2962-74.) For example, the Government questioned whether Lynch reasonably relied on the call in the face of documents he possessed that indicated marijuana was illegal under federal law for all purposes. (ER 2582-91, 2649-95.) The Government further questioned whether it was reasonable for Lynch to continue to rely on the call after the DEA raided his home and dispensary. (ER 2698-721.)

The Government also presented the testimony of DEA Agent Reuter, whose phone number Lynch had called. (ER 2828-29.) Agent Reuter was not the person who gave Lynch the advice at issue; Lynch testified that after a woman answered the phone and placed him on hold, he spoke with a man. (ER 2373-74.) Reuter also had no memory of the phone call. (ER 2842.) She testified, however, that at the time of the call, no agent in her division would have given Lynch the advice he

claimed to have received. (ER 2825-51.)

The district court ruled that Lynch presented sufficient evidence to instruct the jury on his defense with respect to Counts Four and Five and parts of Count One. (ER 2413.) But the court refused to instruct the jury on the defense for any counts alleging distribution of marijuana to "minors," i.e., persons under twenty-one years of age. (ER 2413-28, 2971-72.) Thus, the jury was instructed that it could not consider Lynch's defense with respect to Counts Two and Three and the parts of Count One that alleged conspiracy to distribute to minors. (ER 324.)

4. Sentencing

Lynch's conviction for conspiracy to distribute marijuana carried a potential mandatory minimum sentence of five years, and his convictions for distribution to minors carried potential one-year mandatory minimum terms. *See* 21 U.S.C. §§ 841(b)(1)(B)(vii), 859(a). The Government sought a five-year sentence. (ER 3610.) Probation concurred. (ER 3609.) Lynch urged the court to apply the "safety valve" provided by 18 U.S.C. § 3553(f) to sentence Lynch below the mandatory minimums, and asked for a sentence of time served. (ER 3610, 3432.)

The district court was sufficiently concerned about the mandatory minimum penalties that potentially applied to Lynch's case that it held five sentencing hearings on the matter. (CR 268, 282, 320, 324, 325.) The court entered specific factual findings about Lynch and the offense. (ER 391-431; CR 327.) Because these are the facts this Court must defer to unless clearly erroneous, Lynch quotes from them at length.

> This case is not like that of a common drug dealer buying and selling drugs without regulation, government

oversight, and with no other concern other than making profits. In this case, the defendant opened a marijuana dispensary under the guidelines set forth by the State of California. His purpose for opening the dispensary was to provide marijuana to those who, under California law, were qualified to receive it for medical reasons.

In 2005, Lynch obtained a prescription for medical marijuana to treat his headaches. In order to obtain "medical grade" marijuana, he drove to various marijuana dispensaries operating publicly in Santa Cruz and Santa Barbara. Noting the dearth of such dispensaries in San Luis Obispo County where he resided, Lynch investigated opening such an enterprise. He researched the law on medical marijuana distribution. By January 2006, he opened a medical marijuana dispensary in Atascadero, California. That venture was "short lived" because the city officials used zoning restrictions to close his shop.

Prior to opening the CCCC in Morro Bay, Lynch took a variety of steps. They included, *inter alia*: 1) calling an office of the Drug Enforcement Agency ("DEA") where, according to Lynch, he inquired

> regarding the legality of medical marijuana dispensaries;[1] 2) hiring a lawyer (Lou Koory) and seeking advice in regards to his operations; 3) applying to the City for a business license to operate a medical marijuana dispensary, which he obtained; and 4) meeting with the City of Morro Bay's Mayor (Janice Peters), city council members, the City Attorney (Rob Schultz) and the City Planner (Mike Prater). The aforementioned city officials did not raise any objections to Lynch's plans. However, the City's Police Chief issued a February 28, 2006 memorandum as to Lynch's business license application indicating that, while the medical marijuana dispensary might be legal under California law, federal law would still prohibit such an operation and "California law will not protect a person from prosecution under federal

---

[1] At the trial, Lynch testified as to having telephoned a DEA branch office to inquire about the legality of medical marijuana dispensaries. He also placed into evidence a copy of his phone records which showed that contact was made between his telephone and the DEA's branch office for a number of minutes. However, Lynch did not have any record as to the identity of the purported DEA employee to whom he spoke or what exactly was said by the employee.

Lynch raised the telephone conversation as the basis for an "entrapment by estoppel" defense. Given the verdict, it is clear that the jury found that Lynch had failed to meet his burden of establishing that defense. In so deciding, the jury did not necessarily find that Lynch had lied in regards to having phoned the DEA, talking to a DEA official, and/or (as a result of that discussion) concluding that his operating a medical marijuana facility would not violate federal or state law. . . .

law."[2]

The CCCC was not operated as a clandestine business. It was located on the second floor of an office building with signage in the downtown commercial area. An opening ceremony and tour of the facilities were conducted where the attendees included the city's Mayor and members of the city council. Both the Mayor and Lynch separately passed out their business cards to proprietors of commercial establishments within the immediate vicinity of the CCCC who were told that, should they have any concerns or complaints about the CCCC's activities, they should notify either the Mayor or Lynch. No one ever contacted either the Mayor or Lynch to make a complaint.

Lynch employed approximately ten people to help him run CCCC as security guards, marijuana growers, and sales staff. He worked at the store most days. He ran background checks on prospective employees and did not hire anyone with a felony record or who was an "illegal alien." Employees signed in and out via an

---

[2] In response to the Police Chief's memorandum, on March 13, 2006, the City Attorney for Morro Bay issued a legal opinion and justification to approve and issue a business license for CCCC, even though "under federal law the distribution of marijuana even for medical purposes and in accordance with the CUA could still lead to criminal prosecution."

electronic clock and Lynch ran payroll through "Intuit Quickbooks." Employees had to execute a "CCCC Employee Agreement" which contained various disclosures and restrictions.[3]

Lynch installed a security system which included video recording of sales transactions within the facility. The CCCC kept detailed business records of its purchases and sources of the marijuana. It likewise had extensive records as to its sales, including copies of the customers' medical marijuana authorizations and driver's licenses. No one under 18 was permitted to enter unless accompanied by a parent or legal guardian. Entrance to the CCCC was limited to law enforcement/government officials, patients, caregivers and parents/legal guardians.

Before being allowed to purchase any marijuana product, a customer had to provide both medical authorization from a physician and valid identification. The status of the doctors listed on the medical authorization forms were also checked with the California Medical Board website. CCCC also had a list of physicians who could re-issue expired medical

[3] The CCCC Employment Agreement included the following language: "I understand that Federal Law prohibits Cannabis but California Law Senate Bill 420 allows Medical Cannabis and gives patients a constitutional exception based on the 10th Amendment to the United States of America [sic]."

authorization cards. A customer would have to sign a "Membership Agreement Form" wherein the buyer had to agree to the listed conditions which included, *inter alia*: not opening the marijuana container within 1000 feet of the CCCC, using the marijuana for medical purposes only, abiding by the California laws regarding medical marijuana, etc. In addition, the customer had to execute a CCCC "Designation of Primary Caregiver" form wherein the buyer: 1) certified that he or she had one or more of the medical conditions which provide a basis for marijuana use under the CUA, and 2) named the CCCC as his or her "designated primary caregiver" in accordance with [state law]. Evidence presented at trial showed that the CCCC not only sold the marijuana but also advised customers on which varieties to use for their ailments and on how to cultivate any purchased marijuana plants at their homes.

Nearly all of the persons who supplied the marijuana products to the CCCC (referenced as "vendors") were themselves members/customers of the CCCC. Lynch documented the weight, type, and price of marijuana that he purchased from "vendors." Between CCCC's opening in April of 2006 to its closing in about April of 2007, CCCC paid vendors over $1.3 million for

marijuana products. During that period, the top ten suppliers were paid between $150,097.50 and $30,567.50. Lynch was CCCC's third largest provider and received $122,565. The second highest supplier was John Candelaria II, who was a CCCC employee during part of the relevant time.

Lynch maintains that he did not open CCCC to make money and that he never got his initial investment back. The DEA claims that, based upon CCCC's records between April 2006 and March 2007, CCCC had sales of $2.1 million. However, neither side has provided an actual/reliable accounting to this Court as to CCCC's business records to determine to what extent, if any, CCCC was a profitable venture.[4]

As noted [by Probation], Lynch hired certain employees "who, by their conduct and association to the CCCC, undermined the defendant's well-intended purpose of helping those in need of medical marijuana." For example one employee ([Abrahm] Baxter) sold [$3,200] worth of marijuana from the CCCC to an undercover agent away from the premises without the

---

[4] The court separately found that, "[a]s a result of the present criminal matter, [Lynch] is on the verge of losing his home and has encountered other financial difficulties." (ER 427 (internal quotation marks omitted).)

prerequisite production of any medical authorization. However, there was "nothing to indicate that the defendant knew of Baxter's extracurricular activities other than defendant's own meticulous accounting should have alerted him of unexplained inventory reductions."[5] Baxter has submitted a videotaped statement that Lynch was unaware of Baxter's improper sales. Likewise, there is evidence of observations by San Luis Obispo County Sheriffs of two CCCC employees (*i.e.*, John Candelaria and Ryan Doherty) distributing bags and packages to persons immediately outside of the CCCC premises or exiting the CCCC with such bags/packages and thereafter driving off in their respective vehicles.[6] [The U.S. Probation Officer ("USPO")] states:

> While the defendant and the CCCC may have sold marijuana to some people with a legitimate need

---

[5] There was evidence at trial that certain quantities of the processed marijuana were not pre-packaged. Hence, one may question whether it is reasonable to expect Lynch to have been aware of isolated instances of pilferage by employees.

[6] There is no evidence that all of the bags/packages contained marijuana products or that any purported marijuana therein came from the CCCC. As noted above, Candelaria on his own cultivated marijuana for sale to purchasers. Likewise, the transportation of marijuana by a primary caregiver would not have been in violation of the CUA or MMPA. Also, except for uncorroborated hearsay purportedly from Doherty, there is no evidence that Lynch was aware of those incidents.

> for alternative medical treatment, it is obvious that the CCCC was also providing marijuana to people with no medical need but an authorization in hand. Undercover officers observed customers walking in to the store and leaving the store on rolling shoes. A total of 277 customers were under age 21 which makes it unlikely that they would suffer from disease. And so it appears that the defendant and his CCCC employees knowingly provided marijuana to anyone holding an authorization and did very little to confirm the customer's true justification for holding the authorization.

The USPO's above-stated conclusions are highly questionable. First, if the CCCC checked the status of the doctors who issued the medical marijuana authorization and found them to be in good standing with the California Medical Board (as Lynch claimed and the Government did not rebut), on what other basis would the CCCC determine whether or not the customer had a legitimate need for the marijuana? There was no physician stationed at the facility to conduct medical exams. Second, the fact that certain customers were able to walk into the store and leave "on rolling shoes" does not preclude them from having certain conditions

> specified in the CUA such as cancer, AIDS or migraines. Likewise, the USPO's assumption that persons under the age of 21 are unlikely to "suffer from disease" is unfounded in the context of persons who have gone to doctors and obtained medical authorizations for medicinal marijuana. While it might be argued (based on speculation) that persons who are physically able to leave the store on "rolling shoes" or are under the age of 21 *might* be more likely to have obtained their medical authorization by fraud or through unscrupulous physicians . . . , that argument/supposition would be insufficient to establish fault on the part of a marijuana dispensary such as the CCCC which has checked the standing of the issuing physicians.
>
> On March 29, 2007, DEA agents executed a search warrant at the CCCC and Lynch's home. Processed marijuana, marijuana plants, hashish and other marijuana products were seized along with CCCC's business records. The agents did not shut the facility down at that time and Lynch continued to operate the CCCC for another five weeks.
>
> As calculated by the USPO, the total amount of marijuana involved in this case is . . . 503.206 kilograms.

(ER 402-09 (some internal quotation marks, alterations, citations, and footnotes

omitted).)

The court ultimately applied the "safety valve" to sentence Lynch below the five-year mandatory minimum based on "the undeniable atypicality" of his case. (ER 422.) The court cited a number of factors supporting this decision, including that: (1) "the purpose of the CCCC's distribution of marijuana was not for recipients to 'get high' or for recreational enjoyment. Rather, it was pursuant to the CUA's goal of providing marijuana to Californians for medical uses as prescribed by their treating physicians"; (2) "the CCCC was generally distributing the marijuana products within the portions specified in [state law]," and so "Lynch was not involved in the large bulk transactions which characterize 'kingpin' or even middle-level traffickers"; and (3) Lynch on his own took steps to reduce/eliminate the criminal aspects and/or potential harmful consequences of CCCC's operation." (ER 423-25.)

However, the court believed the safety valve did not apply to the one-year mandatory minimums, and thus felt bound to impose a one-year term of imprisonment. (ER 420.) According to the court, if it had the discretion to sentence Lynch to time served, it would. (ER 3434, 3658-59.) The court did not believe additional incarceration was necessary to serve the purposes of sentencing because, as the court explained, "There is nothing in Lynch's background which indicates a propensity toward criminal or anti-social behavior. Indeed, but for the passage of the CUA and MMPA, it is apparent that he would not have opened the CCCC or been involved in any substantial distribution of marijuana." (ER 428; *see also* ER 429 ("There is no indication that Lynch needs any incarceration time to deter him from any future crimes.").) "[A]rguably," the court wrote, "Lynch

displayed his respect for the law herein by notifying governmental authorities and law enforcement entities of his planned activities prior to engaging in them. Were all purported criminals so accommodating, this country would be a much safer and law-abiding place." (ER 428-29.)

VI. SUMMARY OF ARGUMENT

Lynch's convictions must be set aside because of four separate, but interrelated, errors. First, the district court excluded evidence critical to Lynch's affirmative defense of entrapment by estoppel. Second, the court admitted highly inflammatory evidence and then compounded the error by denying Lynch the right to rebut it. Third, the Government suppressed exculpatory evidence that was material to the central issue at trial, namely, whether a DEA agent gave Lynch the misleading advice he claimed to have received. And finally, to the extent Lynch was able to present his defense to the jury at all, the jury was hamstrung in its consideration of that defense by misleading and incorrect instructions.

In addition, the court gave the jurors a coercive anti-nullification instruction, refused to inform them of the mandatory minimum penalties that applied, concealed ex parte communications with them from counsel, and abdicated its duty to clear away their confusion by responding to substantive questions they posed.

At sentencing, the district court mistakenly imposed a one-year mandatory minimum sentence that was neither authorized by the jury's fact-finding nor required by the statute of conviction.

Individually and cumulatively, these errors require reversal.

VII. ARGUMENT

A. Lynch Was Denied His Fifth and Sixth Amendment Rights To Present a Defense and to a Fair Trial

Lynch had the burden of proving his affirmative defense to the jury. He was unable to do so because the district court excluded much of his relevant evidence, denied him the opportunity to rebut the Government's prejudicial evidence, and instructed the jury to disregard evidence this Court has found relevant to the defense of entrapment by estoppel. In addition, the Government withheld exculpatory evidence and failed to correct a key witness's misleading testimony. The court then failed to right these errors when it denied Lynch's motions for new trial. These errors, individually and cumulatively, require reversal.

1. Standards of Review

This Court reviews de novo whether the district court's evidentiary rulings violated Lynch's constitutional rights. *See United States v. Pineda-Doval*, 614 F.3d 1019, 1032 (9th Cir. 2010). To the extent evidentiary rulings do not rise to the level of a constitutional violation, they are reviewed for abuse of discretion, though the district court's interpretation of the Federal Rules of Evidence is reviewed de novo. *See United States v. Waters*, 627 F.3d 345, 351-52 (9th Cir. 2010).

The court's decision to preclude Lynch's affirmative defense with respect to the "minors" counts and its formulation of the jury instructions are also reviewed de novo. *See Pineda-Doval*, 614 F.3d at 1025; *United States v. Burt*, 410 F.3d 1100, 1103 (9th Cir. 2005).

Where these issues were raised in Lynch's motions for new trial, they are

reviewed for abuse of discretion, except for Lynch's claim that the Government withheld exculpatory evidence, which is reviewed de novo. *See United States v. Pelisamen*, 641 F.3d 399, 408 (9th Cir. 2011).

2. Lynch Was Precluded from Presenting Crucial Facts Supporting His Affirmative Defense

The Government recognized that its prosecution of Lynch might not sit well with jurors. It thus sought to preclude evidence and arguments that might evoke sympathy for Lynch. (*See, e.g.*, ER 474-505.) The problem with the Government's requests was that the excluded evidence was directly relevant to the elements of entrapment by estoppel, which Lynch had the burden of proving. Although defense counsel emphasized this point (ER 1603-13, 2432-44), the district court excluded the evidence. Lynch's testimony in support of his defense thus stood largely uncorroborated.

a. Legal Standard

A defendant has a constitutional right to present a complete defense, guaranteed by the Due Process Clause of the Fifth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986). "This right includes, at a minimum, the right to put before a jury evidence that might influence the determination of guilt." *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010) (alteration and internal quotation marks omitted).

Although "not every evidentiary error amounts to a constitutional violation, [Ninth Circuit precedents] make clear that the erroneous exclusion of important evidence will often rise to the level of a constitutional violation." *Id.* (alteration,

citations, and internal quotation marks omitted). In particular, this Court has found violations of defendants' rights to present a defense where the excluded evidence "was necessary for the defendant to refute a critical element of the prosecution's case" or "was essential to the defendant's alternative theory of the case." *Pineda-Doval*, 614 F.3d at 1033. Where the proffered evidence "went to the heart of [the] defense," even a single error by the district court may warrant reversal. *United States v. Boulware*, 384 F.3d 794, 798 (9th Cir. 2004).

Of course, evidence that is irrelevant to the issues the jury must decide may properly be excluded. *See* Fed. R. Evid. 402. But relevance is a very low bar. "Evidence is relevant if it has '*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Stever*, 603 F.3d at 753 (quoting Fed. R. Evid. 401) (alteration in original). The evidence need not fully exonerate the defendant to be relevant. *See id.* It need not "'prove' anything." *Boulware*, 384 F.3d at 805. "Rule 401's only requirement is that the proffered evidence have . . . *some* tendency to make [the defendant's] explanation . . . more probable and the government's theory of the case . . . less probable." *Id.* at 805 n.3.

Even where a district court properly applies the rules of evidence, it commits error if its rulings infringe on the defendant's constitutional right to present a defense. *See Stever*, 603 F.3d at 755-56. When a district court misapplies the Federal Rules of Evidence, "'due process concerns are still greater because the exclusion is unsupported by any legitimate state justification.'" *Id.* at 755 (quoting *United States v. Lopez-Alvarez*, 970 F.2d 583, 588 (9th Cir. 1992)).

Lynch's defense was that the DEA agent he spoke with in September 2005 misled him to believe his medical marijuana dispensary would be legal if he complied with state and local rules. He had the burden of proving this defense by a preponderance of the evidence. *See United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004); *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1383 (9th Cir. 1991) (per curiam).

b. Corroboration of Lynch's Version of the DEA Call

The disputes at trial centered on two elements of the defense: whether the person Lynch spoke with actually told him it was up to the cities and counties to regulate medical marijuana dispensaries, and whether Lynch reasonably relied on what he was told. Lynch's credibility, of course, was also a key issue.

Lynch testified that the official he spoke with at the DEA told him medical marijuana dispensaries were a matter of local, not federal, concern. The Government aggressively cross-examined Lynch on this point, suggesting he fabricated the contents of the call or heard what he wanted to hear. (ER 2571-76, 2579-82, 2681, 2688-89, 2695-98, 2702-06.) At one point, the Government asked, "Isn't it true that the first time you told anyone in the federal government that you had a conversation with the DEA in September of 2005 was when you came to testify in this case?" (ER 2706.) On rebuttal, the Government presented the testimony of DEA Agent Reuter that no agent in her office ever would have said what Lynch claimed. (ER 2825-51.) In closing argument, the Government twice referred to the dearth of "corroboration" for Lynch's testimony. (ER 3090, 3090.)

But Lynch had evidence that he hadn't fabricated the call. In January 2006, before he opened the CCCC, Lynch relayed the substance of the call to his then-

attorney, who in turn spoke about it in a radio interview. When Lynch said as much on cross-examination, the prosecutor asked if he had any evidence to prove it. (ER 2698.) Lynch then sought to introduce the evidence he had—his former attorney's corroborating testimony and a recording of the radio interview—under the "prior consistent statement" exception to the rule against hearsay. (ER 2768-69, 2774-77, 2897-905, 2907-24, 2926-30, 2935-62, 3284.)

A declarant's prior statement is not hearsay, and is thus admissible at trial, where the declarant "testifies and is subject to cross-examination about" the statement and the statement "is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." Fed. R. Evid. 801(d)(1)(B) (2008). This Court has explained that "a proponent must establish four elements" to admit a prior consistent statement:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

United States v. Collicott, 92 F.3d 973, 979 (9th Cir. 1996).

Here, Lynch testified and was subject to cross-examination, and the

evidence of his prior consistent statement was offered to rebut the Government's claim that he lied about what he was told in his calls to the DEA. It clearly fit within the relevant hearsay exception and should have been admitted.

Nonetheless, the district court excluded the evidence on the theory that Lynch had not satisfied the second and fourth elements of the rule. (ER 274-274A.) As to the second factor, the court held that "the Government's contention is not that Lynch's fabrication is of a recent origin but occurred in 2005 when he merely heard only what he wanted to hear." (ER 274A.) Regarding the fourth factor, the court ruled that Lynch's motive to fabricate arose before his conversation with his attorney, which the court believed occurred in June 2006. (ER 274-274A.) Under the court's theory, Lynch "always had a motive to fabricate on this particular point," from the moment he made the call. (ER 2945.)

As an initial matter, the court's finding on the timing of Lynch's conversation with his attorney was clearly erroneous. The proffered conversation took place in January 2006, before Lynch opened the CCCC, not in June 2006, after he had opened. (ER 2919.)

The district court's legal conclusions were also wrong. As to the second factor, the Government's cross-examination of Lynch was designed to show the jury that he had fabricated the contents of the DEA call to help him at trial. (*See also* 3088-90 (closing argument).) That the Government also had other theories on why Lynch was not telling the truth, including that he misheard the DEA agent, does not negate the clear implication that Lynch was lying to avoid punishment.

United States v. Whitman, 771 F.2d 1348 (9th Cir. 1985), where this Court reversed the defendant's conviction, is instructive. Whitman sought to present

evidence that undermined the Government's theory of motive, but that evidence was excluded. *See id.* at 1350. On appeal, the government claimed "that its theory of the case was that appellant acted on his own behalf to stop [an informant] from implicating him," and "denie[d] that it contended appellant [had the motive Whitman sought to counter]." *Id.* This Court agreed that *one of* the government's theories was that Whitman acted on his own behalf. *See id.* But that "was not the government's *only* theory of the case," *id.* (emphasis added), as was demonstrated by the record. *See id.* at 1350-51. Because the government in part relied on another theory, Whitman "had the right to rebut it." *Id.* at 1351.

Lynch does not dispute that *one of* the Government's theories at trial was that he heard what he wanted to hear. But that was not the Government's *only* theory. The Government's other theory was that Lynch made up the call. "[O]nce the government presented th[at] theory, [Lynch] had the right to rebut it." *Id.*

The fourth factor is also satisfied. At the time of his call to the DEA, Lynch had no reason to invent a conversation during which he was given permission to open a medical marijuana dispensary. No rules or regulations required him to show that he had spoken with the DEA. No one ever would have known about the conversation but Lynch. If the DEA told him his proposal was illegal, he gained no benefit from making up a false authorization.

The district court's decision otherwise makes no sense unless one assumes that Lynch, untrained in the law and unrepresented at the time, placed four calls to the DEA so that his phone bill would provide corroboration for some future, hypothetical prosecution under the obscure defense of entrapment by estoppel. The implausibility of this factual scenario is self-evident.

As to the radio interview, it was proffered to corroborate Lynch's testimony, which otherwise had no evidentiary support, that he told his attorney about the DEA call. The court's reasons for excluding this evidence are unclear, but it appears the court did not believe the evidence was relevant or that Lynch had waived his attorney-client privilege. (ER 2948-62.)

First, the court clearly erred in finding that Lynch had not waived his attorney-client privilege. Lynch's counsel told the court several times that Lynch was prepared to do so. (ER 2577, 2706, 2898, 2952, 3294-96, 3594.) In any event, the recording itself was not privileged, as it was not an attorney-client communication.

Second, the evidence surely "ha[d] *some* tendency to make [Lynch's] explanation . . . more probable and the government's theory of the case . . . less probable," thus satisfying the low bar for relevance. *Boulware*, 384 F.3d at 805 n.3. The prosecutor directly attacked Lynch's credibility when he questioned whether Lynch had any evidence to prove that he told his attorney about the DEA call. The radio recording thus was probative not only on whether Lynch had fabricated his story, but on his credibility more generally.

Even if the district court properly applied the Federal Rules of Evidence, it still erred because the prior consistent statements were reliable and crucial to Lynch's defense. *See Lopez-Alvarez*, 970 F.2d at 588 ("Even when evidence is excluded on the basis of a *valid* application of the hearsay rules, such exclusion may violate due process if the evidence is sufficiently reliable and crucial to the defense."). The evidence was reliable because the radio broadcast demonstrated that Lynch had, in fact, told his attorney about the call. It was crucial because the

call was the key to Lynch's defense, and his testimony on the details of the call was otherwise without corroboration. *See Boulware*, 384 F.3d at 808-09 (recognizing crucial nature of evidence corroborating defendant's version of events, especially where credibility is an issue).

The prior consistent statements went to the heart of the case. Lynch "sought to counter the circumstantial inferences that the Government asked the jury to draw with evidence of other, logically relevant circumstances from which obverse inferences to those sought by the Government could be drawn." *Stever*, 603 F.3d at 754. The district court erred when it excluded this relevant evidence. *See id.*

c. Reasonable Reliance on the DEA Call

Aside from what Lynch was told on the call, the other key issue at trial was whether Lynch relied on this information and, if so, whether that reliance was reasonable. The jury was instructed that "defendant's reliance is reasonable if a person sincerely desirous of obeying the federal law would have accepted the information as true, and would not have been put on notice to make further inquiries." (ER 324.)

i. Compliance with Local Rules

Lynch tried to show that he relied on the DEA agent's statement that the regulation of medical marijuana dispensaries was up to the cities and counties, and that he was a person sincerely desirous of obeying that instruction, by introducing evidence of his compliance with local rules. The court excluded much of this evidence. According to the court, Congress had determined that marijuana has no valid medical purpose, so any evidence of Lynch's compliance with medical marijuana laws was irrelevant. (ER 543, 1605-08.) The court also believed that

Lynch's compliance was not contested. (ER 2039, 2048, 2502-05, 2760-62.)

Thus, the court excluded evidence of the "nuts and bolts" of the CCCC's operations. (ER 1366, 1610.) The court redacted forms Lynch's patients were required to fill out and notices attached to each and every medical marijuana purchase that indicated the marijuana was "for medical use only" and not to be distributed outside the premises. (ER 546, 1447-50, 1607-09, 2431, 3704-14, 3733-36, 3739-62, 3772-77, 3783-88.)

The court precluded patients of the CCCC from testifying to Lynch's strict compliance with local rules and his refusal to break those rules, even when asked to do so for sympathetic reasons. (ER 2021-60, 2615-16; *see* 3406-19, 3546-51.)

Even the term "medical marijuana" was off-limits. (ER 828.) The parties could only refer to the CCCC as a "marijuana dispensary" or "marijuana store." (ER 828-30, 1364.) "Ill looking witnesses" were excluded. (ER 503, 2021.)

Lynch did not proffer this evidence to contest the medical efficacy of marijuana or whether it should be legal under federal law. (ER 1606-08.) As the defense explained, the evidence was relevant to whether Lynch relied on the DEA call (where he was effectively told to follow local rules) and to whether he was a person sincerely desirous of obeying the federal law, as it was explained to him by the DEA agent. (ER 1374, 1603-13, 2432-44.)

Moreover, although the Government denied that it would contest Lynch's compliance with local rules (ER 2502-03), it did just that. As discussed in Section VII.A.3, the Government introduced extensive evidence suggesting Lynch did not comply with local rules, or, as the Government put it in closing argument, that Lynch was not "running . . . a tight ship." (ER 3146.) Lynch's compliance with

local rules was thus relevant and central to the case.

ii. Information from Local Officials

The Government argued to the jury that Lynch's reopening of the CCCC after the DEA raid showed he did not reasonably rely on the DEA phone call. According to the Government, the raid should have put Lynch on notice to make further inquiries. (ER 3094-95.)

Lynch testified that he reopened because "at that point I was still getting mixed messages. . . . And also I did happen to see the local Sheriff on the television saying that he was returning the keys to Mr. Lynch and he could do as he pleases." (ER 2710; *see also* 2711, 2718.) The prosecutor extensively cross-examined Lynch on this point. (ER 2708-21.)

Lynch sought to corroborate his testimony in two ways. First, he proffered video footage of the local sheriff, who had participated in the DEA raid, on television saying Lynch was welcome to reopen. (ER 2520, 2768-69.) Second, Lynch tried to testify that part of the reason he reopened after the raid was that local officials gave him permission. (ER 2517-19, 2710-11, 2715, 2718-19, 2805-08.) More generally, Lynch sought to present evidence that his reliance on the DEA phone call was reasonable based on his interactions with the Morro Bay mayor and city attorney. (ER 2500-05, 2815-17.)

The district court refused to admit the video, ruling that "he cannot rely on state official's approval in regards to a federal crime" and "I don't understand the relevance of this particular" evidence. (ER 2520, *see* 2519-24, 2768-74, 2810.) As to the information from the mayor and the city attorney, the district court ruled that this evidence was irrelevant because their discussions with Lynch "can't be a

basis for estoppel by entrapment. It has to come from a federal official." (ER 2816.)

Binding precedent, however, holds otherwise. Specifically, the sheriff's statement and the information from the mayor and city attorney made Lynch's continued reliance on his earlier calls with the DEA reasonable.[7]

In *Tallmadge*, the defendant was misled by a firearms dealer to believe that he could legally purchase weapons. *See Tallmadge*, 829 F.2d at 775. This Court held that the defendant had established an entrapment by estoppel defense, but only because the firearms dealer was a federal official. *See id.* at 774. That did not mean, however, that statements from other individuals were irrelevant to Tallmadge's defense. To the contrary, this Court wrote that "[t]he uncontradicted evidence establishes that Tallmadge's reliance on the firearm dealer's misleading information was reasonable in light of *his attorney's* legal opinion that he could purchase a rifle, and the comments of *the state trial judge and the deputy district attorney* at the probation termination proceedings." *Id.* at 775 (emphasis added).

In *Brebner*, this Court explained the distinction that the district court in this case missed. Surely the misleading statement that forms the basis for entrapment by estoppel must come from a federal official. *See Brebner*, 951 F.2d at 1027.

---

[7] Lynch also argued that the sheriff was a federal official because he was part of a joint DEA task force that executed the search warrant at the CCCC and Lynch's home for violations of federal law. (ER 2521-22, 2770-74, 2808-11.) In *United States v. Schafer*, this Court left open the possibility that state officials might, in some circumstances, be "federal officials or authorized agents of the federal government" for purposes of entrapment by estoppel. *United States v. Schafer*, 625 F.3d 629, 638 (9th Cir. 2010). Thus, the district court further erred in excluding this evidence because Lynch was misled by the sheriff's statement.

Nonetheless, statements by local officials and others remain relevant "to the second requirement of the entrapment by estoppel test, namely the reasonableness of the defendant's reliance on the" federal official. *Id.*

The sheriff's statement and the information from the mayor and city attorney were thus relevant and admissible.

d. Conclusion

Each of these errors, on its own, justifies reversal. Taken together, "the exclusion [of evidence] was so broad, and the [court's] error[s] so critical," that Lynch was denied his right to present a defense. *Stever*, 603 F.3d at 755 n 3.

3. The Government Was Permitted To Introduce Inflammatory Evidence That Lynch Was Not Allowed To Rebut

Equally troubling, the court permitted the Government to introduce prejudicial evidence with little probative value, but prevented Lynch from rebutting that evidence.

a. Legal Standard

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Where a district court admits prejudicial evidence offered by the Government but excludes the defense's rebuttal evidence, the court's rulings create a "one-sided picture" of the defendant—an "imbalance in the evidence" that requires a new trial. *Waters*, 627 F.3d at 357.

In addition, a district court errs when it admits evidence that is "likely to elicit a response from jurors that causes them to reach a conclusion based on emotion rather than the evidence presented." *United States v. Ellis*, 147 F.3d

1131, 1136 (9th Cir. 1998); *see* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . .").

b. Abrahm Baxter Side-Deals

The first day of trial was largely devoted to the Government proving that a CCCC employee, Abrahm Baxter, sold $3200 worth of marijuana to an informant and undercover agent outside the premises of the CCCC. (ER 1456-88, 1574-76, 1582-83; *see also* 1387-88 (Government highlights Baxter side-deal in opening statement).)

Lynch testified on direct that he had no idea Baxter was engaged in such malfeasance and felt betrayed when he learned about it. (ER 2515-17.) The Government extensively cross-examined Lynch on this point (ER 2724-48), and discussed Baxter in closing argument as an example of Lynch's supposed failure to run "a tight ship." (ER 3146-48.)

Lynch tried to counter these accusations with firsthand evidence to corroborate his testimony that he knew nothing of Baxter's extracurricular activities: the testimony of Baxter himself. But Baxter invoked his right to remain silent. (ER 2247-50, 2254-57.) Because that made him an "unavailable" witness, *see Whelchel v. Washington*, 232 F.3d 1197, 1204 (9th Cir. 2000), the defense moved to introduce his prior statement exculpating Lynch. (ER 2777-82, 2877-95, 2593-609.) Specifically, Baxter had said to a defense investigator that "Charlie didn't know anything about his deal." (ER 2601.)

The Federal Rules of Evidence provide an exception to the rule against hearsay for declarations against interest, which, at the time of Lynch's trial, were

defined as statements that, when made, "so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. R. Evid. 804(b)(3) (2008). This Court has a three-factor test for declarations against interest:

> (1) the declarant is unavailable as a witness; (2) the statement so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.

United States v. Paguio, 114 F.3d 928, 932 (9th Cir. 1997).

The district court denied the motion because it did not believe that (1) there were sufficient circumstances to corroborate the trustworthiness of the statement and (2) the statement was so far against Baxter's interest that he would not have made it unless true. (ER 2879, 2881-87, 2891-95.) The court was mistaken.

First, there were a number of circumstances that corroborated the trustworthiness of Baxter's declaration. The Government's own evidence indicated Baxter was, in fact, guilty of the side-deal. The defense submitted evidence of state felony charges against Baxter for the deal, including a declaration from the deputy district attorney prosecuting Baxter that Baxter had obtained the marijuana "without authorization" from the CCCC. (ER 2603-09.) And the statement was made spontaneously, not in response to questioning. (ER

2894.) *See Paguio*, 114 F.3d at 932-33; *United States v. Satterfield*, 572 F.2d 687, 693 (9th Cir. 1978).

Second, a reasonable person in Baxter's situation would have known the statement was incriminating. *See id.* at 691 & n.1. Baxter, who was facing criminal charges at the time, was approached by an investigator and served with a subpoena to appear in court. (ER 2878.) Moreover, he had recently invoked his right against self-incrimination on this very topic.

Even if the court's analysis of the federal rules was correct, the statement should have been admitted. The Supreme Court's decision in *Chambers* is directly on point. There, the defendant was precluded from presenting a declaration against interest that would have supported his defense. The Court reversed because "[t]he testimony rejected by the trial court . . . bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest" and "was critical to Chambers' defense." *Chambers*, 410 U.S. at 302. The Court continued: "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

Indeed, the evidence of the Baxter deal never should have been admitted in the first place because its prejudicial nature outweighed any probative value it might have. *See* Fed. R. Evid. 403. In a pretrial ruling on Lynch's motion to exclude this evidence, the district court ruled that if the Government failed to prove the connection between Lynch and Baxter's side-deals, it would need to strike the evidence and issue a limiting instruction or even declare a mistrial. (ER 39-40, 1442.) The Government did not prove up any such link, as the court

explained in its sentencing memorandum. (ER 407.) But the court never instructed the jury to disregard the evidence. By refusing to admit Baxter's declaration against interest, the court compounded the error.

c. Other Nefarious Acts

The Government introduced a slew of prejudicial evidence designed to persuade the jury that the CCCC was something other than a reputable organization. As described above, Lynch was not permitted to rebut this evidence with his own documents and witnesses showing his strict compliance with local rules. For example:

- The Government elicited testimony from law enforcement about what appeared to be unlawful distribution by CCCC employees John Candelaria and Ryan Dougherty outside the dispensary. (ER 1409-15, 1714-24, 1728-37.)
- The Government elicited testimony that a CCCC employee appeared to mail a package of marijuana from the post office (ER 1418-20), and that people outside the CCCC frequently engaged in "suspicious" activity (ER 1666-69).
- The Government elicited testimony and presented surveillance video that emphasized sales to teenagers who looked healthy and made purchases on multiple occasions in a single month. (ER 2064-81, 3803-04.)
- When the Government chose to discuss with a witness just a handful of strains of marijuana that the CCCC carried, it selected "AK47" as one of them. (ER 1816.) The CCCC had dozens of strains of marijuana and "AK47" was the only one with a violent name. (ER 3719-32.)

Two particularly inflammatory exhibits served no purpose other than to elicit an emotional response from jurors. Exhibit 100 shows the "type of high" that different strains of marijuana carried by the CCCC induce, including, for example "serious buzz," "stupid and confused," "body stone," "giggles, munchies," and "great daytime smoke." (ER 1924-26, 3723-32.) At the time Exhibit 140 was offered, the Government had already presented charts listing patients under twenty-one and the dates of their visits to the store, organized by customer identification number (ER 3778-82), and date of visit (ER 3789-95). (ER 3197-98.) Exhibit 140, which resorted these same names to show how frequently these "minors" visited the CCCC in one month, appears designed solely to suggest the "minors" were using marijuana recreationally and not for any medical purpose. (ER 2081-84, 3796-802.)

The Government highlighted this evidence in its closing argument:

> If he's running such a tight ship, why is he sending Ryan Doherty to bring marijuana to a grower outside of the store?

(ER 3146); *see id*. (referring to "all these sales out the back door, the sales to Abrahm Baxter, the sales to Ryan Doherty").)

> Was there an agreement to sell to minors under the age of 21? Of course. And again, these customers, they were actually very loyal customers. They came back day after day. And if you look at just one of these customers, customer Dein who you saw video footage of purchasing marijuana and you have still images of him purchasing

> marijuana. This is just for the month of March. He came in ten times; March 4th, 6th, 7th, 8th and on and on. Day in, day out. And he's not alone. There were many others like him.

(ER 3073.)

The evidence was prejudicial, irrelevant to the Government's case, and should have been excluded under the Federal Rules of Evidence. But even if the evidence was relevant to Lynch's reasonable reliance on the DEA phone call, Lynch was not able to rebut it. As described above, the district court excluded evidence that Lynch complied with state and local rules, and he was not permitted to explain why he believed the marijuana he distributed had medical value. The jury was thus left with a distorted picture of Lynch and the CCCC.

d. Profits

The Government introduced evidence that the CCCC had $2.1M in sales in the year it was open. (ER 1982, 3737-38.) It emphasized this number in its opening statement and in closing argument. (ER 1390, 3081.) Needless to say, the defense was concerned that the $2.1M figure, standing alone, would create a misleading and prejudicial impression of Lynch as someone who made huge profits from the very conduct charged by the Government. (ER 628-31.) It would affect Lynch's overall credibility and the jury's decision whether he was someone who sought to follow the law, or might have skirted it to get rich. *See United States v. Green*, 548 F.2d 1261, 1270-71 (6th Cir. 1977) (describing prejudicial impact of "profit" testimony in drug cases).

The defense proffered the testimony of a forensic accountant, Carl Knudson,

that Lynch earned very little from the CCCC. (ER 564-98.) The court excluded the evidence as irrelevant. (ER 710.) According to the court, whether Lynch made a profit was not an issue in the case and the Government would not suggest otherwise. (ER 38-39, 628-31, 1777-78.)

Having excluded Lynch's evidence, the court then permitted the Government to introduce evidence that served no purpose other than to paint Lynch as a profiteer. The court admitted a photocopy of a CCCC business check found in Lynch's home that was made out to Lynch himself. (ER 1760-63, 1769, 3715-18.) The Government claimed the check showed Lynch controlled the CCCC's financial accounts. (ER 1761-62.) The check did show Lynch's control—because Lynch's name was at the top, on the check itself. (ER 3717.) The fact that Lynch wrote the check to himself, which the court refused to redact and the Government emphasized to the jury (ER 1770), had no probative value and served only to imply that Lynch was padding his pockets with CCCC money.

In closing argument, the Government intimated that is exactly what Lynch was doing, referring to "the money that was stuffed in his backpack, the almost $30,000 worth of money that was found at his house," and "his backpack with all that money, almost $30,000 worth of money." (ER 3070, 3081.) Lynch, the Government said, "even wrote checks to himself from that bank account." (ER 3070.)

In sum, the court allowed the Government to paint a misleading picture of Lynch, directly relevant to his credibility and whether he was someone sincerely desirous of following the law or instead out to make a profit. The defense was not allowed to rebut these prejudicial suggestions. Once again, the jury heard only

half the evidence.

e. Conclusion

The evidence described above should have been excluded because "its probative value [wa]s substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. "Rather than contributing to any issue in the case," the evidence "played to the jury's emotions." *Waters*, 627 F.3d at 358. Because this inflammatory evidence was more prejudicial than probative, the district court abused its discretion in admitting it.

The court then compounded its error by denying Lynch the opportunity to rebut the prejudice with his own evidence. *See Waters*, 627 F.3d at 357-59. "Taken together, the wrongful admission of the government's evidence and the erroneous exclusion of the defense evidence left the jury with only half the picture." *Id.* at 359 (alterations and internal quotation marks omitted). The court's rulings, individually and cumulatively, deprived Lynch of his right to a fair trial.

4. The Government Suppressed Exculpatory Evidence That Contradicted DEA Agent Reuter's Pivotal Testimony

The Government withheld evidence that undermined Reuter's testimony that no agent in her office would have referred to local laws in answering Lynch's question and supported Lynch's recollection of the call. Specifically, the prosecutor revealed after trial that compliance with local laws has always been a factor in the federal government's analysis of whether to investigate and prosecute medical marijuana dispensaries in the Central District of California.

a. The Suppressed Evidence

In a pretrial discovery motion, Lynch sought, *inter alia*, "[a]ny and all

information in the government's possession, custody, or control regarding the criteria employed by the federal government in determining which California caregiver or dispensary the federal government should subject to enforcement raids and/or prosecution." (ER 463.) The court denied the motion. (ER 2.)

During the Government's rebuttal case, DEA Agent Reuter testified that no one in her office would have told Lynch that medical marijuana dispensaries were lawful if they complied with state and local rules. (ER 2825-51.) This was so "[b]ecause federal law has nothing to do with state and local officials. We would be investigating the federal laws and the marihuana—illegal sales of marihuana federally. It doesn't matter what the state or local officials say or do." (ER 2844.) In response to the question, "Would it matter to you at the time if a store owner said it would comply with California state law regarding marijuana?" she responded, "It doesn't matter. It's still illegal under federal law." (ER 2845.) Defense counsel was unable to counter Reuter's assertions with any evidence.

It was only after trial that the Government disclosed, apparently inadvertently, that "in this district we . . . made the determination that in allocating our resources we would focus on those [medical marijuana] cases that more clearly violated state law," and that Lynch's compliance with state law was "always [a] factor[] in the investigation at the beginning." (ER 3389-90.) In other words, in the Central District of California, it has always been up to local authorities to decide how to handle the matter of medical marijuana dispensaries.

Lynch filed a motion for new trial, arguing that the Government violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), to turn over information favorable to the defense and to

correct Reuter's false testimony. (ER 3527-42.) The district court denied the motion. (ER 353, 3575-99.)

b. Legal Analysis

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "The *Brady* rule applies to evidence impeaching a government witness . . . ." *Pelisamen*, 641 F.3d at 408. The test is whether "(1) the government willfully or inadvertently suppressed; (2) evidence favorable to the accused; and (3) prejudice ensued." *Id.*

"To determine whether prejudice exists, we look to the materiality of the suppressed evidence." *Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008). "Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (internal quotation marks omitted). When the suppressed evidence "undermines confidence in the outcome of the trial," prejudice is established. *Id.* (internal quotation marks omitted).

A defendant's due process rights are also violated when his conviction is obtained through perjured testimony. *See Napue*, 360 U.S. at 265-69. A *Napue* claim succeeds when "(1) the testimony . . . was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) . . . the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

"In assessing materiality under *Napue*, we determine whether there is any

reasonable likelihood that the false testimony could have affected the judgment of the jury; if so, then the conviction must be set aside." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (internal quotation marks omitted). "[T]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* (internal quotation marks omitted). Although *Napue* does not create "a *per se* rule of reversal," *id.*, "if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic," *id.* at 978 (internal quotation marks omitted).

Lynch easily meets these standards. The central issue in this case was whether Lynch was told what he said he was told. In other words, his entire defense rested on the jury believing that a DEA agent said the regulation of medical marijuana dispensaries was up to cities and counties. When Reuter testified that there was no way any agent would have said that, because the DEA does not care about local laws, Lynch had nothing with which to impeach her. But this testimony was false. The suppressed evidence shows that the federal government does, in fact, base its investigation and charging decisions in medical marijuana cases in part on local laws. This evidence would have been both favorable and impeaching and undermines confidence in the verdict.

5. The Court's Instructions Prevented the Jury From Considering Lynch's Affirmative Defense

Even the evidence Lynch *was* able to introduce was limited in value because the jury was misinstructed on the elements of entrapment by estoppel, directed not

to not consider Lynch's affirmative defense in reaching a verdict on some of the counts, and told the evidence it had heard about state and local laws was not relevant to deliberations.

a. Entrapment by Estoppel Instruction

The court rejected the defense's proposed instruction on entrapment by estoppel. (ER 1592-95.) Instead, the court instructed the jury as follows:

> Defendant has raised an "entrapment by estoppel" defense in this case. Entrapment by estoppel is the unintentional entrapment by a governmental official who mistakenly misleads a person into a violation of the law. In this case, that defense is not available as to the crime of the distribution of marijuana to persons under the age of 21 years which is the crime charged in Counts Two and Three and as one of the objects of the conspiracy charged in Count One.
>
> The Defendant bears the burden of proving this defense by a preponderance of the evidence. To prove something by a preponderance of the evidence is to prove that it is more likely true than not true. This is a lesser standard than proof beyond a reasonable doubt.
>
> In order to find the Defendant "not guilty" of Counts Four or Five of the Indictment or to find him not responsible of a crime charged as an object of the conspiracy alleged in Count One based upon that defense

of entrapment by estoppel, the Defendant must prove the following five elements by a preponderance of the evidence as to that Count or crime:

1) an authorized federal government official who was empowered to render the claimed erroneous advice,

2) was made aware of all the relevant historical facts, and

3) affirmatively told the Defendant that the proscribed conduct was permissible[,]

4) the defendant relied on that incorrect information, and

5) Defendant's reliance was reasonable.

As to the first element, in this case, the entrapment by estoppel defense would only apply to the statements made by United States government officials. It does not apply to statements made by state or local officials or by private parties. As to the third element, the advice or permission received from the federal official must be more than a vague or contradictory statement. As to the fifth element, defendant's reliance is reasonable if a person sincerely desirous of obeying the federal law would have accepted the information as true, and would not have been put on notice to make further inquiries.

> Unless you find that Defendant has met his burden of proving each element of the defense of entrapment by estoppel as to a particular Count, mere ignorance of the law or a good faith belief in the legality of one's conduct is no excuse as to the crimes charged in the Indictment. The Government is not required to prove that the Defendant knew his conduct was unlawful.

(ER 324, 3060-61.) As discussed below, these instructions were incorrect.

b. Legal Analysis

i. Actual vs. Apparent Authority

First, the jury was instructed that Lynch had to prove he was misled by "an authorized federal government official *who was empowered* to render the claimed erroneous advice." (ER 324 (second emphasis added).) This instruction suggests that Lynch could not prove his defense if the person he spoke with did not actually have authority to tell him that his conduct was lawful. Seizing on this language, the Government cross-examined Lynch to show that he did not know the identity of the person with whom he spoke, and argued to the jury in closing, "How do we know that the federal agent was authorized? We don't even know his name or his title." (ER 2537-43, 2560-61, 2565, 3092.)

Lynch concedes that the "empowered" language comes from this Court's cases. *See Batterjee*, 361 F.3d at 1216; *Brebner*, 951 F.2d at 1027. But, to the extent that it suggests reliance on a person with *apparent* authority to render the erroneous advice is not enough to make out an entrapment by estoppel defense, it conflicts with clear Supreme Court precedent.

In *Raley v. Ohio*, the Supreme Court held that defendants had established an entrapment by estoppel defense where the misleading information came from someone "who clearly appeared to be the agent of the State in a position to give such assurances." *Raley v. Ohio*, 360 U.S. 423, 437 (1959). Several circuits recognize that apparent authority is all that's required. *See, e.g.*, *United States v. Giffen*, 473 F.3d 30, 42 n.12 (2d Cir. 2006); *United States v. Baker*, 438 F.3d 749, 753, 755 (7th Cir. 2006); *United States v. Aquino-Chacon*, 109 F.3d 936, 939 (4th Cir. 1997).

Especially when coupled with the Government's argument otherwise, the court's instruction was confusing, did not properly guide the jury's deliberations, and undermined Lynch's defense. *See United States v. Rubio-Villareal*, 967 F.2d 294, 296-300 & n.9 (9th Cir. 1992) (en banc).

ii. Historical Facts

Second, the jury had to find that the federal official "was made aware of all the relevant historical facts." (ER 324.) It is true that this Court has used the quoted language in describing the elements of entrapment by estoppel, *see Batterjee*, 361 F.3d at 1216—although the Supreme Court has never held that it is a factor. This language, however, must be read in light of the precedent from which it derives.

In *Batterjee*, the defendant argued that he was misled by federal officials to believe he could purchase a firearm. *See id.* at 1212. He was ineligible, however, because he was present in the United States on a non-immigrant work visa. *See id.* at 1213 n.2. Batterjee did not inform the federal official of this crucial fact. *See id.* at 1214. He apparently did not have the foresight to know that it would be

relevant to the legality of his conduct. *See id.* at 1218. The district court rejected Batterjee's entrapment by estoppel defense "because [the federal officials] did not know that Mr. Batterjee was in the United States on a work visa, it would be unreasonable to accept the entrapment by estoppel defense." *Id.* at 1215 (internal quotation marks omitted). The Government made the same "historical facts" argument on appeal. *See id.* at 1218. This Court rejected the Government's argument and reversed, holding not only that Batterjee presented enough evidence to send the defense to a jury, but that he had established the defense outright. *See id.* at 1212.

Similarly, in *Tallmadge*, where the "historical facts" language first appeared, *Tallmadge*, 829 F.2d at 774, the defendant did not convey to federal agents the decisive fact on which the legality of his conduct turned. There, the agent misled Tallmadge to believe he could purchase a firearm where "he had read and understood that [Tallmadge] was in some kind of problem, and there may have been a felony conviction. And [Tallmadge] said that was changed to a misdemeanor conviction, and there was no problem." *Id.* at 770 (internal quotation marks omitted). But Tallmadge did not explain that his prior conviction involved a firearm, which was the very reason he was ineligible to purchase another firearm, despite the reduction of that conviction to a misdemeanor. *See id.* at 772. Again, this Court held that the defense of entrapment by estoppel had been established as a matter of law. *See id.* at 775.

The district court failed to explain to the jury that Lynch could prevail on his defense even if he did not tell the DEA agent every fact that might potentially be relevant to the lawfulness of his conduct. Again, the Government capitalized

on this error, questioning Lynch on his failure to discuss these details in his call, and arguing to the jury, "He didn't talk about how he was going to be selling to minors, selling hash products or growing marijuana plants." (ER 2545-52, 2557-65, 3092; *see also* ER 3093 ("Did he mention any of these laws during that phone conversation?").)

The court's instruction on this element, especially when read in conjunction with the Government's argument, conflicts with this Court's precedent. It is "an incomplete, and therefore incorrect, statement of the law." *Hunter v. Cty. of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011) (internal quotation marks omitted).

iii. Affirmative Misleading

Third, the jury was instructed that it had to find a federal official "affirmatively told [Lynch] that the proscribed conduct was permissible." (ER 324.) The court did not define "affirmatively" for the jury, other than to instruct that "the advice or permission received from the federal official must be more than a vague or even contradictory statement." (*Id.*) Although Lynch had submitted substitute language—"the official or agency affirmatively expressly or impliedly assured him the otherwise proscribed conduct was permissible or that the law did not apply to his situation"—the court rejected that proposal. (ER 1594.)

To establish the defense of entrapment by estoppel, a defendant must prove that he was given "assurances . . . either express or implied." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965); *see Batterjee*, 361 F.3d at 1218 (holding that affirmative statement need not be express). While the Supreme Court has said that these assurances cannot be "vague or even contradictory," *Raley*, 360 U.S. at 438,

the bar to meet that standard is low.

In *Raley*, where the "vague or even contradictory" language first arose, the Supreme Court held that defendants had proved entrapment by estoppel where a government official "never told [them] in so many words" that their conduct was lawful, but acted in ways that were "inexplicable on any other basis than that [the official] deemed" it so, "and his statements would tend to create such an impression in one" who heard them. *Id.* at 430-31; *see also id.* at 437 (explaining that official "by his behavior toward" one of the defendants "gave the . . . impression" that his conduct was lawful). The *Raley* Court even reversed convictions for acts done by the defendants *prior to* the authorities' misleading statements based on the misleading nature of their *silent acquiescence* to the defendants' conduct. *See id.* at 426-28, 439.

This Court has taken a similarly broad approach to what constitutes affirmative misleading. In *Batterjee*, this Court rejected the Government's argument that an "affirmative" statement must tell the defendant with specificity that his proposed conduct would not violate the precise law at issue. *See Batterjee*, 361 F.3d at 1217-18. And in *Tallmadge*, this Court held that a "federally licensed gun dealer's statement to Tallmadge that it would not be a 'problem' to receive or possess weapons after a state trial judge has reduced a felony to a misdemeanor" was sufficiently affirmative to support an entrapment by estoppel defense. *Tallmadge*, 829 F.2d at 771.

The court's instruction in Lynch's case was much narrower. The Government's argument to the jury in closing argument demonstrates as much:

> Was there a clear statement that this did not violate

> federal law? When thinking about this element you . . . cannot consider what the agent didn't say. It's not on what was not said. . . .
>
> And did—was there an affirmative statement? No. There was absolutely no discussion of the law in that conversation.

(ER 3092-93; *see* ER 3145 ("[I]t must be an affirmative statement, an unambiguous statement."); *see also* ER 2553-56 (cross-examination of Lynch).) But Lynch was not required to meet this strict definition of "affirmative." The court's instruction was "far from a complete statement of [the relevant] caselaw." *Hunter*, 652 F.3d at 1233.

Because the court misinstructed the jury on several elements of the entrapment by estoppel defense, Lynch's convictions must be vacated.

c. No Defense to "Minors" Counts

Counts Two and Three of the indictment charged Lynch with distribution of marijuana to someone under twenty-one years of age (a "minor" for purposes of federal drug law). One of the objects of the conspiracy charged in Count One was also distribution to minors. (ER 600, 604.)

Lynch testified that he called the DEA, asked about opening a medical marijuana dispensary, and was told it was up to the cities and counties how they wanted to handle the matter. (ER 2374.) He did not specifically ask about distributing medical marijuana to individuals between the ages of eighteen and twenty-one because that "was part of the way dispensaries worked" and he "was asking in general about a marijuana dispensary." (ER 2548.) He assumed that a

DEA agent in California understood what he meant by "a medical marijuana dispensary." (ER 2548-53.)[8]

He was correct. Agent Reuter testified that she knew what the term "medical marijuana dispensary" meant:

> Q. You know what a medical marihuana dispensary is; don't you?
>
> A. Yes.
>
> Q. You know what I mean when I say a medical marihuana dispensary; right?
>
> A. Yes.

(ER 2862-63.) Defense counsel asked whether Reuter understood that the age requirement for medical marijuana dispensary patients in California is eighteen. The court sustained the Government's objection to this question. (ER 2869-70.)

The district court ruled that Lynch did not provide sufficient "historical facts" to the DEA about his intent to distribute marijuana to "minors" to present his entrapment by estoppel defense to the jury on the "minors" counts. (ER 2413-28, 2971-72.)

The court thus instructed the jury that entrapment by estoppel was not a defense to the "minors" counts, essentially directing a guilty verdict on those charges:

> In this case, that defense [entrapment by estoppel] is not available as to the crime of the distribution of marijuana

---

[8] In California, medical marijuana dispensaries are authorized to distribute to anyone eighteen and older. (ER 3462, 3467-68, 3552-71.)

> to persons under the age of 21 years which is the crime charged in Counts Two and Three and as one of the objects of the conspiracy charged in Count One.

(ER 324.)

d. Legal Analysis

"A defendant is entitled to instructions relating to a defense theory for which there is *any* foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *Burt*, 410 F.3d at 1103 (emphasis added). Specifically with respect to the defense of entrapment by estoppel, this Court has explained that the question "is generally one for the jury, rather than for the court." *Shafer*, 625 F.3d at 637 (internal quotation marks omitted); *see generally United States v. Chi Tong Kuok*, 671 F.3d 931, 947 (9th Cir. 2012) ("Factfinding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law."(internal quotation marks omitted)).

Here, the district court refused to instruct the jury on Lynch's affirmative defense for the "minors" counts. The court reasoned that Lynch had not provided sufficient historical facts—i.e., that he would be selling to eighteen to twenty-one year olds—in his call to the DEA. This was error.

Viewing the evidence "in its best light for [Lynch]," as this Court must, *Burt*, 410 F.3d at 1104, it showed that Lynch asked a DEA agent whether he could open a medical marijuana dispensary, and the DEA agent, who understood what the term "medical marijuana dispensary" meant, replied that the regulation of dispensaries was a local matter. Lynch sought to develop additional relevant facts when it asked Agent Reuter whether she understood that the age requirement for

patients in California is eighteen. The district court, however, sustained the Government's objection to that question.

As demonstrated by the discussion of *Batterjee* and *Tallmadge* above, the evidence Lynch presented on the "historical facts" he conveyed in his phone calls was sufficient to put his defense in front of the jury on the minors counts. Indeed, in *Batterjee* and *Tallmadge* this Court held that the vague "historical facts" presented were enough to establish entrapment by estoppel as a matter of law. *See Batterjee*, 361 F.3d at 1212; *Tallmadge*, 829 F.2d at 775.

Because Lynch was denied the opportunity to present evidence supporting his defense on the "minors" counts, and because the district court charged the jury that it could not consider his defense as to these counts, his convictions must be vacated. *See United States v. Smith-Baltiher*, 424 F.3d 913, 922 (9th Cir. 2005); *Burt*, 410 F.3d at 1104.

e. State Law Not Relevant

For those counts where the jury was permitted to consider Lynch's defense, the court gutted the probative value of Lynch's evidence that he reasonably relied on his call to the DEA. Specifically, to the extent Lynch was able to present evidence of state and local rules for the distribution of medical marijuana and his compliance therewith, the jury was instructed, repeatedly and emphatically, that it could not consider that evidence. Although Lynch explained that these instructions would prevent the jury from considering evidence relevant to his defense, the court was unmoved. (ER 1586-91.)

At the start of the case, the jury was given a preliminary instruction that state law was irrelevant and federal law required a guilty verdict any time

marijuana distribution was proved:

> This case is a federal criminal lawsuit and is governed exclusively by federal law. Under federal law, marijuana is a Schedule I controlled substance and federal law prohibits the possession, distribution and/or cultivation of marijuana for any purpose.
>
> Any state laws that you may be aware of concerning the legality of marijuana in certain circumstances are not controlling in this case. For example, unless I instruct you otherwise, you cannot consider . . . any references to the medical use of marijuana.

(ER 1314-15; *see* ER 331.)

The court's final instructions to the jury reiterated these points:

> This case is governed exclusively by federal law. Under federal law, marijuana is a Schedule I controlled substance, and therefore, federal law prohibits the possession, distribution, or growing of marijuana for any purpose. Any state laws that you may be aware of concerning the legality of marijuana in certain circumstances do not override or change the federal law. For example, unless I instruct you otherwise, you should not consider any references to the medical use of marijuana.

> The United States Congress did not violate the Tenth Amendment of the United States Constitution when it criminalized the manufacture, distribution or possession of marijuana even in states such as California which have legalized marijuana for certain purposes under state law.

(ER 314.)

Yet another instruction emphasized:

> You are instructed, as a matter of law, that marijuana, and . . . THC . . . are Schedule I controlled substances. Federal law prohibits the possession, distribution, or manufacture of marijuana, marijuana plants, or THC for <u>any</u> purpose. State or local law cannot trump federal law in this area.

(ER 318.)

In sum, these instructions told the jury that state and local law were irrelevant and that there were no exceptions to the criminal nature of marijuana distribution. The district court never instructed the jury on how Lynch's evidence of his compliance with state and local medical marijuana laws could "otherwise" be considered. In closing argument, the Government emphasized to the jury that the instructions nowhere made state law relevant. (ER 3141-44, 3146.) The jurors apparently took this to heart. One wrote to the judge after trial, "Because of the instructions we were given regarding that we were to disregard the State Law I felt we had no other option but to convict Mr. Lynch." (ER 3320.)

f. Legal Analysis

The district court failed to appreciate the relevance of Lynch's evidence of compliance with local rules and of state and local officials' statements to him. The court was correct that the misleading information giving rise to an entrapment by estoppel defense must have come from a federal official. But, as discussed above, that does not mean that all evidence of state and local rules, or the statements of nonfederal officials, are irrelevant. To the contrary, this Court has held that such information is directly relevant to whether a defendant reasonably relied on the federal misrepresentation. *See Brebner*, 951 F.2d at 1027; *Tallmadge*, 829 F.2d at 775.

The district court's misunderstanding led it to instruct the jury that Lynch's case was "governed exclusively by federal law," that "unless I instruct you otherwise, you cannot consider . . . any references to the medical use of marijuana," and that "State or local law cannot trump federal law." (ER 314, 318, 1314-15.) The court never instructed the jury "otherwise."

The court further emphasized that there were no exceptions to federal prohibitions on marijuana, implying the jury was required to find Lynch guilty. This effectively negated any defense Lynch had.

These instructions were incorrect, confusing, and stripped Lynch of his right to have the jury instructed on his theory of defense.

B. Lynch Was Denied His Sixth Amendment Right to Trial by Jury

Lynch was denied his Sixth Amendment right to a trial by jury when the district court gave a coercive anti-nullification instruction and denied Lynch's repeated requests to inform the jury of the mandatory minimum sentences he faced

if convicted.

1. The Court Gave a Coercive Anti-Nullification Instruction

Forestalling any possible nullification by jurors was a theme that permeated voir dire, where prospective jurors were questioned extensively on their views on medical marijuana. (*See, e.g.*, ER 977-1014.) A number of prospective jurors expressed concern over the conflict between state and federal law in this area. (*See, e.g.*, ER 987-93, 995-1005, 1011-12.) The jurors were thus instructed repeatedly that state law was irrelevant to Lynch's case (*see, e.g.*, ER 986-87, 989, 993-95), and were questioned on whether they could follow the court's instructions to ignore state law (*see* ER 1278 ("THE COURT: . . . All of the discussion prior to this point in time has been the court asking the jurors whether or not they can follow the law. That was done ad nauseam for the last, what, six hours in this voir dire process?".) At one point, a prospective juror responded to the judge: "I will follow what you say. And I want to follow the law and I don't want to be put in the jail, so I will follow what you say." (ER 1192.) The court clarified, "I have never thrown a juror in jail in my entire career," and the juror replied that he was not being serious. (*Id.*)

Later in voir dire, as defense counsel was attempting to rehabilitate a prospective juror who had expressed misgivings about the federal law, the juror raised the issue of nullification:

> [DEFENSE COUNSEL]: You also mentioned that it would be difficult for you to follow the law as instructed by the judge or that—I believe your words were, it would be hard for you to follow the law as the

court would wish you to. Do you understand that the court is going to instruct you on the law but will not instruct you about the decision that you need to come to after being instructed on the law? Do you understand the difference?

[THE PROSECUTOR]: Objection. Misstates the law.

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

[DEFENSE COUNSEL]: Do you understand that the ultimate decision as to whether to find a person guilty or not guilty is your decision?

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

THE COURT: No—

JUROR: —the law is wrong—

THE COURT: No. Let me stop you—

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

(ER 1263.) The court dismissed the jury, terminated defense voir dire, and—over defense objection that doing so would be coercive—instructed the jurors on their return to the courtroom as follows:

THE COURT: . . . Let me ask the prospective, all prospective jurors, how many of you talked about the

> issue of juror nullification when you were in the hallway?
>
> JUROR: About what?
>
> THE COURT: Juror nullification when you were in the hallway. Any of you? None of you talked about the issue?
>
> All right. Let me indicate the following: Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a . . . juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.
>
> Do all of you understand that?
>
> JUROR: Yes.

(ER 1282; *see* ER 1262-85.)

Following this admonition, the court questioned each prospective juror, one by one, to elicit a "yes" response to the question, "Could you follow that instruction?" (ER 1282-85.)

In a post-verdict letter to the judge, one juror wrote:

> When the jury first met, I told the other jurors that the instructions appeared to leave no room for considering

> that Mr. Lynch might not be guilty, and I asked if this was fair . . . . I was assured by a number of jury members . . . that we had promised the honorable judge to comply with his instructions, and that we would be breaking our promise if we did not vote to convict.

(ER 3327-28.)

2. The Court Refused To Instruct the Jury on Punishment

In pretrial motions and during later discussions, Lynch asked for the jury to be instructed on the mandatory minimum punishments that would apply if he were convicted. (ER 454, 506-10, 1590, 3054.) The court denied Lynch's requests. (ER 14-15, 528-29.)

Instead, the court instructed the jury that the court would have authority to decide how to sentence Lynch, if convicted: "The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the Government has proved its case against the Defendant beyond a reasonable doubt." (ER 326.)

Some jurors were surprised when they learned about the mandatory minimums and wrote to the court seeking leniency for Lynch at sentencing. (*See, e.g.*, ER 3320, 3327-29.)

3. Standard of Review

This Court reviews de novo whether the district court's anti-nullification instruction and refusal to inform the jury of the mandatory minimum sentences violated Lynch's constitutional rights. *See United States v. Napier*, 436 F.3d 1133, 1135 (9th Cir. 2006) (reviewing "the scope of a constitutional right" de

novo).

4. Legal Analysis

a. Historical Role of the Jury

The Supreme Court has repeatedly emphasized that appellate courts must "examine the historical record" in addressing Sixth Amendment claims "because the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *S. Union Co. v. United States*, __ U.S. __, 2012 WL 2344465, at *7 (June 21, 2012) (internal quotation marks omitted). Thus, "the salient question" for this Court in determining whether the district court's anti-nullification instruction and refusal to apprise the jury of the mandatory minimums violated Lynch's constitutional rights "is what role the jury played in prosecutions" at the time of the founding. *Id.* at *8; *see Johnson v. Louisiana*, 406 U.S. 356, 371 (1972) (Powell, J., concurring) ("[I]n amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law.").

It is largely undisputed

> that the petit juries of 1791 would have been aware of any harsh sentence imposed mandatorily upon a finding of guilt of a particular crime . . . [and] would have been expected to deliver a verdict of not guilty or of guilty of a lesser crime had it believed the punishment excessive for the crime actually charged and proved.

United States v. Polizzi, 549 F. Supp. 2d 308, 405 (E.D.N.Y. 2008), *rev'd sub. nom. United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009); *see id.* at 404-21

(surveying the "legal and historical scholarship on eighteenth-century colonial and English criminal practice"). As numerous scholars have explained, cases of jury nullification, often based on the punishment attendant to the offense, were celebrated at common law and at the forefront of the minds of the Founders who drafted and ratified the Sixth Amendment. *See, e.g.*, Jenny E. Carroll, *The Jury's Second Coming*, 100 Geo. L.J. 657, 663-75 (2012); Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 Santa Clara L. Rev. 775, 775-807 (2011); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 681-86 (1996).

b. Jury Nullification

In *Sparf v. United States*, the Supreme Court held that it was not the province of the jury to engage in statutory or constitutional construction; the law was for the court to decide, the facts for the jury to decide. *Sparf v. United States*, 156 U.S. 51, 99-107 (1895). *Sparf* is sometimes cited as forbidding jury nullification, but that is a misreading of the case. The Supreme Court itself has rejected such an interpretation: "[O]ur decision [in *Sparf*] in no way undermined the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue," including "find[ing] a verdict of guilty or not guilty as their own consciences may direct." *United States v. Gaudin*, 515 U.S. 506, 513-14 (1995) (internal quotation marks omitted)). *Sparf*'s holding that the jury receives the law from the court is very different from saying that jurors do not have the right to issue a verdict "as their own consciences may direct." Importantly, the *Sparf* jury *was* instructed that it had the power to nullify and told what punishment the defendants faced if

convicted—instructions with which the Court did not quibble. *See id.* at 60-62 & n.1

Rather than forbid nullification, the Supreme Court repeatedly has recognized that the Framers adopted the Sixth Amendment's right to trial by jury with the knowledge and intent that the jury, and jury nullification specifically, would serve as "the grand bulwark" to protect defendants from overzealous prosecutions by the government. *See Jones v. United States*, 526 U.S. 227, 244-48 (1999); *Gaudin*, 515 U.S. at 510-15; *Duncan v. Louisiana*, 391 U.S. 145, 151-58 (1968). The Court has never retreated from its position that a defendant's right to a jury encompasses the right to a jury with the power to nullify.

This power need not be explained to a sitting jury, or at least that is what this Court (but not the Supreme Court) has held. *See United States v. Powell*, 955 F.2d 1206, 1212-13 (9th Cir. 1991); *United States v. Simpson*, 460 F.2d 515, 518-20 (9th Cir. 1972). Lynch, however, did not request a *pro*-nullification instruction, and does not assign error to the district court's failure to give one. The problem in this case is that the district court stripped away the jury's right to nullify by giving a coercive, chilling *anti*-nullification instruction.

Perhaps because an anti-nullification instruction is so far out of the norm, this Court has not yet addressed the propriety of such a charge. This Court has, however, recognized that nullification is a valuable, sometimes desirable outcome, and that courts must not interfere with the jury's right to nullify. *See Simpson*, 460 F.2d at 519 & n.11 (discussing desirability of occasional exercise of jury's "freedom to grant acquittals against the law" and citing early nullification cases as examples of "how well our society's interests have been served by acquittals

resulting from application by the jurors of their collective conscience and sense of justice"); *Finn v. United States*, 219 F.2d 894, 900 (9th Cir. 1955) ("Of course, in a criminal case a jury has the power to fly in the teeth of the evidence and the law and acquit a defendant; that is something that cannot be taken away from it."); *Morris v. United States*, 156 F.2d 525, 528-32 (9th Cir. 1946) (rejecting encroachment on jury's traditional role, include power to nullify, by trial courts); *see also Duncan*, 391 U.S. at 157 ("[W]hen 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.").

Pro-nullification instructions are unnecessary only because, even in their absence, "jurors often reach 'conscience' verdicts without being instructed that they have the power to do so" and "American judges have generally avoided such interference as would divest juries of their power to acquit the accused, even though the evidence of his guilt may be clear." *Simpson*, 460 F.2d at 520; *see United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972). "Thus, the existing safeguards"—the jury's independent role in the judicial system and courts' non-interference with this role—"are adequate" to protect a defendant's right to a jury with the power to nullify. *See Simpson*, 460 F.2d at 520.

Here, the district court disrupted that delicate balance. The court's anti-nullification instruction, coupled with its individual questioning of each prospective juror on the matter, stripped the jury of its power to nullify and Lynch of his right to trial by jury. The court's directive and questioning were coercive and chilling, implying the possibility of sanctions if the jurors failed to comply.

Because Lynch did not receive the trial by jury guaranteed by the Sixth Amendment, this Court must reverse.

c. Punishment

Because the original understanding of the Sixth Amendment included the right to trial by a jury with knowledge of the penalty for conviction, Lynch's constitutional rights also were violated by the district court's refusal to instruct the jury on the mandatory minimum penalties that applied. Lynch concedes that precedent is against him on this point. *See Shannon v. United States*, 512 U.S. 573 (1994); *United States v. Frank*, 956 F.2d 872, 878-82 (9th Cir. 1991). However, that precedent has been abrogated by the Supreme Court's recent Sixth Amendment cases.

As Judge Weinstein persuasively explained in *Polizzi*,

> Whatever the judicial system's evaluation of modern juries and their proper role, the Supreme Court has recently instructed us that in matters of sentencing as well as hearsay, it is necessary to go back to the practice as it existed in 1791 to construe the meaning of constitutional provisions such as the Sixth Amendment . . . . Judges are forcefully reminded in *Crawford v. Washington*, [541 U.S. 36 (2004)], reevaluating the constitutional right of confrontation and the limits on the use of 'testimonial' hearsay, that no matter how long and firm a precedential line of Supreme Court cases, if analysis shows it was ill-based historically it must be

abandoned.

Polizzi, 549 F. Supp. 2d at 421-22; *see also Apprendi v. New Jersey*, 530 U.S. 466, 518 (2000) (Thomas, J., concurring) ("Today's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments.").

The Second Circuit rejected Judge Weinstein's legal conclusions—but not his unquestionably sound historical analysis. *See Polouizzi*, 564 F.3d at 159-63. This Court has yet to rule on the matter. Because more recent Supreme Court decisions "have undercut the theory or reasoning underlying the prior case law," this Court is not bound by *Shannon* and *Frank*. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Of note, both *Shannon* and *Frank* addressed a defendant's right to have the jury instructed on the consequences of a "not guilty by reason of insanity" verdict under a federal statutory scheme. Their discussions of mandatory minimum sentences are thus dicta, and their precedential force necessarily must yield to the Supreme Court's *Crawford* and *Apprendi* line of cases, which explain that the Sixth Amendment protects the right to jury trial that existed when the amendment was adopted. *See United States v. Pabon-Cruz*, 391 F.3d 86, 94 (2d Cir. 2004) (referring to *Shannon*'s consideration of mandatory minimum sentences as dicta); *Polizzi*, 549 F. Supp. 2d at 438, 445 (same).

Even if *Shannon* and *Frank* stand, Lynch is still entitled to relief. The "general rule" that a court should not instruct a jury on the consequences of its verdict "has an exception where there is a danger that the jury has been misled regarding the consequences of its verdict." *United States v. Diekhoff*, 535 F.3d

611, 621 (7th Cir. 2008); *see Pabon-Cruz*, 391 F.3d at 95 (recognizing that instructions on punishment may be necessary where "jury has been affirmatively misled"); *Frank*, 956 F.2d at 880-81 (holding an instruction on punishment may be necessary to right a "tilt [of] the scales in the government's favor"). This exception comes directly from *Shannon*, which held that "an instruction of some form may be necessary under certain limited circumstances," such as "to counter a misstatement" about potential punishment. *Shannon*, 512 U.S. at 587.

Here, the jury wasn't simply barred from hearing about the mandatory minimum punishment that applied; it was actively misled to believe that the district court would be able to exercise discretion in sentencing Lynch when it was instructed that "[t]he punishment provided by law for this crime *is for the court to decide*." (ER 326 (emphasis added).) Thus, in this particular case, either as a matter of constitutional right or as an exercise of this Court's supervisory power, *see Shannon*, 512 U.S. at 584, Lynch's conviction should be vacated.

C. Lynch Was Denied His Fifth and Sixth Amendment and Statutory Rights When the Court Concealed Jury Communications from Him and Refused To Answer Jury Questions

The district court committed three errors with respect to jury communications. First, it allowed its clerk to engage in ex parte communications with the jury and then concealed those communications from the defense. Second, it refused to answer jurors' questions, which may have suggested to the jurors that their concerns were irrelevant or that the court viewed the evidence in a way that hinted at obvious answers to their questions. Third, the court preemptively forbid the jury from asking any substantive questions at all, effectively abdicating its

duty to clear away juror confusion. Individually and cumulatively, these errors require reversal.

1. The Court Refused To Answer Substantive Questions from the Jury and Concealed Ex Parte Jury Communications from the Parties

Prior to trial, the court suggested to the parties that it might permit juror questioning of witnesses. Lynch approved of the idea, the Government objected, and the court decided not to allow such questions. (ER 806-07.)

On the third day of trial, immediately following opening arguments and before any evidence was presented in the case, the court informed the parties "that a juror has asked whether or not they will be allowed to ask questions," and said the court would inform the jury "that there would be no questions from the jurors." (ER 1402.) The record does not indicate whether the juror's request was written or oral, and whatever form it took it was filtered through the court clerk, who then shared its message with the judge. (ER 1425.) There is no record on whether the request was to ask questions of witnesses or questions of the court.

Regardless of what the juror actually asked, the court proceeded to inform the jurors that they could not ask questions at all:

> THE COURT: All right. Let me just indicate to the jury, my clerk informed me that one of the jurors questioned as to whether or not the jurors were going to be allowed to ask questions. Let me indicate that I have decided in this case the answer is no.
>
> I do not allow questions from jurors in criminal

> cases because of—well, the very major problems of evidence that come into play more so seriously in criminal cases than in civil case [*sic*], so I do allow questions from jurors in civil cases. I do not allow them in criminal cases, so jurors will not be asking questions.

(*Id.*)

Two days later, on the fifth day of trial, the court informed counsel that the jury had submitted a question to his clerk, although again no formal record of the contents of the question was made:

> THE COURT: Let me indicate for the record. Earlier there was a question that one of the jurors had addressed to my clerk which was taken care of by the questioning by [the prosecutor], but I just want to make sure it was noted on the record that one juror had a question and that was just as to whether or not DEA agents and sheriffs—that a juror had asked a question as to the status of the sheriff's department and also the DEA agent and that matter was taken care of by the government's subsequent questioning.

(ER 1940-41.) The court did not respond to the juror's question.

Later that day, the court informed counsel that its clerk had received a question from a juror about whether a "minor" was defined as someone under eighteen or under twenty-one. (ER 2049.) The court further stated that "that same juror indicated he does not understand what hash is, although that question has

been asked and answered." (ER 2049-50.) The jury was brought in and instructed on the definition of a minor. (ER 2050-51.) Nothing was said in response to the question about hash.

On the sixth day of trial, without any advance notice to the parties, the court told the jury that "my clerk has indicated to me that some of you have a question as to when a counsel objects on the basis of 403 or when the court rules on the basis of 403, what does that mean." (ER 2208.) The court informed the jury that it would not explain what "403" meant because the jury must accept evidentiary rulings without inquiring into their bases. (*See id.*)

Despite the court's instruction to the jury that it could not submit questions and its failure to respond to two substantive questions previously submitted, the jury continued to ask for clarification on substantive matters. On the seventh day of trial the court explained to the parties that it had received additional questions from the jury but would not answer them. Defense counsel then requested that the court inform the parties what the questions were; the court refused:

> THE COURT: Also, one other thing. . . . [My clerk] is continually getting questions from the jury. I will inform the jury that—I've already indicated that the jurors are not going to be allowed to ask questions during the course of this trial. So we won't be responding to the questions.
>
> [DEFENSE COUNSEL]: To the extent they have already, we'd be curious as to what the questions are.
>
> THE COURT: I know you'd be curious, but the

answer is no.

(ER 2505.)

The court brought in the jury and emphasized again that it would not accept substantive questions from jurors:

> THE COURT: . . . Also, my clerk informs me that he has periodically been getting questions from jurors. Let me indicate to the jurors that I've already indicated at the start of this case that the jurors were not going to be allowed to ask substantive questions. If you have some procedural questions of how the case is going or some aspect of procedure, I would be able to answer that. But in terms of substantive questions, no, there will be no questions from jurors in the course of this trial.
>
> Do all of you understand that?
>
> THE JURY: (Nodding heads.)

(ER 2505-06.)

At no point did the court instruct the jury or, apparently, its clerk to discontinue ex parte communications. The court made no record of the substantive inquiries by the jury that it refused to answer or share with counsel.

Although the court later invited questions on the jury instructions, at the time they were given, it never revised its position that the jury could only pose questions on "procedural" matters or the instructions, as opposed to other "substantive" questions the jury might have. (ER 3060-61.) Indeed, after the court's second admonishment that jurors could not submit substantive questions,

there was no further communication from the jury until it sent word that it had reached a verdict in the case. (ER 3763.)

In a letter written to the court shortly after trial, one juror wrote: "I sent several written notes and verbal messages to the [*sic*] your honorable attention, requesting clarification about issues that arose in my mind. . . . I received no response to my requests, and found that this was a controlled trial that suggested a predetermined outcome for the case." (ER 3327-28.)

2. Standard of Review

Whether the district court's response to jury inquiries violated Lynch's constitutional and statutory rights is subject to de novo review. *See United States v. Smith*, 31 F.3d 469, 471 (7th Cir. 1994).

3. Legal Analysis

a. Concealed Ex Parte Communications

A defendant has a constitutional right to be present at every "critical stage" of his trial and a statutory right to be present at every stage of his trial. *See United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1109 (9th Cir. 2002). The constitutional right is rooted in the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment, and the statutory right is found in Federal Rule of Criminal Procedure 43. *See id.*; Fed. R. Crim. P. 43(a).

A judge's response to a communication from the jury is a stage at which these constitutional and statutory rights apply. *See United States v. Collins*, 665 F.3d 454, 459 (2d Cir. 2012); *United States v. Degraffenried*, 339 F.3d 576, 579 (7th Cir. 2003); *cf. Rosales-Rodriguez*, 289 F.3d at 1109-10 (holding that a judge's ex parte communication with the jury is a critical stage).

In addition, a defendant has a Sixth Amendment right to counsel's assistance in the formulation of a response to a jury question. *See United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998). This Court has recognized the importance of this right not only in persuading a district court *how* to respond, but also in convincing a court *to* respond. *See id.*

In order to protect these rights, the Supreme Court has held "that a communication from the jury should be answered in open court and that counsel should be allowed to respond before the judge resolves the situation." *Degraffenried*, 339 F.3d at 580 (citing *Rogers v. United States*, 422 U.S. 35, 39 (1975)); *see United States v. Ronder*, 639 F.2d 931, 934 (2nd Cir. 1981) (setting forth preferred practice, including reducing jury's question to writing and entering it in the record); *United States v. Maraj*, 947 F.2d 520, 525 (1st Cir. 1991) (same). This procedure applies not only during deliberations but also to cases "where a juror asks a question or requests to speak with the judge before deliberations have begun." *United States v. Smith*, 31 F.3d 469, 471 (7th Cir. 1994); *see United States v. Arriagada*, 451 F.2d 487, 488 (4th Cir. 1971).

Thus, when a district court fails to divulge the contents of a jury communication to defense counsel before responding, the court violates the defendant's constitutional and statutory rights. *See Collins*, 665 F.3d at 461-62; *United States v. Mohsen*, 587 F.3d 1028, 1031 (9th Cir. 2009) (per curiam); *Degraffenried*, 339 F.3d at 580; *Barragan-Devis*, 133 F.3d at 1289; *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996); *United States v. Parent*, 954 F.2d 23, 24-25 (1st Cir. 1992); *Maraj*, 947 F.2d at 525-26; *Ronder*, 639 F.2d at 934. Here, that is precisely what occurred. The court permitted its clerk to engage

in repeated ex parte communications with the jury. The court then revealed only portions of those communications to counsel before responding. This was unquestionably error. *See, e.g.*, *Maraj*, 947 F.2d at 526 (finding error where court divulged bulk of jury note to counsel but concealed final sentence because "[a] lawyer's ability to respond to the exigencies of the moment in a meaningful way is equally hampered whether counsel is kept wholly in the dark or given part, but not all, of the relevant facts").

Sitting en banc, this Court has emphasized "how seriously jurors consider judges' responses to their questions." *Frantz v. Hazey*, 533 F.3d 724, 742 (9th Cir. 2008) (en banc). Even "'analytically correct' answers to a jury may unnecessarily—and improperly—influence a jury" because "*some* influence on the jury's deliberations is difficult to avoid when the jury is troubled enough to seek advice." *Id.* It is for this reason that a defendant's right to participate in the formulation of the court's response is so critical. *See id.* at 743.

Here, we do not know what questions the jury asked. We do know that those questions were, in the court's words, "substantive." (ER 2506.) We also know that the court's failure to respond to those questions gave at least one juror the impression that the issues raised in them were not relevant to Lynch's trial. (ER 3328.) Had counsel been privy to the jury's questions, they could have availed themselves of the "important opportunity to try and persuade the judge *to* respond." *Frantz*, 533 F.3d at 743 (internal quotation marks omitted).

The court's errors require reversal. At the very least, a hearing is necessary. *See Rushen v. Spain*, 464 U.S. 114, 119-20 (1983) (per curiam); *Bustamante v. Cardwell*, 497 F.2d 556, 557-58 (9th Cir. 1974) (per curiam).

b. Refusal To Answer Jury Questions

The Supreme Court has held that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946); *see McDowell v. Calderon*, 130 F.3d 833, 839 (9th Cir. 1997) (en banc) ("*Bollenbach* places on the trial judge a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem." (internal quotation marks omitted)); *Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1036 & n.3 (4th Cir. 1975). While district courts are given considerable leeway in formulating responses to jury questions, *see Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir. 2003), a judge may not simply refuse to respond to or ignore a question entirely. *See United States v. Southwell*, 432 F.3d 1050, 1052-53 (9th Cir. 2005) (holding that failure to answer a jury's question is an abuse of discretion); *Wright v. United States*, 250 F.2d 4, 11 (D.C. Cir. 1957) (en banc) (holding that refusal to answer juror's question is reversible error).

Refusing to respond to an inquiry is especially problematic when the court tells the jury that it may not ask any additional questions. This Court has twice held that a defendant's due process rights are violated when a judge refuses to answer a juror's question and instructs the jury not to inquire again. *See Beardslee v. Woodford*, 358 F.3d 560, 575 (9th Cir. 2004) (as amended); *Johnson*, 351 F.3d at 997-98. This Court further has explained that a court's response in such a situation "can be consistent with the due process clause but nonetheless improper and reversible under the federal supervisory power." *Johnson*, 351 F.3d at 997.

The district court's actions and inactions here violated Lynch's Fifth Amendment right to due process and Sixth Amendment right to a properly functioning jury. Either because of these constitutional errors or in the exercise of its supervisory power, this Court should reverse.

D. The Cumulative Errors Made by the District Court Undermine Confidence in the Jury's Verdict and Require Reversal

Even if each of these errors on its own does not require reversal, cumulatively they operated to deprive Lynch of his right to a fair trial. "Cumulative error applies where, 'although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.'" *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (quoting *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)). Here, because there were "a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *Frederick*, 78 F.3d at 1381 (internal quotation marks omitted).

Cumulatively, these errors deprived Lynch of a fair trial and resulted in a verdict in which this Court can have no confidence. His conviction should be vacated.

E. The One-Year Mandatory Minimum Does Not Apply to Lynch

The district court, having presided over Lynch's case for three years, and having reviewed extensive submissions by the parties (ER 391-93), was very clear: Lynch did not deserve to spend a single day in prison. The court applied

the safety valve provided by 18 U.S.C. § 3553(f), which authorized the court to sentence Lynch below the five-year mandatory minimum that otherwise applied. (ER 426.) Lynch argued that the court also had the authority to sentence him below the one-year mandatory minimum for violations of 21 U.S.C. § 859(a) (the "minors" counts). (ER 3613-23, 3514-18.) The court disagreed, but ordered Lynch to remain on bond so that he could appeal the matter. (ER 3637, 3650-51.)

1. Standard of Review

This Court reviews the legality of a sentence de novo. *See United States v. Fernandes*, 636 F.3d 1254, 1255 (9th Cir. 2011) (per curiam).

2. The Jury Did Not Authorize a One-Year Mandatory Minimum Sentence on Count One

The district court indicated its intent to sentence Lynch to time served for any count for which the mandatory minimum did not apply. (ER 3363, 3658-59.) The court, however, apparently believed the one-year mandatory minimum applied to Count One, and sentenced Lynch to a year and a day on that count. (ER 432.) The court was mistaken.

The conspiracy statute provides: "Any person who . . . conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, *the commission of which was the object of the . . . conspiracy*." 21 U.S.C. § 846 (emphasis added). Thus, the one-year mandatory minimum applied to Count One if the jury's verdict was based on the object of the conspiracy that triggered that minimum, specifically a violation of 21 U.S.C. § 859(a) (distribution to minors). *See United States v. Ching Tang Lo*, 447 F.3d 1212, 1233 (9th Cir. 2006); *United States v. Labrada-Bustamante*, 428 F.3d 1252,

1262 (9th Cir. 2005). But the jury never made such a finding. (ER 3621.) For Count One, the special verdict form asked only whether the jury found that Lynch had conspired to possess with intent to distribute, to distribute, or to manufacture marijuana, and if so, in what quantities. (ER 3764-66.) It did not ask for a finding on the object of the conspiracy involving minors.

Indeed, once the jury answered the questions in the special verdict form in the affirmative, there was no need for them to consider whether any additional facts also provided a basis for a guilty verdict on Count One. Because the jury never found the facts necessary to subject Lynch to a one-year mandatory minimum sentence on Count One, the sentence on that count must be vacated and the case remanded for resentencing.

3. The One-Year Mandatory Minimum Does Not Apply Because a Greater Minimum Sentence Is Otherwise Provided by Statute

21 U.S.C. § 859 mandates a one-year minimum sentence "[e]xcept to the extent a greater minimum sentence is otherwise provided by section 841(b)." 21 U.S.C. § 859(a). In Lynch's case, a greater minimum sentence is provided by section 841(b)—a five-year minimum term. By its plain language, the one-year minimum does not apply to Lynch.

Abbott v. United States, 131 S. Ct. 18 (2010), where the Supreme Court rejected a similar argument regarding the "except" clause of 18 U.S.C. § 924(c)'s mandatory consecutive sentencing provision, is distinguishable. Section 924(c)'s "except" clause reads, "Except to the extent that a greater minimum sentence is otherwise provided by this subsection *or by any other provision of law* . . . ." 18 U.S.C. § 924(c)(1)(A) (emphasis added). The Court thus sought some limiting

principle for the clause. *See Abbott*, 131 S. Ct. at 26. Because of the statute's unique drafting history, the Court concluded that "the 'except' clause is most naturally read to refer to the conduct § 924(c) [itself] proscribes." *Id.* at 30.

By contrast, section 859's "except" clause refers directly to section 841(b). It thus needs no limiting construction. And because it provides a mandatory minimum penalty, and not a consecutive one, *Abbott*'s concerns that defendants might escape an *additional* punishment are absent. *See id.* at 2728.

4. The Safety Valve Applied to All Counts

In *United States v. Kakatin*, 214 F.3d 1049 (9th Cir. 2000), this Court held that the "safety valve" in 18 U.S.C. § 3553(f) applies only to convictions under 21 U.S.C. sections 841, 844, 846, 960, and 963. Following *Kakatin*, the district court believed it was bound to impose the one-year mandatory minimum triggered by Lynch's convictions under 21 U.S.C. § 859(a). Because *Kakatin* was wrongly decided, Lynch preserves his objection, raised below (ER 3322), to the court's failure to apply the safety valve to these counts.

VIII. CONCLUSION

For the foregoing reasons, Lynch respectfully requests that this Court vacate his convictions and sentence.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: July 3, 2012

By *s/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

CERTIFICATE OF RELATED CASES

Counsel for appellant certifies that she is unaware of any pending case presenting an issue related to those raised in this brief. Previous cross-appeals by the parties in Case Nos. 09-50295 and 09-50388 were dismissed as moot without prejudice to filing new, timely notices of appeal from entry of the final judgment.

DATED: July 3, 2012

s/ Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(c) and Circuit Rule 32-1, I certify that this opening brief is proportionally spaced, has a typeface of 14 points or more, and contains 20,450 words. I am concurrently filing a motion to file an oversized brief.

DATED: July 3, 2012

s/ Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2012, I electronically filed the foregoing **Appellant's First Cross-Appeal Brief** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Nicole Quintero
Nicole Quintero

ADDENDUM

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property (Refs & Annos)

➡➡ AmendmentV. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<This amendment is further displayed in five separate documents according to subject matter,>

<see USCA Const Amend. V-Capital Crimes>

<see USCA Const Amend. V-Double Jeopardy>

<see USCA Const Amend. V-Self Incrimination>

<see USCA Const Amend. V-Due Process>

<see USCA Const Amend. V-Just Compensation>

U.S.C.A. Const. Amend. V-Full Text, USCA CONST Amend. V-Full Text

Current through P.L. 112-135 approved 6-21-12

END OF DOCUMENT

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)
Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials

Current through P.L. 112-135 approved 6-21-12

END OF DOCUMENT

Effective: May 27, 2010

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code,

subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [FN1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [FN2] **Sentencing.**--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [FN3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court

finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216.)

[FN1] So in original. The period probably should be a semicolon.

[FN2] So in original. No subpar. (B) has been enacted.

[FN3] So in original. The second comma probably should not appear.

UNCONSTITUTIONALITY OF SUBSEC. (B)(1)

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).>

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 112-135 approved 6-21-12

END OF DOCUMENT

Effective: August 3, 2010

United States Code Annotated Currentness
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties
§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eli-

gible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such

person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an

individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such persons shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as

defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other trigger-

ing mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term “date rape drug” means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally--

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of Title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally--

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(f) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections 823(f) of this title or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to--

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to--

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of Title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of Title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

CREDIT(S)

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub.L. 104-237, Title II, § 206(a), Title III, § 302(a), Oct. 3, 1996, 110 Stat. 3103, 3105; Pub.L. 104-305, § 2(a), (b)(1), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(a), Oct. 21, 1998, 112 Stat. 2681-759; Pub.L. 106-172, §§ 3(b)(1), 5(b), 9, Feb. 18, 2000, 114 Stat. 9, 10, 13; Pub.L. 107-273, Div. B, Title III, § 3005(a), Title IV, § 4002(d)(2)(A), Nov. 2, 2002, 116 Stat. 1805, 1809; Pub.L. 109-177, Title VII, §§ 711(f)(1)(B), 732, Mar. 9, 2006, 120 Stat. 262, 270; Pub.L. 109-248, Title II, § 201, July 27, 2006, 120 Stat. 611; Pub.L. 110-425, § 3(e), (f), Oct. 15, 2008, 122 Stat. 4828; Pub.L. 111-220, §§ 2(a), 4(a), Aug. 3, 2010, 124 Stat. 2372.)

21 U.S.C.A. § 841, 21 USCA § 841

Current through P.L. 112-135 approved 6-21-12

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties
§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

CREDIT(S)

(Pub.L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265; Pub.L. 100-690, Title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

21 U.S.C.A. § 846, 21 USCA § 846

Current through P.L. 112-135 approved 6-21-12

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties
§ 859. Distribution to persons under age twenty-one

(a) First offense

Except as provided in section 860 of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) subject to (1) twice the maximum punishment authorized by section 841(b) of this title, and (2) at least twice any term of supervised release authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. The mandatory minimum sentencing provisions of this subsection shall not apply to offenses involving 5 grams or less of marihuana.

(b) Second offense

Except as provided in section 860 of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age after a prior conviction under subsection (a) of this section (or under section 333(b) of this title as in effect prior to May 1, 1971) has become final, is subject to (1) three times the maximum punishment authorized by section 841(b) of this title, and (2) at least three times any term of supervised release authorized by section 841(b) of this title, for a second or subsequent offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. Penalties for third and subsequent convictions shall be governed by section 841(b)(1)(A) of this title.

CREDIT(S)

(Pub.L. 91-513, Title II, § 418, formerly § 405, Oct. 27, 1970, 84 Stat. 1265; Pub.L. 98-473, Title II, §§ 224(b), 503(b)(3), Oct. 12, 1984, 98 Stat. 2030, 2070; Pub.L. 98-473, § 224(b), as amended Pub.L. 99-570, Title I, § 1005(b)(1), Oct. 27, 1986, 100 Stat. 3207-6; Pub.L. 99-570, Title I, §§ 1004(a), 1105(a), (b), Oct. 27, 1986, 100 Stat. 3207-6, 3207-11; Pub.L. 100-690, Title VI, §§ 6452(b), 6455, 6456, Nov. 18, 1988, 102 Stat. 4371, 4372; renumbered § 418 and amended by Pub.L. 101-647, Title X, §§ 1002(a), 1003(a), Title XXXV, §

3599L, Nov. 29, 1990, 104 Stat. 4827, 4828, 4932.)

21 U.S.C.A. § 859, 21 USCA § 859

Current through P.L. 112-135 approved 6-21-12

END OF DOCUMENT

United States Code Annotated Currentness
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
IX. General Provisions

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) Organizational Defendant. The defendant is an organization represented by counsel who is present.

(2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.

(4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) In General.A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

CREDIT(S)

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(35), 89 Stat. 376; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Cr. Proc. Rule 43, 18 U.S.C.A., FRCRP Rule 43

Amendments received to 11-1-11

END OF DOCUMENT

United States Code Annotated Currentness
Federal Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1931; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 401, 28 U.S.C.A., FRE Rule 401

Amendments received to 11-1-11

END OF DOCUMENT

United States Code Annotated Currentness
Federal Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 402, 28 U.S.C.A., FRE Rule 402

Amendments received to 11-1-11

END OF DOCUMENT

United States Code Annotated Currentness

Federal Rules of Evidence (Refs & Annos)

Article IV. Relevance and Its Limits

➡➡ Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 403, 28 U.S.C.A., FRE Rule 403

Amendments received to 11-1-11

END OF DOCUMENT

110TH CONGRESS
2nd Session
COMMITTEE PRINT
No. 8

FEDERAL RULES
OF
EVIDENCE

DECEMBER 1, 2008

Printed for the use
of

THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: (202) 512–1800 Fax: (202) 512–2250
Mail: Stop SSOP, Washington, DC 20402–0001

witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation.—Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.—In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection.—Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

ARTICLE VIII. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.—A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.—A ''declarant'' is a person who makes a statement.

(c) Hearsay.—''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's

authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(As amended Oct. 16, 1975, eff. Oct. 31, 1975; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997.)

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification,

110TH CONGRESS
2nd Session
COMMITTEE PRINT
No. 8

FEDERAL RULES
OF
EVIDENCE

DECEMBER 1, 2008

Printed for the use
of

THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: (202) 512–1800 Fax: (202) 512–2250
Mail: Stop SSOP, Washington, DC 20402–0001

but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.—Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) [Other exceptions.] [Transferred to Rule 807]

(As amended Dec. 12, 1975; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 17, 2000, eff. Dec. 1, 2000.)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.—''Unavailability as a witness'' includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death.—In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a

claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history.—(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Other exceptions.] [Transferred to Rule 807]

(6) Forfeiture by wrongdoing.—A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(As amended Dec. 12, 1975; Mar. 2, 1987, eff. Oct. 1, 1987; Nov. 18, 1988; Apr. 11, 1997, eff. Dec. 1, 1997.)

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997.)

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through