No. 14-50585

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
NOAH KLEINMAN,	)
	)
Defendant-Appellant.	)
	)

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court
for the Central District of California

No. 2:11-cr-893-ODW
Honorable Otis D. Wright, II, United States District Judge

BECKY S. JAMES (CA Bar # 151419)
E-mail: BJames@JamesAA.com
JESSICA W. ROSEN (CA Bar # 294923)
E-mail: JRosen@JamesAA.com
JAMES & ASSOCIATES
17383 Sunset Blvd., Ste. A315
Pacific Palisades, California 90272
Telephone: (310) 492-5104
Facsimile: (310) 492-5026

Attorneys for Defendant-Appellant
NOAH KLEINMAN

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INTRODUCTION

Defendant-Appellant Noah Kleinman is serving 17 years in federal prison. For this, one might expect that Mr. Kleinman had committed a heinous violent crime or stolen millions of dollars. But instead, Mr. Kleinman was convicted of doing something that the majority of states and the public believe should not be a crime at all – participating in medical marijuana dispensaries.

After years of conflict between state and federal law, Congress has now spoken on the issue of medical marijuana, enacting legislation prohibiting the Department of Justice from using funds to prosecute medical marijuana cases where such prosecutions would interfere with states' implementation of their own laws legalizing medical marijuana. In contrast to Congress's recent directive, the government went after Mr. Kleinman with a vengeance, and the district court ultimately took impermissible and unconstitutional steps to ensure he was convicted of this federal offense, notwithstanding that California, which has legalized medical marijuana, chose not to prosecute him.

While the financial toll for continuing this prosecution is substantial, the personal toll is even greater. As a result of his incarceration on this federal marijuana charge, Mr. Kleinman was unable to be with the mother of his children when she became gravely ill and died. He had to leave his two young children behind, leaving them effectively orphaned, and if Mr. Kleinman's sentence stands,

he will not be released from prison until after his children are grown. Congress has expressly recognized that the tragic consequences that flow from federal prosecution are not warranted in medical marijuana cases. This Court must heed Congress's directive and put an end to this prosecution and to Mr. Kleinman's continued incarceration.

ISSUES PRESENTED

1. Whether this federal prosecution involving operation of California medical marijuana dispensaries must be dismissed as it unconstitutionally contravenes an express Congressional directive prohibiting federal interference with state laws permitting the possession, distribution, and cultivation of medical marijuana.
2. Whether the district court deprived Mr. Kleinman of his due process and Sixth Amendment jury trial rights by giving an anti-nullification jury instruction that stripped the jury of its power to nullify and effectively directed a guilty verdict.
3. Whether the district court erred in denying Mr. Kleinman's motion to suppress evidence seized as a result of a state search warrant that failed to establish probable cause to find a violation of California's medical marijuana laws.

4. Whether the district court deprived Mr. Kleinman of a fair trial by refusing to instruct the jury on Mr. Kleinman's joint ownership defense.

5. Whether Mr. Kleinman's 211-month sentence to federal prison based on distribution of medical marijuana is procedurally and substantively unreasonable.

JURISDICTIONAL STATEMENT

Pursuant to 18 U.S.C. § 3231, the district court had jurisdiction over this federal criminal proceeding. This Court has jurisidiction over this appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court entered its judgment and commitment order on December 8, 2014. (ER 35-42.) Mr. Kleinman filed his timely notice of appeal on December 19, 2014. (ER 706.)

BAIL STATUS

Mr. Kleinman is in federal custody, serving the 211-month sentence imposed in this medical marijuana case.

STATEMENT OF THE CASE

I. Statement of Facts

A. Factual Background

In 1996, California voters enacted the Compassionate Use Act ("CUA"), paving the way for legal possession, cultivation and use of marijuana for medical purposes. Cal. Health & Saf. Code §§ 11357 and 11358. To further the CUA's

stated purpose, the California state legislature enacted the Medical Marijuana Program Act ("MMPA") in 2003. Cal Health & Saf Code § 11362.7 et seq. Under the MMPA, medical marijuana patients are permited to form "collectives" or "cooperatives" to cultivate and provide medical marijuana, whereby members of the collective or cooperative are permitted to pay each other and receive compensation and reimbursement to cover the necessary operating costs of the collective or cooperative. Importantly, patients are immune from arrest and prosecution under state law so long as guidelines are met. Cal Health & Saf Code § 11362.71(e).

Some years after the enactment of the MMPA, Noah Kleinman, an educated and devoted family man and parent, with no criminal history, decided to venture into dispensaries with a colleague, Paul Montoya. Mr. Kleinman, Mr. Montoya and others opened and operated medical marijuana collectives beginning in 2006 or 2007 to 2010. (PSR ¶ 110.) The various collectives supplied medical marijuana to patients who, after demonstrating they had a valid identification card and doctor recommendation, would sign an agreement that the medical marijuana is jointly owned by all the members. (ER 484, 541; 05/30/2014 RT 118; 06/04/2014 RT 112.) Some of these patients who signed these agreements were individuals who also formed collectives, and would purchase medical marijuana at wholesale. (ER 499-500; 05/30/2014 RT 154-55.)

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

B. State Proceedings

In 2010, Los Angeles Police Department Officer Cecil Mangrum and his partner Officer Walden investigated certain medical marijuana collectives—Medco Organic and The Relief Collective—in the Los Angeles area. In his affidavit seeking a search warrant, Officer Mangrum stated that he and Officer Walden had entered one of the dispensaries in an undercover capacity and "observed various strains of marijuana in clear glass display jars along with a white dry erase board on the wall displaying the various strains." (ER 398.) He further explained that he asked an employee there "how it worked to be part of their collective," and the employee responded that he just needed to show his identification and doctor recommendation every time he came in. (ER 398-99.) Officer Mangrun stated in his affidavit that he clarified with the employee that he did not need to grow his

own marijuana and bring it into the clinic, and the officers then purchased marijuana from the employee. (*Id.*)

In his affidavit, Officer Mangrum stated the factual basis for probable cause that Mr. Kleinman and others were in violation of state law:

> Not requiring "members" to participate in any activities of the "collective" and marking the marijuana packaging with "Rx" to make it appear to be a legitimate pharmaceutical product are violations of the California Compassionate Use Act of 1996 and the California Medical Marijuana Program. Further, exchanging marijuana solely for money is a violation of California Health and Safety Code Section 11360 (Sales of Marijuana).

(ER 399.) On March 16, 2010, Officer Mangrum obtained a search warrant of the medical marijuana collectives and individuals' homes, including Mr. Kleinman's, and pursuant to that search warrant seized evidence, including Mr. Kleinman's laptop computer. (ER 392-402.)

At the subsequent preliminary hearing in the state criminal proceeding on March 25, 2011, Officer Mangrum detailed his experience in entering Medco and his purchase of medical marijuana differently from the description that he provided in the search warrant affidavit. In his testimony, Officer Mangrum explained that when the undercover officers entered the Medco premises, they went into a room where a security guard awaited. Inside this room, the security guard asked to the see their identification cards and doctors' recommendations. While the security guard verified that information, the officers "completed membership applications."

(ER 200-205.) Further, the security guard verified the doctors' recommendations, which Officer Mangrum confirmed was a valid recommendation that he had received from a doctor. (ER 244-47.) Thereafter, the security guard allowed each officer to enter a backroom through a "man trap" and once inside the back room, each officer—who had *verified doctor recommendations*—purchased medical marijuana. (ER 284-87.)

After the preliminary hearing, Mr. Kleinman moved in the state criminal court to dismiss the information under the Compassionate Use Act of 1996 and the Medical Marijuana Program Act of 2004. The Deputy District Attorney conceded and informed the superior court that "unless the court has some reason to deny [the motion][,] I read the moving papers and read the transcript, and I don't see a basis in those to deny them." (ER 433-34.) The criminal charges were dismissed on that same day, on January 9, 2012.

II. Procedural History in this Federal Case

On September 21, 2011, a federal grand jury in the Central District of California returned an indictment charging Mr. Kleinman, co-defendant Paul Montoya and four other co-defendants with one count of conspiracy to distribrute and possess with intent to distribute marijuana in violation of 21 U.S.C. § 846. Mr. Kleinman and others were also charged with three counts of distribution of marijuana in violation of 21 U.S.C. § 841(a)(1); one count of maintaining a drug-

involved premises in violation of 21 U.S.C. § 856(a)(1); and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). (CR 1.) The grand jury returned a first superseding indictment on December 7, 2011 with the same charges, but added an additional co-defendant.[1] (ER 43-70.) On April 5, 2012, after the state case against Mr. Kleinman had been dismissed, the government sought and obtained an order permitting the Drug Enforcement Administration ("DEA") to seize the property that was in the custody of the Los Angeles Police Department ("LAPD"). (ER 71-92.)

A. Pretrial Proceedings

1. Mr. Kleinman's Motion to Dismiss

On April 15, 2014, Mr. Kleinman filed his motion to dismiss the indictment, or in the alternative, set for evidentiary hearing. (CR 366.) The district court struck his motion, and he filed an amended motion on April 22, 2014. (ER 93-104.) Mr. Kleinman contended that the indictment must be dismissed on two constitutional grounds. First, Mr. Kleinman contended that medical marijuana is a fundamental right under the Federal Constitution because the right to use medical marijuana is now "deeply rooted in this nation's history and tradition" and is "implicit in the concept of ordered liberty." (ER 99-103.) Second, Mr. Kleinman

[1] Before trial, all co-defendants except Mr. Kleinman pled guilty pursuant to plea agreements. (CR 207, 208, 213, 215, 221, 222.)

contended in the alternative that the selective enforcement of the Controlled Substance Act as to marijuana violated the equal protection clause, and only highlighted the irrationality of the Federal Drug Scheduling as applied to medical marijuana. (ER 103-04.)

2. Mr. Kleinman's Motion to Suppress Evidence Seized Under the State Search Warrant

On April 15, 2014, Mr. Kleinman filed his motion to suppress evidence seized pursuant to a state search warrant. (CR 365.) Specifically, Mr. Kleinman contended that the affidavit in support of the search warrant lacked probable cause because it failed to establish any violations of state law. (*Id.*) The purported violations of state law asserted in the affidavit were not requiring patients to cultivate marijuana and exchanging money for marijuana. (ER 399.) However, as Mr. Kleinman pointed out, that was simply not the the law at the time the warrant issued, as California medical marijuana laws did not require that members of a collective cultivate marijuana and did not prohibit the exchange of money for medical marijuana. (ER 148-62.)

Mr. Kleinman also asked for a *Franks* hearing in connection with his motion. (ER 153-54.) As Mr. Kleinman pointed out, Officer Mangrum's preliminary hearing testimony, which established, *inter alia*, that a security guard properly verified the officers' medical documentation, was significantly different

from his affidavit in support of the search warrant and undermined the probable cause for the search. (*See* ER 154-55.)

After twice striking his motion and ultimately permitting only a truncated 15-page motion, the district court decided in advance that "no hearing is necessary." (ER 138; 05/09/2014 RT 34.) In a minute order entered on May, 27, 2014, the day before trial began, the district court summarily denied Mr. Kleinman's motion to suppress. (ER 1.) In doing so, the district court provided no legal reasoning nor did it make any factual findings.

3. The Government's Motions in Limine to Preclude Introduction of Evidence and Argument Related to "Medical Marijuana" and to Exclude Any Reference to Jury Nullification

The government filed its pretrial motions on April 14, 2014. The government moved in limine to exclude all and any reference to jury nullification at trial, as well as to preclude introduction of evidence and argument relating to "medical marijuana." (CR 361, 362.) Mr. Kleinman opposed both these motions. (CR 376, 377.) At the pretrial hearing on May 9, 2014, the district court concluded that any reference to medical marijuana was not relevant. (ER 126; 05/09/2014 RT 22.) When defense counsel attempted to explain that the relevance was that the jurors "have a right to understand what the essential facts were, how this sales operation worked," the district court remarked, "You are looking for nullification, aren't you?" (ER 128; 05/09/2014 RT 24.)

And while the government only moved to preclude statements and argument concerning jury nullification, the district court proposed giving the jury an anti-nullification instruction. Indeed, the district court proclaimed: "[W]ith the jury nullification, if the defense's case proceeds like the written submissions, we most certainly will be giving that instruction. If we start hearing things like a fundamental or constitutional right to use marijuana, we most certainly will." (ER 121; 05/09/2014 RT 17.) The district court nevertheless left the issue of the anti-nullification instruction unresolved at that time, and granted the government's motions to exclude any reference to jury nullification and preclude any evidence of "medical marijuana." (ER 121-22, CR 431.)

B. Trial Proceedings

1. Jury Selection

Jury selection began on May 28, 2014. During voir dire, the district court asked, "anyone [] know anyone or themselves that has been either treated by or have a physician's recommendation that they be treated by the use of marijuana?" and was apparently surprised by the response, exclaiming, "Wow, look at the hands. 3, 4, 5, 6, 7, 8, 9 -- we need to start all over again." (ER 437; 05/28/2014 RT 40.) Prospective jurors admitted they themselves had medical marijuana cards, or knew of friends or family members, including mothers and fathers, sisters and brothers, who had cards. (ER 437-47; 05/28/2014 RT 40-47.)

The district court then emphasized that the case was "not about whether or not there has or has not been compliance with state law" but rather was "being tried under federal law and it will be federal law which controls this case." (ER 444; 05/28/2014 RT 47;.) The court then asked the "64-dollar question" whether any juror "would not be able to follow the Court's instructions on federal law." (*Id.*) No prospective juror responded in the affirmative.

The district court questioned jurors twice more regarding whether they could follow federal law even if they disagreed with it. (ER 445-46, 448; 05/28/14 RT 48-49, 05/28/14 RT 64.) The district court also told jurors not to question the conflict in state and federal law:

> That is for legislators whenever they feel like coming to work, okay? They will -- they will work that out. That is not what we do here, okay? What we do here, we determine facts. That's what the juries do. They determine facts. Have these facts been established, and if so, under the instructions of the law as the Court has given it, has there been a violation of the law. Really quite simple.

(ER 447; 05/28/14 RT 50.)

2. Opening Statements

Once jury selection concluded, opening statements proceeded on May 29, 2014. Defense counsel explained in opening:

> This case, you'll see, is simply about there were some medical marijuana dispensaries operating. Mr. Kleinman may have been a part of them, may have been involved with them; so were many other people. For whatever reason, he's been selected here to be put on trial. But I think you'll see he was not involved in any large-scale

> conspiracy.
>
> […]
>
> This case, 99 percent of it at least, is about simply routine transactions of dispensaries here in L.A. that Noah may have had some role in […] just like the many other dispensaries you see all over town operating. And if you're going -- after hearing this evidence, if you agree that this is largely about these dispensaries and that Mr. Kleinman wasn't some type of mastermind at the operation, that he was a worker there, convicting him, I submit, would be like convicting any other patient who goes to a dispensary.

(ER 451-52; 05/29/2014 RT 77-78.) Outside the presense of the jury, the district court scolded defense counsel, and stated: "I'll say this: I hope it was worth it. But based upon [defense's] opening, I'm going to give the jury nullification instruction." (ER 454; 05/29/2014 RT 80.)

3. Mid-Trial Voir Dire of Individual Jurors Regarding Jury Nullification

During the fifth day of trial, it came to the district court's attention that there were "a bunch of people outside the courthouse that the jury has to walk through and carrying signs and saying, 'Smart jurors are hung jurors. No victim of crime,' something like, 'Judges have the law, jury has the power.'" (ER 507; 06/04/2014 RT 6.) The district court decided that it "want[ed] to talk to the jurors one a time …to find what effect this has had on any of them." (*Id.*)

Before the district court began its inquiry into each juror, it stated that this situation "makes our job in here harder. Now we're going to have to really craft some jury instructions. [Defense] didn't want jury nullification to begin with; now

you have people out here screaming, 'Jury nullification.' This is making your job very difficult." (ER 508-09; 06/04/2014 RT 7-8.)

The district court then brought each juror out, one by one, and asked them whether they had seen the signs. (ER 513-16; 06/04/2014 RT 12-15.) Ultimately, the district court instructed the jurors of the "important decision" they "have to make" and that it did not want the jurors "influenced by anything outside of the courtroom." (ER 528; 06/04/2014 RT 27.)

4. The Government's Case

At trial, the government case encompassed a number of federal agents and cooperating witnesses. The agents testified to the laptop that the government had seized from the LAPD, and explained the forensics they had done. Cooperating witnesses testified to the spreadsheets accessed from the laptop, which the government argued established Mr. Kleinman's possession of over 1000 kilos of marijuana. The cooperating witnesses also testified to their roles in the "storefronts," to their e-mail correspondences with Mr. Kleinman, and ultimately admitted that through these "storefronts", Mr. Kleinman and others possessed large amounts of marijuana and sold the marijuana to others. The government also presented charts from data taken from the seized laptop, arguing that the numbers demonstrated Mr. Kleinman's possession with intent to distribute over 1,000 kilograms of marijuana. And the government argued that California state law had

no application to the case at hand, and the jury was not instructed as to that law. Given that state law had no place at the trial, the jury was not asked to nor did it consider whether Mr. Kleinman's activities complied with state law.

5. Jury Instructions: Anti-Nullification Instruction and Mr. Kleinman's Proposed Instruction of his Theory of Defense

At the end of the sixth day of trial, Mr. Kleinman stated his objections to the proposed jury instructions. First, Mr. Kleinman objected to the government's proposed instruction that the case is governed exclusively under federal law and that, "You must disregard any state or local law to the contrary." (ER 568; 06/05/2014 RT 147.) Mr. Kleinman explained that it is "clear as to what the law is and I don't think there's any reason – there's no reason to add this additional instruction," and that it "will only confuse the jurors." (ER 568-69; 06/05/2014 RT 147-48.) The district court overruled Mr. Kleinman's objection. (ER 570; 06/05/2014 RT 149.)

The district court then turned to the anti-nullification instruction. (ER 570; 06/05/2014 RT 149.) The government proposed the following language:

> You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not your determination whether a law is just or whether a law is unjust. That cannot be your task. <u>There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.</u>

(CR 417; *see also* ER 15-16.)

Mr. Kleinman objected in whole and stated that "[t]he most objectionable part, though" is the last part, "You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case." Mr. Kleinman explained that "the last [part] is worst" because "[t]hat's not a violation of the law and that does suggest they would be punished if they did something that wasn't in compliance with the law, which is not the state of the law. … it suggests they're violating the law if they exercise jury nullification. That's not the case." (ER 15; 06/05/2014 RT 150.) Mr. Kleinman emphasized that the instruction erroneously suggested jurors could be punished for nullifying. (*Id.*) The district court overruled Mr. Kleinman's objection and decided to give the anti-nullification instruction, using the government's proposed language. (ER 21-22; 06/06/2014 RT 25-26.)

Mr. Kleinman also requested that the district court instruct the jury of his theory of defense, that is that he could not be guilty of possession with intent to distribute marijuana if the jury found that he and the members jointly owned the marijuana at issue. "Where a group of individuals jointly purchase and then simultaneously and jointly acquire possession of a drug for their own use intending only to share it together, they cannot be found guilty of the offense of distribution of the drug." (ER 555; 06/05/2014 RT 134.) The district court denied Mr.

Kleinman's proposed jury instruction and provided no other instruction as to Mr. Kleinman's theory of defense.

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

C. Sentencing Proceedings

Sentencing was set to be heard on September 29, 2014. Accordingly, the Presentence Investigation Report ("PSR") was filed on August 8, 2014 and Mr. Kleinman filed his objections to the PSR and his sentencing memorandum on September 8, 2014. (CR 510.) Ten days later, on September 18, 2014, the government filed an ex parte application for an extension of time to October 27, 2014 to file its objections to the PSR and its sentencing memorandum and to continue sentencing to November 10, 2014. (ER 598-632.) Mr. Kleinman opposed. (CR 526.) Nevertheless, the district court granted the government's application and continued sentencing. After an additional continuance, sentencing was set for December 8, 2014. Mr. Kleinman filed supplemental information in support of his sentencing memorandum on November 14, 2014, and a motion for bail pending appeal on November 24, 2014. (CR 556, 558.) The government filed no response.

Four days before the sentencing hearing, over a month after the deadline to file its position on sentencing, and over two months after the deadline to file its

objections to the presentence report, the government filed its late sentencing memorandum, including its objections to the PSR, in violation of Fed. R. Cr. P. 32(f) on December 4, 2014. (ER 634-55.) The government was highly critical of the PSR and asserted that it omitted a leadership enhancement. Because the PSR omitted a leadership role, argued the government, Mr. Kleinman was not entitlted to the safety valve reduction. Notably, the government rejected the Probation Office's recommendation of a 120-month sentence and asserted that "a term of at least 211 months' imprisonment" should be imposed. Mr. Kleinman was unable to respond given the short period between the government's filing and the sentencing hearing.

On December 8, 2014, the district court rejected the PSR and adopted the government's position, including finding that Mr. Kleinman was a leader or organizer, and sentenced Mr. Kleinman to a term of 211 months, followed by supervised release for a term of five years. The district court denied Mr. Kleinman's motion for bail pending appeal and ordered him remanded into custody that day. (ER 702-03; 12/08/2014 RT 47-48.) Mr. Kleinman filed his timely notice of appeal on December 19, 2014. (ER 706.)

SUMMARY OF ARGUMENT

This federal prosecution of Mr. Kleinman based on his involvement in medical marijuana dispensaries in California must be dismissed because it violates

an express directive from Congress prohibiting the Department of Justice ("DOJ") from using funds "to prevent such States [including California] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." P.L. 113-235, Sec. 538 (Consolidated and Further Continuing Appropriations Act, 2015). Any further action by government on this case, including defending this appeal, is *ultra vires* and violates the strict separation of powers that is "essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (citing *Morrison v. Olson*, 487 U.S. 654, 685-696 (1988)). Moreover, especially in light of recent Congressional intent, the Court should revisit whether one's right to medical marijuana is fundamental under the Constitution.

Further, Mr. Kleinman's conviction requires automatic reversal because the district court committed structural error. The district court denied Mr. Kleinman due process and his Sixth Amendment right to trial by jury by stipping the jury of its power to nullify, that is render a verdict consistent with their conscience. While the district court had no duty to inform the jury of its power to nullify, the district court infringed Mr. Kleinman's Sixth Amendment rights when it instructed the jury that it would violate the law "if it willfully brought a verdict contrary to the law given to you in this case." (ER 22.) Moreover, the district court's anti-

nullification jury instruction was impermissibly coercive, having the effect of directing a guilty verdict.

The Court must also reverse Mr. Kleinman's conviction because the district court erroneously summarily denied Mr. Kleinman's motion to suppress critical evidence seized by the Los Angeles Police Department in violation of his Fourth Amendment rights, which was ultimately admitted into evidence at trial. The state magistrate judge issued a search warrant, even though the affidavit lacked probable cause that Mr. Kleinman and others had committed any crime under California law, rendering all seized items and subsequent searches unconstitutional. But even if the search warrant on its face did not lack probable cause, Mr. Kleinman made a sufficient showing that a *Franks* hearing was warranted.

Reversal is also required because the district court deprived Mr. Kleinman of a fair trial by limiting his defense evidence and then refusing to instruct the jury of Mr. Kleinman's theory of defense. Mr. Kleinman sought to present evidence that he could not be guilty of possession with the specific intent to distribute marijuana where himself and the members of the medical marijuana collectives jointly acquired and possessed the marijuana at issue. *See United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977). Despite Mr. Kleinman's theory being grounded in law, the district court limited Mr. Kleinman from further exploring his defense when cross-examining cooperating witnesses and precluded Mr. Kleinman from

admitting into evidence the agreements that demonstrated he and members jointly acquired and possessed the medical marijuana. The district court further erred by not instructing the jury on the defense theory because while the district court limited Mr. Kleinman's defense, he nonetheless presented *some* evidence of that defense, requiring the jury be instructed of his theory of defense.

Finally, Mr. Kleinman's sentence must be reversed and remanded for resentencing because it the 211-month sentence imposed in this medical marijuana case is both procedurally and substantively unreasonable. First, the government filed its objections to the presentence report only 4 days before sentencing, giving the defense no time to respond. Second, Mr. Kleinman's sentence created unwarranted sentencing disparities with co-defendants who pled guilty, some of whom received probation, and imposed an unconstitutional penalty on Mr. Kleinman's exercise of his right to go to trial. Finally, Mr. Kleinman's continued lengthy incarceration is out of line with public opinion and contravenes Congress's directive not to expend federal resources on medical marijuana prosecutions.

ARGUMENT

I. This Case Must Be Dismissed Because Continued Prosecution Contravenes Federal Statutory Law and the Constitution

In Section 538 of the 2015 Appropriations Bill, Congress gave an express directive: the Department of Justice ("DOJ") must cease using federal taxpayer dollars to prosecute medical marijuana cases. Pursuant to that directive, this

prosecution must be dismissed. Further, in light of the shifting political and social attitude concerning medical marijuana, the Court should revisit the important question of whether federal prosecutions in medical marijuana cases unconstitutionally infringes on fundamental rights.

A. Standard of Review

Legal and constitutional determinations are reviewed de novo.'" *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1133 (9th Cir. 2011) (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc) (citation omitted)). "'A district court's determinations on mixed questions of law and fact that implicate constitutional rights are also reviewed de novo.'" *Id.* When reviewing a question of constitutionality of a statute, such as the Controlled Substance Act ("CSA"), the Court "appl[ies] strict scrutiny if the governmental enactment … burdens the exercise of a fundamental right.'" *Id.* at 1141 (citations omitted). The Court asks whether the statute is "narrowly tailored to serve a compelling governmental interest." *Id.* (citation omitted).

B. The Government Must Cease Prosecution Under the Rohrabacher-Farr Amendment

1. Relevant Legal Background

In December 2014, "[t]hrough the bi-partisan leadership of twelve U.S. Representatives, Congress spoke clearly when it passed the Rohrabacher-Farr

Amendment, [Section 538 of the 2015 Appropriations Act,] issuing a statutory directive instructing the DOJ to stop interfering with state medical marijuana laws." (RJN, Exh. 1 [Brief of Members of Congress Rohrabacher (R-CA) and Farr (D-CA) as *Amici*, filed in support of defendant's position in *United States v. Lynch*, No. 10-50219, another medical marijuana case pending in this Court] at 2-3 ("Congress Amicus Brief").) On December 16, 2014, President Barack Obama signed the bill into law, which effectively directed the DOJ "to cease using federal taxpayer dollars to prosecute medical marijuana cases in the specified states" in section 538, including California. (Congress Amicus Brief at 3.) Section 538 provides:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217 (2014).

"Congress extended the force of Section 538 by passing the Continuing Appropriations Act of 2016 [], Pub. L. 114-53, § 103, 129 Stat. 502 (2015)" until December 11, 2015. *United States v. Marin Alliance*, Case No. 98-cv-00086-CRB,

2015 U.S. Dist. LEXIS 141940 at 1 n.1 (October 19, 2015). The Continuing Appropriations Act of 2016 maintained the status quo of Section 538.[2]

While the Continuing Appropriations Act of 2016 is currently in effect, and thus Section 538 is the law at the time of this filing, appropriations legislation for 2016 is pending and incorporates the same prohibition on using federal funds to prosecute medical marijuana cases. Indeed, both the House and Senate have incorporated a provision that is identical to Section 538 except that it adds numerous additional states to the list of states, bringing the total to 39 states. *See* Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, H.R. 2587, 114th Cong., § 558; An Act Making Appropriations for Law Enforcement and for Other Purposes, 2016, S. 2131, 114th Cong., § 542.

2. Congress Has Prohibited the Government From Continuing Prosecution in this Medical Marijuana Case

"Congress [] may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) (citing *United States v. Will*, 449 U.S. 200, 222 (1980)). Indeed, "when

[2] The Continuing Appropriations Act of 2016 provides for continued funding "at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2015 and under the authority and conditions provided in such Acts" and provides that such funds "shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act." Pub. L. No. 114-53, § 101.

Congress desires to suspend or repeal a statute in force, '[there] can be no doubt that…it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *Will*, 449 U.S. at 222 (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)). The Supreme Court has explained, "'The whole question depends on the intention of Congress as expressed in the statutes.'" *Id.* (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883); and citing *Belknap v. United States*, 150 U.S. 588, 594 (1893)).

Here, Congress expressed its clear intent to suspend enforcement under the Controlled Substances Act as it relates to medical marijuana. The Department of Justice therefore is prohibited by the Anti-Deficiency Act, 31 U.S.C. §§ 1341 et seq., 1511 et seq.; and Article I, Sections 8 and 9 of the United States Constitution, from continuing to expend federal resources on such prosecutions. Indeed, to continue do so in the face of this clear Congressional directive is an act in excess of the executive branch's power and "infringe[s] the constitutional principle of the separation of governmental powers." *Bowsher v. Synar*, 478 U.S. 714, 724 (1986) (quoting *Myers v. United States*, 272 U.S. 52, 161 (1925)).

The plain language of Section 538 of the 2015 Appropriations Act provides that "[n]one of the funds made available in this Act to the Department of Justice may be used … to prevent such States [including California] from implementing

their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." The authoring Congressmembers explain:

> As the debate surrounding the Rohrbacher-Farr Amendment on the House floor illustrates, federal prosecution of medical marijuana cases where state law permits its use is a tremendous waste of federal resources and is *precisely* what prompted Congress to approve the measure. California—which has regulated medical marijuana use under its Compassionate Use Act since 1996—has demonstrated over the last two decades that it is competent to enforce its own medical marijuana laws. Spending federal funds so the DOJ can continue looking over the shoulder of California, and other medical marijuana states, second guessing those states' law enforcement and charging decisions, and stepping in to bring federal criminal prosecutions against lawabiding citizens …, tramples on state sovereignty, is a waste of federal tax dollars, and is *exactly* what Section 538 prohibits.

Congress Amicus Brief at 4 (emphasis in original).

This case is *exactly* the kind of federal criminal prosecution, trampling on state sovereignty, which Congress prohibited in Section 538. As illustrated by this case, California can and does investigate medical marijuana operations and enforces its own medical marijuana regulations. In this case, California did not pursue criminal proceedings against Mr. Kleinman. In response to Mr. Kleinman's motion to dismiss the information, which explained that Mr. Kleinman was immune to such arrest and prosecution because he complied with state law, (*see* ER __; CR 437-22), the Deputy District Attorney responded that he had "read the moving papers and read the transcript," and didn't "see a basis in those to deny" Mr. Kleinman's motion, (ER __; CR 437-23 at 3). Nevertheless, the federal

government has doggedly persisted in "second guessing" California's "law enforcement and charging decisions [and its dismissals]," and "stepping in to bring federal criminal prosecutions against lawabiding citizens."

Judge Breyer considered this very issue in the Northern District of California, concluding that he was "not in a position to 'override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited.'" *Marin Alliance*, 2015 U.S. Dist. LEXIS 141940 at 12 (quoting *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001)). Judge Breyer explained that "Congress dictated in Section 538 that it intended to prohibit the Department of Justice from expending any funds in connection with the enforcement of any law that interferes with California's ability to 'implement [its] own State law[] that authorize[s] the use, distribution, possession, or cultivation of medical marijuana.'" *Id.* (citing 2015 Appropriations Act § 538). And though "[t]he CSA remains in place," Judge Breyer acknowledged it could only be enforced to the "extent that Congress has allowed in Section 538." *Id.*

Mr. Kleinman's case here must be dismissed. Prosecuting Mr. Kleinman, even if it ultimately only has a "minimal effect on California's medical marijuana regime," still "prevents" California from "implementing" its own laws permitting the distribution, possession, and cultivation of medical marijuana. *Id.* at 13-14. Indeed, Judge Breyer noted, the "reliance on the operation of other medical

marijuana dispensaries to justify enjoining this dispensary is an a fortiori reason why the injunction is inappropriate in its present form." *Id.* at 14 (emphasis in original). "It has never been a legal principle than an otherwise impermissible government intrusion can be countenanced because any one defendant is a small piece of the legal landscape." *Id.*

Finally, while the statutory language is clear on the face of Section 538, the legislative history likewise establishes that this prosecution must stop. As Judge Breyer concluded, "Without exception, it appears that both the supporters and opponents of Section 538 in Congress at least agreed that the words mean what they appear to mean." *Id.* at 18. Indeed, the legislative history establishes that Section 538 was "a bipartisan appropriations measure that looks to prohibit the DEA from spending funds to arrest state-licensed medical marijuana patients and providers." 160 Cong. Rec. 82, H4914, H4984 (daily ed. May 29, 2014) (statement of Rep. Alcee Hastings). And as explained by Lead Sponsor Dana Rohrabacher:

> The harassment from the [DEA] is something that should not be tolerated in the land of the free. Businesspeople who are licensed and certified to provide doctor recommended medicine within their own States have seen their businesses locked down, their assets seized, their customers driven away, and their financial lives ruined by very, very aggressive and energetic Federal law enforcers enforcing a law … Instead of continuing to finance this repressive and expensive approach, we should be willing to allow patients and small businesses to follow their doctors' advice under the watchful eye of State law enforcement and regulators....

160 Cong. Rec. 70, H4020, H4053-55 (daily ed. May 9, 2014).[3]

Thus, Congress has spoken: the federal harassment that is this prosecution must cease. The Court therefore should reverse with instructions to dismiss the indictment against Mr. Kleinman. While Mr. Kleinman was convicted before enactment of Section 538, the government's continued expenditure of funds to defend that conviction on appeal contravenes Congress's directive. Accordingly, Mr. Kleinman's conviction must be vacated because "the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal," as such resolution "is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence.'" *United States v. Oberlin,* 718 F.2d 894, 896 (9th Cir. 1983) (quoting *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977)).

[3] *See also Marin Alliance*, 2015 U.S. Dist. LEXIS 141940 at 18-20 (citing 60 Cong. Rec. 82, H4914, H4984 (daily ed. May 29, 2014) (statement of Cosponsor Rep. Dina Titus) ("[T]his commonsense amendment simply ensures that patients do not have to live in fear when following the laws of their States and the recommendations of their doctors. Physicians in those States will not be prosecuted for prescribing the substance, and local businesses will not be shut down for dispensing the same."); 160 Cong. Rec. 82, H4914, H4984 (daily ed. May 29, 2014) (statement of Lead Sponsor Rep. Sam Farr) ("This is essentially saying, look, if you are following State law, you are a legal resident doing your business under State law, the Feds just can't come in and bust you.");; 160 Cong. Rec. 82, H4914, H4983-84 (daily ed. May 29, 2014) (statement of Rep. John Fleming in opposition) ("What this amendment would do is, it wouldn't change the law, it would just make it difficult, if not impossible, for the DEA and [DOJ] to enforce the law.").

C. The Court Should Revisit Whether the Classification of Marijuana as a Schedule I Substance under the Controlled Substances Act is Unconstitutional

"One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). California has done just that by legalizing medical marijuana.

On remand in *Raich*, this Court recognized that the day may come when the courts determine medical marijuana is a "fundamental right" and enforcement of the CSA as to medical marijuana would be unconstitutional. *See Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007). Although the Court held "that the asserted right has not yet gained the traction on a national scale to be deemed fundamental," *id.* at 869, the Court opined:

> Justice Anthony Kennedy told us that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence* [*v. Texas*, 539 U.S. 558, 579 (2003)]. For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected. Until that day arrives, federal law does not recognize a fundamental right to use medical marijuana prescribed by

> a licensed physician to alleviate excruciating pain and human suffering.

Id. at 866.

That day has arrived. The political and social landscape has changed drastically since the Supreme Court's opinion in *Raich* in 2005. *See United States v. Pickard*, No. 2:11-CR-00449-KJM, 2015 U.S. Dist. LEXIS 51109 at 2 (E.D. Cal. 2015) ("It has been forty-five years since Congress passed the Controlled Substances Act, including marijuana in Schedule I. … To say the landscape with respect to marijuana has changed significantly since 1970, in many ways, is an understatement."). Today, an overwhelming majority of the states and a number of territories have deregulated marijuana in some form, from decriminalizing marijuana possession to legalizing its use for medical purposes or even recreational use. The Department of Justice itself has recognized the changing landscape and adopted policies limiting the enforcement of the CSA as to medical marijuana. *See* Memorandum for Selected United States Attorneys dated October 19, 2009.[4] And as discussed above, Congress and the President have signed into law appropriations bills to stop funding for federal prosecutions that interfere with states' medical marijuana laws. Thus, medical marijuana is no longer an "experiment" tested by a "single courageous state," *Raich*, 545 U.S. 1, 43, and the

[4] http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf.

Court must now recognize "a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering." *Raich*, 500 F.3d at 866.

Moreover, by Congress's own recognition, there can be no compelling justification – or even any rational basis – for the federal government to continue criminalizing medical marijuana. Indeed, Congress has expressly disavowed any need for federal intervention through its appropriations legislation, recognizing that the states are "competent to enforce [their] own medical marijuana laws and that federal prosecutions are a "waste of federal tax dollars." (Congress Amicus Brief at 4.) Accordingly, this prosecution is an impermissible and unconstitutional exercise of federal power and must be dismissed.

II. The District Court Denied Mr. Kleinman His Due Process Rights and Sixth Amendment Right to Trial By Jury By Stripping The Jury of Its Power to Nullify

A. Standard of Review

Generally, the Court reviews jury instructions for an abuse of discretion. *See United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). However, where the claimed jury instruction violates a defendant's constitutional right the Court reviews de novo. *Cf. United States v. Lopez*, 500 F.3d 840, 847 (9th Cir. 2007) (due process). "Whether a judge has improperly coerced a jury's verdict is a mixed question of law and fact we review de novo." *United States v. Berger*, 473

F.3d 1080, 1089 (9th Cir. 2007) (citing *Jiminez v. Myers*, 40 F.3d 976, 979 (9th Cir. 1994)).

Because the anti-nullification instruction affected the framework of the jury trial by depriving the jury of its most fundamental power, the error is structural and requires automatic reversal. The Supreme Court explains that "structural defects" "defy analysis by 'harmless-error' standards" because they "affect the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Indeed, structural errors "infect the entire trial process" and "necessarily render a trial fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 8 (1999) (quotations omitted). "Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.'" *Id.* at 8-9 (quotation omitted). Such errors accordingly require reversal, regardless if the error could be deemed harmless.

Even if the anti-nullification instruction were not deemed a structural error, it must be shown to be harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 23-24 (1967). "The burden of proving a constitutional error harmless beyond a reasonable doubt rests upon the government." *Lopez*, 500 F.3d at 845 (citing *United States v. Williams*, 435 F.3d 1148, 1162 (9th Cir. 2006)).

B. The District Court Committed Structural Error by Giving an Anti-Nullification Instruction That Effectively Stripped the Jury of Its Power to Nullify, Requiring Reversal

The power of the jury to nullify, that is to "acquit the defendant even when the government has proven its case beyond a reasonable doubt," *United States v. Powell*, 955 F.2d 1206, 1212-13 (9th Cir. 1991), is an integral and essential part of our jury system. As Justice Oliver Wendell Holmes expressed, "the jury has the power to bring in a verdict in the teeth of both law and facts" and that "the jury [is] allowed the technical right, if it can be called so, to decide against the law and the facts." *Horning v. District of Columbia*, 254 U.S. 135, 138-39 (1920); *see also Standefer v. United States*, 447 U.S. 10, 22 (1980) (noting that juries in criminal cases are permitted to "acquit out of compassion or compromise or because of 'their assumption of a power which they ha[ve] no right to exercise, but to which they [are] disposed through lenity'") (quoting *Dunn v. United States*, 284 U.S. 390, 393 (1932)). This "ability to acquit 'in the teeth of both law and facts,' is a well-established power that … 'has been with us since Common Law England.'" *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005) (internal quotations omitted). And the Supreme Court has recognized that the constitutional right to a jury trial encompasses this power of the jury to nullify. *United States v. Gaudin*, 515 U.S. 506, 513-14 (1995) (the "historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every

issue," includes "find[ing] a verdict of guilty or not guilty as their own consciences may direct") (internal quotation marks omitted).

The importance of jury nullification rests on the premise that "[t]he jury occupies, and should continue to occupy, an independent role in our judicial system." *United States v. Simpson*, 460 F.2d 515, 520 (9th Cir. 1972). As scholars have explained, "the value of the law is not only in its predictability but also in its ability to be responsive to the citizens' own lives and to conform with the citizens' expectations and understanding of the law…. This in turn elevates the value of nullification within the democracy as a mechanism through which the citizens can voice dissent and exercise discretion previously reserved for more formal actors." Jenny E. Carroll, *Nullification as Law*, 102 GEORGETOWN L.J. 579, 583 (2014). Thus, "nullification is a vital component of democracy and its lawmaking function." *Id.* at 586. Further, jury nullification is an avenue for the people to express their dissent to unjust laws: "The doctrine of jury nullification is based on community dissent where juries can push back on the law through refusal to observe it." McKillop Bradford Erlandson, *Revisiting Progressive Federalism*, 68 U. MIAMI L. REV. 853, 866 n.87 (2014).

With this in mind, no court has stripped this important *power* to nullify from the jury. While courts have held that jurors need not be informed of their power to nullify, courts have acknowledged the difference between the jury's "technical

right" or *power* to nullify and the jury's right to be informed of this power. *See United States v. Navarro-Vargas*, 408 F.3d 1184, 1198 (9th Cir. 2005) (citing cases).

Here, the district court did more than *not* instruct the jury of their power to nullify. The district court went one step further and affirmatively instructed the jury that it did not have the power to nullify. Specifically, the court instructed:

> You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not your determination whether a law is just or whether a law is unjust. That cannot be your task. There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.

(ER 21-22.)

This instruction flies in the face of the well-established and constitutionally required power to nullify. The district court's overt statement that "[t]here is no such thing as valid jury nullification," is flatly wrong and ignores the history, purpose, and guarantees of our jury system. Contrary to the court's instruction, jurors *do* have the power to determine whether a law is just or unjust and to render a verdict consistent with their conscience. However, when the district court instructed the jurors that they would violate not only their oath, but also *the law*, if they "willfully brought a verdict contrary to the law," the jurors had no choice but to reqlinquish their power to nullify under threat of facing punishment themselves

for their violation of law. The anti-nullification instruction thus deprived Mr. Kleinman of the "basic protections" of "the historical and constitutionally guaranteed right" of a criminal trial by jury under the Sixth Amendment. *See Gaudin*, 515 U.S. at 513-14.

The deprivation of Mr. Kleinman's jury trial right was a structural error requiring automatic reversal. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (holding constitutionally deficient reasonable-doubt jury instruction instruction is structural error requiring reversal). Indeed, "[t]hat must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee." *Id.* Moreover, the Sixth Amendment right to jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Id.* (citing *Sparf v. United States*, 156 U.S. 51, 105-106 (1895)). However, here, by stripping the jury of its power to nullify and render a verdict consistent with their conscience, it cannot be said with any certainty that the jury *actually* rendered a verdict of guilty, rather than being directed by the district court to find Mr. Kleinman guilty. Such error is thus structural and requires automatic reversal. *See id.* ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else

directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.").

C. The District Court's Anti-Nullification Instruction Also Impermissibly Coerced a Guilty Verdict and Was Not Harmless Under Any Standard

In reviewing "whether a judge's statements to a jury were impermissibly coercive," the Court "appl[ies] a 'totality of the circumstances' analysis." *Berger*, 473 F.3d 1080 (citing *Jiminez v. Myers*, 40 F.3d 976, 980 (9th Cir. 1994)). The Court has identified three pertinent factors in the analysis: the form of the jury charge; the total time of deliberation; and other indicia of coerciveness or pressure. *Weaver v. Thompson*, 197 F.3d 359, 366 (9th Cir. 1999) (citing *United States v. Wills*, 88 F.3d 704, 717 (9th Cir. 1996)).

Here, the form of the jury charge could not have been more coercive: the district court charged the jury that they would *violate the law* if they returned a verdict that was "contrary to the law given to you in this case." (ER 21-22.) Since "the law given to [the jury] in this case" was the instruction that under federal law it is illegal to possess with intent to distribute marijuana without exception, the jurors had to fear that any not-guilty verdict would appear to be illegal jury nullification. Further, it logically follows that violating the law has punitive consequences, and "[j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors." *United*

States v. Rosenthal, 445 F.3d 1239, 1246 (9th Cir. 2006). "The threat of punishment works a coercive influence on the jury's independence, and a juror who genuinely fears retribution might change his or her determination of the issue for fear of being punished." *Id.*

Thereafter, the short deliberation exemplified the coercive effect of the instruction. The jury only deliberated for a little over two hours in this seven-day trial, before finding Mr. Kleinman guilty on all counts. This short deliberation time strongly suggests that the jurors felt they had no choice but to convict.

Finally, "other indicia of coercion [and] pressure" certainly warrant a finding that the instruction was impermissibly coercive. Informing the jury that they must only follow federal law, and ignore state law and their own feelings toward federal law, was a theme throughout trial, beginning with jury selection. For example, the district court stated during voir dire:

> As it should be evident to everybody now, under California state law it is permitted for certain people to use and sell marijuana for medical purposes in limited circumstances. This case is not about whether or not there has or has not been compliance with state law. You may have noticed that when you entered this building it says "United States Courthouse." This matter is being tried under federal law and it will be federal law which controls this case, and it's under federal law which forbids the possession, sale, and distribution of marijuana **for any purpose**.

(ER 444 (emphasis added).) The district court also informed jurors that it was "not our function" to consider the contradictions of federal law with state law but rather only to determine whether there has been a violation of federal law. (ER 447.) And finally, the district court asked prospective jurors: "Let's assume that all of you disagree with federal drug laws. The question at this point is can you follow my instructions on federal drug laws, and if the government has satisfied its burden of proof, would you be able to return a guilty verdict of a violation of federal law even though you disagreed with it?" (ER 448.)

Once the jury was impaneled and the prosecution's case underway, the district court became concerned that the jury may consider nullification due to protest signs in front of the courthouse, informing the jury of their power to nullify. In a dramatic gesture, the district court proceeded to interview each juror individually. Thus, each juror was put on the spot to assure Judge Wright that he or she would not nullify. And since the nullification protests were obviously aimed at persuading jurors to acquit, the jurors logically would have come away from the experience believing they could not legitimately acquit.

Against this backdrop, the court's inclusion in its final charge of an instruction that jurors would violate the law if they returned a verdict contrary to federal law inevitably and impermissibly directed the jurors to find Mr. Kleinman guilty.

III. The Seizure of Evidence Under a State Search Warrant Violated Mr. Kleinman's Fourth Amendment Rights Where It Failed to Establish Probable Cause to Find a Violation of State Law

The Fourth Amendment forbids "unreasonable searches and seizures" and provides that "no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "Suppression hearings are often as important as the trial itself." *United States v. Prieto-Villa*, 910 F.2d 601, 609-10 (9th Cir. 1990) (citing *Waller v. Georgia*, 467 U.S. 39, 46 (1984)). Mr. Kleinman's Fourth Amendment rights were violated because the affidavit in support of the state search warrant lacked probable cause and that the admission of evidence seized from that search is reversible error. At the very least, Mr. Kleinman made the requisite showing that a *Franks* hearing was warranted.

Yet, the district court, without a hearing and without making any factual findings, summarily denied Mr. Kleinman's motion to suppress. But as Mr. Kleinman asserted, the affidavit submitted on behalf of the state search warrant used to seize evidence at various medical marijuana collectives and homes, including his own home, lacked probable cause and contained material omissions and misrepresentations. Had the state judge been apprised of the accurate facts, the

state judge in no way could have found probable cause of illegal activity, as the medical marijuana collectives complied with state law.[5]

A. Standard of Review

The Court reviews the denial of a motion to suppress de novo. *United States v. Barnes*, 713 F.3d 1200, 1202 (9th Cir. 2013) (citing *United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011)). "Underlying factual issues are reviewed for clear error." *United States v. Cervantes*, 703 F.3d 1135, 1138 (9th Cir. 2012) (citing *United States v. Summers*, 268 F.3d 683, 686 (9th Cir. 2001)).

B. Relevant Legal Background

In 1996, the California state legislature enacted law legalizing the use of medical marijuana under the Compassionate Use Act ("CUA"). The CUA provides "limited immunity from state criminal prosecution, including a defense at trial, for two marijuana-related offenses: possession ([Cal. Health & Saf. Code] § 11357) and cultivation ([Cal. Health & Saf. Code] § 11358)." *People v. London*, 228 Cal.App.4th 544, 511 (2014). To further the CUA's stated purpose, the California state legislature enacted the Medical Marijuana Program Act ("MMPA") in 2003. *Id.* at 552. "The MMPA did not amend; it is a separate legislative scheme that

[5] Evidence seized included "the laptop," which the government contended was pertintent to its case, (ER 71-87; CR 165), and later proved to be critical to its case as Exhibit 1.

implements the CUA." *Id.* Thus, "[t]he MMPA abrogated pre-MMPA case law … to the extent that case law 'took a [more] restrictive view' of the activities allowed by the CUA than the MMPA." *Id.* at 552-53 (quoting *People v. Urziceanu*, 132 Cal.App.4th 747, 772-73 (2005)). As the Supreme Court of California explained, "At the heart of the MMP[A] is a voluntary 'identification card' scheme that, unlike the CUA—which … provides only an affirmative defense to a charge of possession or cultivation—provides protection against arrest for those and related crimes." *People v. Kelly*, 47 Cal.4th 1008, 1014 (2010).

With the enactment of the MMPA, "qualified patients, valid identification cardholders, and their respective primary caregivers, if any, [are allowed] to form nonprofit groups, and through those groups, *pay each other and receive compensation and reimbursement from each other* in amounts necessary to cover the 'overhead costs and operating expenses' of cultivating and providing medical marijuana to the qualified patient and valid cardholder members of the group." *London*, 228 Cal.App.4th at 564 (quoting Cal. A.G. Guidelines, § IV.B.6., p. 10; citing Cal. Health and Saf. Code §§ 11362.765, 11362.775) (emphasis in original). Further, the "MMPA does not limit the number of qualified patient members a medical marijuana cooperative or collective may have," *id.* (citing *People v. Jackson*, 210 Cal.App.4th 525, 537 (2012)), nor must "all members of [a]

cooperative or collective [] participate in cultivating marijuana for other members," *id.* (citing *People v. Colvin*, 203 Cal.App.4th 1029, 1039 (2012)).

C. The Search Warrant Lacked Probable Cause, Requiring Suppression of All Seized Evidence from the LAPD

The evidence seized by the LAPD should have been suppressed because the affidavit in support of the search warrant cannot support a finding of probable cause under state law. *See United States v. $186,416.00*, 590 F.3d 942, 948 (9th Cir. 2010) ("[T]he search was [] illegal … because it violated [claimant medical marijuana dispensary's] Fourth Amendment right against unreasonable searches and seizures, in light of the absence of probable cause under state law.").

After LAPD Officers Mangrum and Walden investigated certain medical marijuana collectives—Medco Organic and The Relief Collective—in the Los Angeles area, Officer Mangrum sought to obtain a search warrant of the medical marijuana collectives and individuals' homes, including Mr. Kleinman's, attesting:

> Not requiring "members" to participate in any activities of the "collective" and marking the marijuana packaging with "Rx" to make it appear to be a legitimate pharmaceutical product are violations of the California Compassionate Use Act of 1996 and the California Medical Marijuana Program. Further, exchanging marijuana solely for money is a violation of California Health and Safety Code Section 11360 (Sales of Marijuana).

(ER 399.) As demonstrated above, however, California law provides that each member of a cooperative or collective need *not* participate in cultivating marijuana

and members *may* receive money for compensation and reimbursement. *London*, 228 Cal.App.4th at 564; *Colvin*, 203 Cal.App.4th at 1039-1041. As early as 2005, the California courts held that the MMPA "contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." *Urziceanu*, 132 Cal.App.4th at 785; *see also Jackson*, 210 Cal.App.4th at 529-30 ("[T]he collective or cooperative association required by the act need not include active participation by all members in the cultivation process but may be limited to financial support by way of marijuana purchases from the organization.").

Further, it cannot be more clear that the affidavit lacked probable cause, as the state criminal court ultimately granted Mr. Kleinman's motion to dismiss the information on the basis that Mr. Kleinman was immune from arrest and prosecution under California's medical marijuana laws. Indeed, even the Deputy District Attorney agreed that he found no reason why the state criminal court should not grant the motion. (ER 434.)

Accordingly, the search warrant affidavit, relying as it did on the fact that patients were not required to cultivate marijuana and that the dispensary received payment, was insufficient to establish probable cause to find illegal activity under California law. The factual basis attested to by Officer Mangrum therefore lacked

probable cause of illegal activity, and the search warrant that issued on that basis was in violation of Mr. Kleinman's Fourth Amendment rights.

D. At a Minimum, Mr. Kleinman Made the Requisite Showing for a *Franks* Hearing, as the Search Warrant Contained Reckless Material Omissions of Fact

A defendant is entitled to a hearing under *Franks* if he "makes a substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit cannot support a finding of probable cause without the allegedly false information." *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000); *see also Franks v. Delaware*, 438 U.S. 154, 170 (1978). The LAPD officers who sought and obtained the search warrant at issue ignored legal precedent and fashioned an affidavit in support of finding probable cause by omitting relevant material facts that demonstrated that the collectives under investigation complied with state law. Mr. Kleinman made a substantial showing that Officer Mangrum intentionally and recklessly made misleading omissions in his affidavit, and that once provided the full picture, the affidavit cannot support a finding of probable cause under state law.

In his affidavit, Officer Mangrum described entering the dispensary where he "observed various strains of marijuana in clear glass display jars along with a white dry erase board on the wall displaying the various strains." He then "spoke with an employee 'Eddie' at the dispensary" about "how it worked to be part of

their collective," and "Eddie" replied that he "did not have to do anything except show [his] ID and doctor recommendation every time [he] came in." And "Eddie" told him that Officer Mangrum did not need to grow any marijuana. (ER 398-99.)

At a preliminary hearing in the state criminal proceeding, however, Officer Mangrum detailed his experience *differently* in entering Medco and his purchase of medical marijuana. What came to light were material facts that Officer Mangrum omitted from his affidavit that demonstrated that the collectives were operating in accordance with state law. Specifically, Officers Mangrum and Walden entered the dispensary into a room where a security guard awaited. Inside this room, the security guard asked to the see their identification cards and doctors' recommendations. While the security guard verified that information, the officers "completed membership applications." (ER 200-01.) Further, the security guard verified the doctors' recommendations, which Officer Mangrum confirmed was a valid recommendation that he had received from a doctor. (ER 201.). It was only then that the security guard allowed each officer to enter a backroom and purchase medical marijuana. (ER 201-02.)

These omitted facts were material to the finding of probable cause, and certainly would have eliminated any basis for finding a violation of state law. The district court should have, at a minimum, granted a *Franks* hearing to determine whether the search warrant affidavit contained intentional or reckless material

omissions and, if so, whether probable cause existed taking into account the omitted facts.

E. The Failure to Exclude Evidence Seized as a Result of the Illegal Search Requires Reversal

Reversal is required where the evidence from an erroneous denial of a motion to suppress is introduced and is "central to the conviction." *Barnes*, 713 F.3d at 1202. The evidence seized by the LAPD included the laptop that was ultimately provided to the federal government, and the laptop and evidence retrieved from the subsequent search of that laptop should have been suppressed as fruits of the illegal search and seizure. Instead, the laptop was introduced at trial as Exhibit 1.

The laptop was central to the government's case because, as contended by the government, and explained by cooperating witnesses, the laptop contained day-to-day transactions of the medical marijuana dispensaries, detailing the purchases and sale of the medical marijuana. The government then had Special Agent Kelly create a chart from the data on the laptop, which the government presented at trial, to argue to the jury that through the purchases and sales of medical marijuana, Mr. Kleinman and others possessed over 1,000 kilograms of marijuana throughout the period at issue. Accordingly, the failure to suppress the evidence seized based on

the unlawful state search warrant requires reversal of Mr. Kleinman's conviction and sentence.

IV. The District Court Deprived Mr. Kleinman of a Fair Trial When It Limited Defense Evidence and then Refused to Instruct the Jury Regarding Mr. Kleinman's Joint Ownership Defense

A. Standard of Review

Whether the district court's instructions adequately covered a defendant's proffered defense is reviewed de novo. *United States v. Morsette,* 622 F.3d 1200, 1201 (9th Cir. 2010). Further, if an evidentiary ruling "precludes the presentation of a defense, review is de novo." *United States v. Lynch*, 367 F.3d 1148, 1159 (9th Cir. 2004) (citing *United States v. Ross*, 206 F.3d 896, 898-99 (9th Cir. 2000)). The Court also "review[s] de novo whether the error 'rises to the level of a constitutional violation.'" *United States v. Haischer*, 780 F.3d 1277, 1281 (9th Cir. 2015) (quoting *United States v. Pineda-Doval*, 614 F.3d 1019, 1032 (9th Cir. 2010)). "If it does," the Court "must reverse the conviction unless [the Court] conclude[s] that the error was harmless beyond a reasonable doubt. *Id.*

B. Relevant Background

The government's case against Mr. Kleinman was that Mr. Kleinman trafficked marijuana by running "storefronts" that were part of his medical marijuana dispensaries. Cooperating witness Paul Montoya testified that there

were different "transactions" at the dispensaries. There were the people "coming through the front door and the back door." Those who came through the front door, "the retail patients" was "just basically [] small amounts." Mr. Montoya further testified that "the back door, … was, like, the wholesale business." Mr. Montoya explained, those buyers were "other stores." (ER 498; 05/30/2014 RT 132.) In addition to the "front door" and "back door" transactions, there was evidence that there were some out-of-state shipments to Philadelphia and New York, in the amount of approximately 85 kilograms of marijuana. (ER 700; 12/8/2014 RT 45.)

Mr. Kleinman intended to present a defense that he could not be guilty of possession *with intent to distribute* any marijuana because he and the members of the collectives, to whom Mr. Kleinman sold medical marijuana, had joint possession of the marijuana at issue, negating any intent to distribute. *See United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977). The district court initially allowed defense counsel to cross examine cooperating witnesses regarding the make up of the cooperatives, and whether prospective members signed an agreement, whereby members agreed to jointly possess the medical marijuana. Mr. Montoya testified that members did sign such an agreement. (*See, e.g.*, ER 484; 05/30/2014 RT 118.) However, shortly after defense counsel began questioning cooperating witness Montoya, the government requested a sidebar and

contended that such questioning was "completely irrelevant." (ER 492; 05/30/2014 RT 126.) The district court agreed and ultimately found such evidence irrelevant." (ER 494; 05/30/2014 RT 128.) Mr. Kleinman also sought to introduce the written agreement the collective members signed agreeing to joint ownership, but the district court excluded the agreement as irrelevant. (ER 539-43, 579-80; 06/04/2014 RT 110-14, 06/06/2014 RT 72-73.)

Despite being limited in exploring the members' joint ownership of the medical marijuana, defense counsel requested a jury instruction on the theory of its defense concerning joint ownership. Defense counsel explained,

> Our opinion in this case and our theory of it is that while there may or may not have been an agreement with [Philadelphia buyer] to collectively possess this marijuana, many of these supposed customers who came -- all of the supposed customers who came in through the front door of these dispensaries signed an agreement to collectively possess that marijuana. And according to testimony given in this court, many of the customers coming in through the back door had also signed that agreement to collectively possess and share that marijuana given by Paul Montoya because they first came in through the front door and then came in through the back door. So all of those persons together were a member of a collective jointly possessing, acquiring, and using that drug for their own personal use.

(ER 550; 06/05/2014 RT 13.)

The defense proposed a jury instruction that, "Where a group of individuals jointly purchase and then simultaneously and jointly acquire possession of a drug for their own use intending only to share it together, they cannot be found guilty of the offense of distribution of the drug." (ER 555; 06/05/2014 RT 134.) While the

district court stated, "I don't have much problem with that" (*id.*), it nevertheless refused to give the instruction, commenting, "Okay. Listen, you gave it a good shot. I appreciate that you kept a straight face. That was good." (ER 559-60; 06/05/14 RT 138-139.)

C. The District Court's Refusal to Instruct the Jury Regarding Mr. Kleinman's Theory of Defense is Reversible Error

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 58, 63 (1988). Ninth Circuit "cases hold that '[a] defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence.'" *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007) (quoting *United States v. Fejes*, 232 F.3d 696, 702 (9th Cir. 2000)). "A failure to give such instruction is reversible error; but it is not reversible error to reject a defendant's proposed instruction on his theory of the case if other instructions, in their entirety, adequately cover that defense theory." *United States v. Thomas*, 612 F.3d 1107, 1120 (9th Cir. 2010) (quoting *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990)); *see also United States v. Trevino*, 419 F.3d 896, 901 (9th Cir. 2005). So fundamental is the right to have the jury adequately instructed on the theory of defense that this Court has held that "when a defendant

actually presents and relies upon a theory of defense at trial, the judge must instruct the jury on that theory even where such an instruction was not requested." *United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2002). Despite clear precedent, the district court refused to instruct the jury on Mr. Kleinman's theory of defense.

Mr. Kleinman's joint ownership defense is supported by law. Mr. Kleinman relied on *Swiderski*, 548 F.2d 445, a Second Circuit case for his defense that he could not be guilty of possession *with intent to distribute* where he and the members of the dispensaries jointly possessed the medical marijuana at issue. In *Swiderski*, the Second Circuit addressed "whether joint purchasers and possessors of a controlled substance, who intend to share it between themselves as users, may be found guilty of the felony of possession 'with intent to distribute' as that phrase is used in Title 21 U.S.C. § 841(a)(1)." *Id.* at 447. The Court held "that they may not." *Id.* Accordingly, the Second Circuit reversed where the trial court had instructed the jury that intent to distribute "merely means that you intend at some point or later time to pass on all or some of it; it means you intend to sell it; it means you intend to give it away; *you can intend to give it to a friend of yours or somebody who is close to you*. If you are going to pass it on, that is to distribute under the statute." *Id.* at 448-49 (emphasis in original).

The Second Circuit reasoned:

> [W]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it

> together, their only crime is personal drug abuse - simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution.

Id. at 450. The *Swiderski* court concluded that the defendants' "simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a 'continuing criminal enterprise' or in drug distribution." *Id.*

This Court has not expressly adopted or rejected the law of *Swiderski*, In fact, the Court time and again has avoided deciding whether *Swiderski* is good law in this Circuit by distinguishing the facts of a given case. *See United States v. Wright*, 593 F.2d 105, 108 (9th Cir. 1979) ("His actions exceeded the scope of the rule propounded in *Swiderski*; Thus even if it is good law, about which we express no opinion, he was not entitled to the proffered instruction."); *United States v. Mancuso*, 718 F.3d 780, 798 (9th Cir. 2013) ("Even assuming the *Swiderski* rule was binding in the Ninth Circuit, it would not apply to Mancuso's case, because the record does not support finding that any of the witnesses pooled money with Mancuso and traveled with him to acquire the cocaine jointly, intending only to share it together.") The Court should answer in the affirmative that *Swiderski* is good law and apply its reasoning to the facts here.

Mr. Kleinman's actions do not "exceed the scope of the rule propounded in *Swiderski*." *See Wright*, 593 F.2d at 108. Mr. Kleinman's actions did not promote any "dangerous, unwanted effect of drawing additional participants into the web of drug abuse." *Swiderski*, 548 F.2d at 450. Rather, Mr. Kleinman provided medical marijuana to patients with verified doctors' recommendations, who, upon joining the collective, agreed to jointly acquire the medical marijuana. Further, Mr. Kleinman and members undoubtedly "pooled money" together to purchase medical marijuana, as that is the function of the cooperative. *See London*, 228 Cal.App.4th at 564 ("qualified patients, valid identification cardholders, and their respective primary caregivers, if any, [are allowed] to form nonprofit groups, and through those groups, pay each other and receive compensation and reimbursement from each other in amounts necessary to cover the 'overhead costs and operating expenses' of cultivating and providing medical marijuana to the qualified patient and valid cardholder members of the group.")

The rule in *Swiderski* recognizes clear congressional intent behind the Controlled Substances Act in "draw[ing] a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties." *United States v. Martin*, 599 F.2d 880, 889 (9th Cir. 1979). As was the case in *Swiderski*, the "simple joint possession [here] does not pose any of the evils which Congress sought to deter and punish through the more severe

penalties provided for those engaged in a 'continuing criminal enterprise' or in drug distribution," 548 F.2d at 450, and rather, it falls within the states' implementation and enforcement of their own laws as to the possession, cultivation, and distribution of medical marijuana, *see* Pub. L. No. 113–235, § 538.

Mr. Kleinman's theory of defense also had some foundation in the evidence. *See United States v. Johnson*, 459 F.3d 990, 992 (9th Cir. 2006). The Court has explained, "The legal standard is generous: 'a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, *even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility*.'" *Kayser*, 488 F.3d at 1076 (quoting *United States v. Washington*, 819 F.2d 221, 225 (9th Cir. 1987)) (emphasis added). Moreover, "[a] defendant needs to show only that 'there is evidence upon which the jury could rationally sustain the defense.'" *Id.* (quoting *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984) (per curiam); citing *Johnson*, 459 F.3d at 993). And "[w]here, as here, factual disputes are raised, this standard protects the defendant's right to have questions of evidentiary weight and credibility resolved by the jury." *Id.* (citing *Jackson*, 726 F.2d at 1468; *Johnson*, 459 F.3d at 993).

While the district court limited Mr. Kleinman from presenting his complete defense, the district court nonetheless permitted *some* evidence of his defense by way of permitting defense counsel on cross-examination to question cooperating

witnesses about the cooperative agreements whereby members agreed to jointly acquire medical marijuana before being permitted to make any medical marijuana purchases. Moreover, the defense would have presented additional evidence in support of the joint ownership defense, including the collective agreement itself, but the district court erroneously precluded such evidence as irrelevant. The evidence that was presented, especially when combined with the evidence that was erreoeously precluded, amply supported the defense's proposed jury instruction on its theory of defense.

And the district court gave no "other instructions, in their entirety, [that] adequately cover[ed]" Mr. Kleinman's theory of defense. *Trevino*, 419 F.3d at 901. Indeed, the defense was not able to present any theory of defense, as evidenced by the district court's later observation that Mr. Kleinman "has literally no defense and offered none at trial." (ER 715.)

In the end, allowing defense counsel to elicit minimal evidence and make some argument in its closing regarding the theory of defense did not adequately convey to the jury that Mr. Kleinman's defense was that he could not legally be found to possess medical marijuana with the specific intent to distribute because he and the members jointly acquired and jointly possessed the marijuana at issue, absent any instruction informing the jury of that defense. Accordingly, Mr. Kleinman's conviction must be reversed and the case remanded for new trial.

V. Mr. Kleinman's 211-Month Sentence is Procedurally and Substantively Unreasonable

A. Standard of Review and Applicable Legal Standards

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007); *Carty*, 520 F.3d at 993. The Court "first consider[s] whether the district court committed significant procedural error," then it "consider[s] the substantive reasonableness of the sentence." *Carty*, 520 F.3d at 993.

In considering the substantive reasonableness of a sentence, the Court consider the totality of the circumstances. *Carty*, 520 F.3d at 993. "The overarching statutory charge for a district court is to 'impose a sentence sufficient, but not greater than necessary' to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." *Id.* at 991 (quoting 18 U.S.C. § 3553(a)).

B. The Court Must Remand for Resentencing Because the Government Violated Rule 32(f) and Prejudiced Mr. Kleinman

As an initial matter, Mr. Kleinman's sentence must be vacated because it was procedurally defective. The government did not comply with the Federal Rule of Criminal Procedure 32(f)(1), which provides that "[w]ithin 14 days after receiving the presentence report ("PSR"), the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report." Despite the clear and unambiguous rule, the government stated its objections in writing far more than 14 days after it received the PSR. Indeed, it filed no written objections to the original PSR, and after the Probation Office submitted its revised PSR on September 17, 2014, the government filed its written objections nearly two-and-a-half months later, on Thursday, December 4, 2014, *one business day before* the Monday sentencing hearing on December 8, 2014. In doing so, the government sandbagged Mr. Kleinman and gave neither defense counsel nor the Probation Office any meaningful opportunity to investigate and respond to the government's objections. *See* Fed. R. Cr. P. 32(f)(3). Nor did Mr. Kleinman have any meaningful opportunity to respond in writing to the government's objections and its sentencing position in general.

The government's late submission was highly prejudicial. In its sentencing papers, the government criticized the Probation Office's factual findings and

contended that the Probation Office erred in not finding that Mr. Kleinman acted as a leader. Thus, the government asserted that Mr. Kleinman was subject to an enhancement that would make him ineligible for the safety valve, and subject him to, at a mimum, the mandatory minimum of 120 months. If that were not enough, the government also recommended an astounding 211-month sentence, which was nearly double the Probation Office's recommendation of 120 months. And though Mr. Kleinman stated the government's response violated Rule 32, (*see* ER 662-63; 12/08/2014 RT 7-8), the district court nonetheless adopted the government's position, rejected the PSR, and sentenced Mr. Kleinman to a 211-month term of imprisonment.

C. The 211-Month Sentence Created Unwarranted Sentencing Disparities and Penalized Mr. Kleinman for Exercising His Sixth Amendment Right to Trial by Jury

This Court's "law prohibits a '*disparity* in sentences' based on a defendant's exercise of his right to stand trial." *United States v. Carter*, 804 F.2d 508, 516 (9th Cir. 1986) (Reinhardt, J., dissenting) (quoting *United States v. Capriola*, 537 F.2d 319, 321 (9th Cir. 1976)) (emphasis in original). Indeed, "[i]t is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial." *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (citing *United States v. Capriola*, 537 F.2d 319, 321 (9th Cir. 1976); *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973)). "This

sentencing rule has two rationales: it avoids chilling the exercise of a constitutional right, and it acknowledges that in sentencing a defendant, a court should look solely to considerations personal to that defendant." *Carter*, 804 F.2d at 516 (Reinhardt, J., dissenting) (citations omitted).

Here, Mr. Kleinman was unduly punished for exercising his Sixth Amendment right to a trial, as evidenced by his co-defendants' sentences, all of whom pleaded guilty, and all of whom received extremely lenient sentences. Five of the six co-defendants were sentenced to probation, with varying types of reentry programs. Mr. Montoya, the leader of this supposed conspiracy, also pleaded guilty to conspiracy to possess marijuana with intent to distribute, and also agreed that the quantity was over 1,000 kilograms, and he was only sentenced to 37 months of detention. Mr. Kleinman, on the other hand, was sentenced to a staggering 211 months.

The government conceded "that it's true that the sentences in this case are quite disparate," but stated "there are reasons for that." (ER 689; 12/8/2014 RT 34.) The government's "reasons," however, amount to nothing more than punishing Mr. Kleinman for going to trial. The government explained, "The defendants who have previously been sentenced not only demonstrated extraordinary efforts at self-rehabilitation and at community service and so forth, but they also came forward and offered assistance to the government, including

testifying at trial, and that means that they offered substantial assistance to the government and received appropriate motions for downward departure on their sentences under Section 5K of the Sentencing Guidelines." (ER 689; 12/08/2014 RT 34.) But even so, and ignoring that Mr. Kleinman himself "demonstrated extraordinary efforts at self-rehabilitation", (*see* ER 619), the degree of disparity between probation for two of the co-defendants and 211 months imprisonment simply cannot be justified, especially where Mr. Kleinman and those co-defendants were convicted of the *same* crime. *See United States v. Carter*, 560 F.3d 1107, 1121 (9th Cir. 2009) (collecting cases and explaining disparate treatment arguments generally fail because the complaining defendant and his or her co-defendants were convicted of *different* crimes). Nor can the disparity between Mr. Montoya's 37-month sentence and Mr. Kleinman's 211-month (17 years 5 months) sentence be justified, especially when the district court concluded that both defendants were on "equal footing" as leaders in this purported drug conspiracy.[6] (ER 665; 12/08/2014 RT 10.) As the numbers make clear, Mr. Kleinman was subject to an unwarranted disparate sentence because he elected to go to trial.

[6] Mr. Montoya surrendered to the Bureau of Prisons on January 7, 2015, and his expected release date is less than a year away, on September 8, 2016. Mr. Kleinman's expected release date, on the other hand, is March 30, 2030. *See* http://www.bop.gov/inmateloc/.

Nor was it any justification for the district court to impose such a disparate sentence based on its belief that Mr. Kleinman had no valid defense to the federal charges. "[A]criminal defendant cannot be denied the right to a trial … because he has no sturdy legal leg to stand on but thinks he has a chance that the jury will acquit him even if it thinks he's guilty." *DeBartolo v. United States*, 790 F.3d 775, 779 (7th Cir. 2015). The district court here in essence punished Mr. Kleinman for having "no sturdy legal leg to stand on" in federal court. Tellingly, in a post-sentencing ruling, the district court expressly stated, "As it was pointed out frequently at trial, Defendant was prosecuted, tried and convicted of violation of *federal* drug laws. To that, he has literally no defense and offered none at trial." (ER 715 (emphasis in original).) Although wrong, as discussed above, the district court's attitude of "no defense" permeated this prosecution and ultimately sentencing. Indeed, the district court made note repeatedly at sentencing that at trial, Mr. Kleinman was prosecuted under federal law and not state law. (ER 674, 679; 12/08/2014 RT 19, 24.)

But at a minimum, reversal is nonetheless required because the district court did not state with any specificity as to his reasoning for imposing this significant disparate sentence. The district court made no mention, nor did it provide any reasoning of this grave disparity other than: "The Court has evaluated the various kinds of sentences available as well as the Guideline Sentencing range. The Court

has also analyzed the sentences imposed on others who have either pled or been found guilty in this case in order to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." (12/8/2014 RT 45.) Yet, the district court did not provide any reasoning, much less an adequate explanation, *how* sentencing Mr. Kleinman to 211 more months than most of the co-defendants, who received only probation, and over 14 years more than Mr. Montoya, who was on "equal footing," avoided unwarranted sentencing disparaties. Thus, if reversal is not outright required due to the significant unwarranted disparite sentences, reversal is nonetheless required to provide the district court an opportunity to adequately explain its sentencing of Mr. Kleinman.

D. The Sentence Imposed Here is Substantively Unreasonable

Finally and most fundamentally, Mr. Kleinman's 211-month sentence is certainly substantively unreasonable because it does not provide *just* punishment; rather, this 211-month sentence is far greater than necessary to reflect the seriousness of this medical marijuana offense. *See* 18 U.S.C. § 3553(a). Indeed, public opinion supports that this sentence is unjust. As Rep. Rohrabacher stated:

> It is no surprise [] that public opinion is shifting []. A recent Pew Research Center survey [in 2014] found that 61 percent of Republicans and a whooping 76 percent of Independents favor making medical marijuana legal and available to their patients who need it." (Rohrabacher, H4983) ¶ As I have said, [in 2014] 29 States

> have already enacted laws that will permit patients access to medical marijuana and their derivatives. By the way, 80 percent of Democrats feel the same way.

160 Cong. Rec. 82, H4983 (daily ed. May 29, 2014). Despite the overwhelming public opinion that medical marijuana is not a danger to the public, Mr. Kleinman here was sentenced to more than 17 years in prison for his activity related to running and managing medical marijuana dispensaries.

Indeed, data released in October 2015[7] establish that this 211-month sentence imposed in this medical marijuana case is out of line with current norms. In marijuana cases at fiscal year end 2012, a majority of marijuana offenders received a sentence between one and five years in prison. And Mr. Kleinman's sentence of 17 years was more than double the average sentence of 7 years.

Finally, sentencing Mr. Kleinman to 211 months in federal custody is unreasonable in light of Congress's stated intention not to spend federal resources on medical marijuana prosecutions, as discussed above. Congress spoke clearly when it enacted the Appropriations Bill of 2015 and the Continuing Appropriations Bill, in which it directed the DOJ to cease expending monies "to prevent such States [including California] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." It

[7] http://www.bjs.gov/content/pub/pdf/dofp12.pdf at p. 6 (released Oct. 2015); *see also* http://www.bjs.gov/content/pub/pdf/dofp12_sum.pdf.

follows, that the DOJ should not be expending monies to keep Mr. Kleinman in prison until March 30, 2030, his projected release date, in this medical marijuana case. The Department of Justice reports that "[t]he fee to cover the average cost of incarceration for Federal inmates in Fiscal Year 2014 was $30,619.85 ($83.89 per day)." http://www.gpo.gov/fdsys/pkg/FR-2015-03-09/pdf/2015-05437.pdf (March 9, 2015). Given that Mr. Kleinman was sentenced to 211 months, and is expected to remain in prison until 2030, the continued costs of Mr. Kleinman's incarceration alone will exceed $450,000. This Court cannot allow this sentence to stand when it flies in the face of a clear Congressional directive.

CONCLUSION

For all the foregoing reasons, Mr. Kleinman's conviction should be vacated, or in the alternative reversed and remanded for a new trial and/or resentencing.

Dated: November 18, 2015

JAMES & ASSOCIATES

By: /s/ Becky S. James

Becky S. James
Attorneys for Defendant-Appellant
NOAH KLEINMAN

STATEMENT OF RELATED CASES

Defendant-Appellant Noah Kleinman is aware of the following pending cases that are related as defined in Ninth Circuit Rule 28-2.6 because they raise the same or similar issues.

- *United States v. Lynch*,
  Case No. 10-50219
- *United States v. McIntosh*,
  Case No. 15-10117
- *United States v. Iane Lovan, et al.*,
  Case Nos. 15-10122, 15-10127, 15-10132, 15-10137, 15-71158, 15-77174, 15-71179, 15-71225
  (consolidated with Case No. 15-10117)
- *United States v. Jerad Kynaston, et al.*,
  Case No. 15-30098
  (consolidated with Case No. 15-10117)

Mr. Kleinman informs the Court that the *McIntosh* case has been calendared for oral argument on December 7, 2015, at the James R. Browning Courthouse in San Francisco, CA.

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CERTIFICATE OF COMPLIANCE
United States v. Kleinman, No. 14-50585

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel hereby certifies that the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 15,533 words, and that a motion seeking leave to file an oversize brief is being filed concurrently with this brief.

Dated: November 18, 2015

JAMES & ASSOCIATES

By: /s/ Becky S. James

Becky S. James
Attorneys for Defendant-Appellant
NOAH KLEINMAN

CERTIFICATE OF SERVICE
United States v. Kleinman, No. 14-50585

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 18, 2015.

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.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 18, 2015, in Pacific Palisades, California.

/s/ Becky S. James
Becky S. James