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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES C. LYNCH, Defendant.	Case No. CR 07-0689-GW **SENTENCING MEMORANDUM**

I. INTRODUCTION

On August 5, 2008, defendant Charles C. Lynch was convicted by a jury of five counts of violating the federal Controlled Substance Act ("CSA"), 21 U.S.C. §§ 801 et seq. The charges arose out of his establishing and operating a medical marijuana facility - i.e. the Central Coast Compassionate Caregivers in Morro Bay, California.

In reaching the sentence in this matter, this Court has reviewed and considered inter alia the following: 1) the Indictment (Doc. No. 1)[1] and the "redacted" Indictment provided to the jury (Doc. No. 161); 2) the evidence admitted during the trial which began on July 23, 2008; 3) "Government's Sentencing Position for Defendant Charles

[1] Reference to the documents filed in this criminal case in the United States District Court, Central District of California's Case Management/Electronic Case Filing ("CM/ECF") will be to the "Document number" ("Doc. No.") indicated in the CM/ECF.

C. Lynch" (Doc. No. 232); 4) "Declaration of Special Agent Rachel Burkdoll in Support of Government's Sentencing Position; Exhibits" (Doc. No. 236); 5) "Government's Position Re: Applicability of Mandatory Minimum Sentence to Defendant Charles C. Lynch" (Doc. No. 238); 6) Notice of Lodging of Mr. Lynch's Initial Position re: Applicability of the Mandatory Minimum Sentence; Exhibits" (Doc. No. 244); 7) "Charles Lynch's Position re: Sentencing Factors; Exhibits" (Doc. No. 245); 8) "Declaration in Support of Charles Lynch's Position re: Applicability of the Mandatory Minimum Sentence" (Doc. No. 246); 9) "Government's Amended Position on Applicability of Safety Valve Provision to Defendant Charles C. Lynch" (Doc. No. 249); 10) "Government's Amended Position on Applicability of Mandatory Minimum Sentences to Defendant Charles C. Lynch" (Doc. No. 250); 11) "Government's Amended Response to Presentence Report for Defendant Charles C. Lynch" (Doc. No. 251); 12) "Government's Amended Sentencing Recommendation for Defendant Charles C. Lynch" (Doc. No. 252); 13) "Statement of Sergeant Zachary Stotz in Support of Charles C. Lynch's Position re: Sentencing Factors (Doc. No. 253); 14) "Defendant's Reply to Government's Position re: Applicability of the Mandatory Minimum Sentences (Doc. No. 254); 15) "Defendant's Reply to Government's Position re: Sentencing Factors; Declaration of Charles C. Lynch" (Doc. No. 255); 16) Letters of Jurors and Prospective Jurors (Doc. Nos. 257, 258 and 262); 17) United States Probation Office ("USPO") Presentence Investigation Report (Doc. No. 259) and Addendum to the Presentence Report (Doc. No. 260); 18) USPO Recommendation Letter initially dated November 24, 2008 (Doc. No. 314); 19) "Letters in Support of Defendant's Position re: Sentencing Factors" (Doc. No. 264); 20) "Charles Lynch's Amended Initial Position re: Applicability of the Mandatory Minimum Sentence" (Doc. No. 265); 21) "Statement in Support of Defendant's Position re: Sentencing" (Doc. No. 266); 22) "Government's Notice re Defendant Charles C. Lynch" (Doc. No. 267); 23) "Government's Response to Inquiry by the Court Regarding Sentencing" (Doc. No. 276); 24) Abram Baxter's Video-Taped "Statement

in Support of Defendant's Position re: Sentencing" (Doc. No. 277); 25) "Declaration of Joseph D. Elford in Support of Charles C. Lynch's Position re: Sentencing" (Doc. No. 279); 26) "Supplemental Letters in Support of Charles C. Lynch's Position re: Sentencing" (Doc. No. 280); 27) "Charles Lynch's Supplemental Memorandum of Points and Authorities re: Sentencing; Exhibits" (Doc. No. 285); 28) Government's Response to the Court's Inquiries During April 23, 2009 Hearing; Exhibits" (Doc. No. 286); 29) "Government's Filing re Defendant Charles C. Lynch" (Doc. No. 287); 30) "Government's Response to Defendant's Supplemental Memo of Points and Authorities re Sentencing" (Doc. No. 290); 31) "Charlie Lynch's Reply to Government's Response to Court's Inquiries During April 23, 2009 Hearing" (Doc. No. 289); 32) "Charlie Lynch's Reply to Government's Response to Supplemental Memorandum of Points and Authorities re: Sentencing" (Doc. No. 296); 33) "Supplemental Exhibit in Support of Charles Lynch's Position re Sentencing" (Doc. No. 297); 34) the other materials contained in the Court's file including previously submitted evidentiary material; 35) statements made on behalf of Lynch at the sentencing hearings on March 23, April 23 and June 11, 2009; and 36) the argument of counsel on said dates. Pursuant to 18 U.S.C. § 3553(c), this Court issues this Sentencing Memorandum which incorporates its prior positions as stated at the sentencing hearings but also more fully delineates the bases for its imposition of the sentence on Defendant Lynch.

II. BACKGROUND

A. The Conviction

Lynch was convicted of the following five counts: 1) conspiracy - (a) to possess and distribute "at least" 100 kilograms of marijuana, "at least" 100 marijuana plants, and items containing tetrahydrocannabinol ("THC"), (b) to maintain a premises for the distribution of such controlled substances, and (c) to distribute marijuana to persons under the age of 21 years - in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(B), 856 and 859; 2 and 3) sales of more than 5 grams of

marijuana to J.S., a person under the age of 21, on June 10 and August 27, 2006 in violation of 21 U.S.C. §§ 841(a)(1) and 859(a); 4) on March 29, 2007, possession with the intent to distribute approximately 14 kilograms of material containing a detectable amount of marijuana and approximately 104 marijuana plants in violation of 21 U.S.C. § 841(a)(6) and (b)(1)(B); and 5) between about February 22, 2006 and March 29, 2007, maintaining a premises at 780 Monterey Avenue, Suite B, Morro Bay, California under the name "Central Coast Compassionate Caregivers" ("CCCC") for the purpose of growing and distributing marijuana and THC. See the Verdict (Doc. No. 175); the redacted Indictment (Doc. No. 161).

B. The Legality of Medical Marijuana Dispensaries Under California and Federal Laws

The CSA establishes five schedules of controlled substances. 21 U.S.C. § 812(a). To fall within Schedule I, it must be found that:

> (A) The drug or other substance has a high potential for abuse.
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. § 812(b)(1). Congress has designated both marijuana and THC as Schedule I controlled substances.[2] 21 U.S.C. § 812(c) - (Schedule I)(c)(10) and (17). As noted in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425 (2006):

> Substances listed in Schedule I of the Act are subject to the most comprehensive restrictions, including an outright ban on all importation and use, except pursuant to strictly regulated research projects. See [21 U.S.C.] §§ 823, 960(a)(1). The Act authorizes the imposition of a criminal sentence for simple possession of Schedule I substances, see §

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[2] The CSA allows the United States Attorney General to transfer a controlled substance designation from one schedule to another or to remove it from the schedules entirely if it no longer meets the requirements for such inclusion. 21 U.S.C. § 811(a). However, attempts to move marijuana from Schedule I (which began in 1972) have proved unsuccessful both on the administrative level, see, e.g., 66 Fed.Reg. 20038 (2001), and in the courts, see, e.g., Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994). See Gonzales v. Raich, 545 U.S. 1, 15 n.23 (2005).

> 844(a), and mandates the imposition of a criminal sentence for possession "with intent to manufacture, distribute, or dispense" such substances, see §§ 841(a), (b).

Thus, federal law prohibits the manufacture (i.e. cultivation), distribution, sale or possession (with intent to distribute) of marijuana. 21 U.S.C. § 841(a)(1).

In 1996, California voters passed Proposition 215, known as the "Compassionate Use Act of 1996" ("CUA"), which is codified in California Health & Safety Code ("Cal. H & S Code") § 11362.5. See Gonzales v. Raich, 545 U.S. 1, 5-6 (2005). The purpose of Proposition 215 was to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment" of certain conditions such as cancer, glaucoma, "or any other illness for which marijuana provides relief." Cal. H & S Code § 11362.5(b)(1)(A). A goal of Proposition 215 (which has not been achieved to date) is to "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana."[3] Id. at § 11362.5(b)(1)(C). The operative sections of the CUA provide that: 1) "no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes," and 2) "[Cal. H & S Code] Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." Id. at § 11362.5(c) and (d). The term "primary caregiver" is defined in the CUA as "the

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[3] Not to be critical of Proposition 215 or the efforts of California legislators after its passage, it would appear rather obvious that, as a matter of federal law, - until such time as marijuana is removed or downgraded from the CSA's list of Schedule I controlled substances - there could never be any coordination or consistency between the federal and state governments in regards to allowing the use of marijuana for medicinal purposes. See infra; see also Raich, 545 U.S. at 33.

individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." Id. at § 11362.5(e).

After the passage of the CUA, the California courts recognized that, "except as specifically provided in the [CUA], neither relaxation much less evisceration of the state's marijuana laws was envisioned." People v. Trippet, 56 Cal. App. 4th 1532, 1546 (1997) ("We accordingly have no hesitation in declining appellant's rather candid invitation to interpret the statute as a sort of 'open sesame' regarding the possession, transportation and sale of marijuana in this state."). The issue of medical marijuana dispensaries under California law following the enactment of CUA was first considered in People ex rel Lungren v. Peron, 59 Cal. App. 4th 1383 (1997). Therein, just before the passage of the CUA, the trial court granted a preliminary injunction enjoining defendants from selling or furnishing marijuana at a premises known as the "Cannabis Buyers' Club." After the enactment of § 11362.5, the trial court modified the injunction to allow the defendants to possess and cultivate medical marijuana for their personal use on the recommendation of a physician or for the personal medical use of persons with medical authorization who designated the defendants as their primary caregivers, so long as their sales did not produce a profit. The court of appeal vacated the modification of the preliminary injunction finding that the CUA did not sanction the sale of marijuana even if it was on a non-profit basis and for medicinal purposes, and that marijuana providers such as the Cannabis Buyers' Club could not be designated as "primary caregivers" because they do not "consistently assume[] responsibility for the housing, health or safety" of their customers. Id. at 1395-97. See also People v. Galambos, 104 Cal. App. 4th 1147, 1165-69 (2002) (holding that Proposition 215 cannot be construed to extend immunity from prosecution to persons who supply marijuana to medical cannabis cooperatives).

In United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483

(2001), federal authorities brought an action to enjoin (and subsequently a contempt motion against) a non-profit medical marijuana cooperative that had been distributing marijuana to persons with physician's authorizations under the CUA. The cooperative raised a defense of medical necessity that was rejected by the district court but accepted by the Ninth Circuit. The Supreme Court reversed the Ninth Circuit's decision because "in the Controlled Substances Act, the balance already has been struck against a medical necessity exception." Id. at 499. As explained by the Court:

> Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a "determination of values." . . . . In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana. Indeed, for purposes of the Controlled Substance Act, marijuana has "no currently accepted medical use" at all. § 811.

Id. at 491.

In 2003, the California Legislature enacted the Medical Marijuana Program Act ("MMPA") (Cal. H & S Code §§ 11362.7 to 11362.9) wherein it sought to:

> (1) Clarify the scope of the application of the [Compassionate Use Act] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. (2) Promote uniform and consistent application of the [Compassionate Use Act] among the counties within the state. (3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.

California Stats. 2003, ch. 875, § 1, subd. (B); see also People v. Urziceanu, 132 Cal. App. 4th 747, 783 (2005). Among the provisions of the MMPA are: 1) the establishment through the California Department of Health Services of a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of the MMPA, see Cal. H & S Code § 11362.71(a); 2) a bar under

California law providing that "No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established [in the MMPA], unless there is reasonable cause to believe that the information contained in the card is false or falsified, [or] the card has been obtained by means of fraud," see id. at § 11362.71(e); and 3) the setting of a maximum of eight ounces of dried marijuana and "no more than six mature or 12 immature marijuana plants per qualified patient," see id. at § 11362.77(a).[4] "Primary caregiver" is given substantially the same meaning in the MMPA as it has in the CUA. Compare Cal. H & S Code § 11362.5(e) with § 11362.7(d). The MMPA envisioned collective and/or cooperative cultivation of marijuana for medical purposes. See Cal. H & S Code § 11362.775 which states:

> Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions . . . .

However, Cal. H & S Code § 11362.765(a) provides that: "nothing in this section shall . . . authorize any individual or group to cultivate or distribute marijuana for profit." Nevertheless, a primary caregiver can receive "compensation for actual expenses,

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[4] As observed in Raich, 545 U.S. at 32 n.41, "the quantity limitations [in § 11362.77(a)] serve only as a floor . . . . and cities and counties are given *carte blanche* to establish more generous limits. Indeed, several cities and counties have done just that. For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana."

Moreover, in People v. Kelly, 47 Cal. 4th 1008 (2010), the California Supreme Court held that the MMPA (enacted by the California legislature at Cal. H & S Code § 11362.77(a)) - insofar as it set amount limitations which would burden the defense to a criminal charge of possessing or cultivating marijuana under the CUA (which was enacted pursuant to the California initiative process) - impermissibly amended the CUA and, in that respect, is invalid under the California Constitution, Article II, Section 10(c). Id. at 1049. Consequently, under California law, a patient or primary caregiver may assert as a defense in state court that he or she possessed or cultivated "an amount of marijuana reasonably related to meet his or her current medical needs . . . without reference to the specific quantitative limitations specified by the MMP[A]." Id.

including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under [the MMPA] . . . ." Id. at § 11362.765(c).

The MMPA was observed to be "a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers . . . ." Urziceanu, 132 Cal. App. 4th at 785. It was viewed as contemplating "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." Id.

In Raich, the Supreme Court addressed the issue of "whether the power vested in Congress by Article 1, § 8 of the Constitution '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law." 545 U.S. at 5. Its answer was yes. The Court vacated the Ninth Circuit's decision ordering preliminary injunctive relief which was based on a finding that the plaintiffs therein had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority." Id. at 8-9. The Court did not address certain other claims raised by the plaintiffs, but not adopted by the Ninth Circuit, and remanded the case. On remand, in Raich v. Gonzales, 500 F.3d 850 (9th Cir. 2007) ("Raich II"), the Ninth Circuit did address those remaining claims and held that: 1) while the plaintiffs might have a viable necessity defense, that defense would only protect against liability in the context of an actual criminal prosecution and would not empower a court to enjoin the "enforcement of the Controlled Substance Act as to one defendant," id. at 861; 2) there was no substantive due process violation under the Fifth or Ninth Amendments because "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; and 3) the Supreme Court's decision in Raich had foreclosed plaintiffs' Tenth Amendment claim, id. at 867.

On August 25, 2008, pursuant to Cal. H & S Code § 11362.81(d), the California Attorney General issued "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" ("Cal. AG Guidelines"). See Exhibit 15 to Declaration of Special Agent Rachel Burkdoll ("Burkdoll Decl.") (Doc. No. 236); see also People v. Hochanadel, 176 Cal. App. 4th 997, 1009-11 (2009). Those guidelines recognize that "a properly organized and operated collective or cooperation that dispenses medical marijuana through a storefront may be lawful under California law" provided that it complies with the restrictions set forth in the statutes and the guidelines. See Cal. AG Guidelines at page 11, Exhibit 15 to Burkdoll Decl. The Cal. AG Guidelines also state that:

> The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego* v. *San Diego NORML* (July 31, 2008) --- Ca1.Rptr.3d ---,2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition.
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> In light of California's decision to remove the use and cultivation of physician-recommended marijuana from the scope of the state's drug laws, this Office recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws.

Id. at page 3.[5]

In November 2008, the California Supreme Court in People v. Mentch, 45 Cal. 4th 274 (2008), addressed the issue of who may qualify as a "primary caregiver" under the CUA and the MMPA. Defendant Mentch grew marijuana for his own use and for five other persons. Both he and the other five had authorizations from physicians for medical marijuana. He testified that he sold the marijuana "for less than street value" and did not make a profit from the sales. At his trial, Mentch sought to argue that he was a primary caregiver when he provided medical marijuana to the other five persons who had a doctor's recommendation. The California Supreme Court rejected that argument observing that the statutory definition of a "primary caregiver" was delineated as an individual "who has consistently assumed responsibility for the housing, health or safety" of that patient. Id. at 283; see also Cal. H & S Code § 11362.5(d). Therefore, the mere fact that an individual supplies a patient with medical marijuana pursuant to a physician's authorization does not transform that individual into a primary caregiver because he or she will not have necessarily and previously and consistently assumed responsibility for the patient's housing, health and/or safety. Id. at 284-85. The fact that the individual is the "consistent" or exclusive source of the medical marijuana for the patient makes no difference. Id. at 284-86. Likewise, "[a] person purchasing marijuana for medicinal purposes cannot simply designate seriatim, and on an ad hoc basis, . . . sales centers such as the Cannabis Buyers' Club as the patient's 'primary caregiver.'" Id. at 284 (quoting Peron, 59 Cal. App. 4th at 1396).

During a press conference on February 24, 2009, in response to a question whether raids on medical marijuana clubs established under state law represented

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[5] The Cal. AG Guidelines' language that "no legal conflict exists" is somewhat misleading. While no such conflict existed as to California law vis-a-vis "physician recommended marijuana," there certainly remained a definite conflict between federal and California laws as to the legality and enforcement of criminal statutes concerning the cultivation, possession and distribution of marijuana for medicinal purposes.

federal policy going forward, United States Attorney General Eric Holder reportedly stated, "No, what the president said during the campaign, you'll be surprised to know, will be consistent with what we'll be doing in law enforcement. He was my boss during the campaign. He is formally and technically and by law my boss now. What he said during the campaign is now American Policy."[6] See United States v. Stacy, No. 09cr3695, 2010 U.S. Dist. LEXIS 18467 at *12 (S.D. Cal. 2010). On March 19, 2009, Holder explained that the Justice Department had no plans to prosecute pot dispensaries that were operating legally under state laws.[7] Id.

C. Nature and Circumstances of Defendant's Criminal Conduct

As characterized and stated by USPO in its November 24, 2008 Sentencing

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[6] In November of 2008 during his campaign, Senator (now President) Barack Obama is reported to have stated that:

> . . . his mother had died of cancer and said he saw no difference between doctor-prescribed morphine and marijuana as pain relievers. He said he would be open to allowing medical use of marijuana, if scientists and doctors concluded it was effective, but only under "strict guidelines," because he was "concerned about folks just kind of growing their own and saying it's for medicinal purposes."

See, Bob Egelko, "Next President Might Be Gentler on Pot Clubs," San Francisco Chronicle (May 12, 2008). The same article quoted Ben LaBolt, Obama's campaign spokesman, as saying:

> "Voters and legislators in the states . . . have decided to provide their residents suffering from chronic diseases and serious illnesses like AIDS and cancer with medical marijuana to relieve their pain and suffering. Obama supports the rights of states and local governments to make this choice - through he believes medical marijuana should be subject to (U.S. Food and Drug Administration) regulations like other drugs." LaBolt also indicated that Obama would end U.S. Drug Enforcement Administration raids on medical marijuana suppliers in states with their own laws.

However, morphine as a designated Schedule II controlled substance is recognized by federal statute as having "a currently accepted medical use in treatment in the United States," see 21 U.S.C. § 812(b)(2), and hence can be prescribed by physicians as a pain reliever. Marijuana cannot - because it is classified under federal law as a Schedule I substance and hence "has no currently accepted medical use." See 21 U.S.C. § 812(b)(1).

[7] In response to this Court's inquiry regarding Attorney General Holder's statements, the Government submitted a letter from H. Marshall Jarrett, Director of the Executive Office for United States Attorneys, United States Department of Justice, which indicated that the Office of the Deputy Attorney General had reviewed the facts of Lynch's case and concurred "that the investigation, prosecution, and conviction of Mr. Lynch are entirely consistent with Department policies as well as public statements made by the Attorney General." See Doc. No. 276.

Recommendation Letter ("Sent. Rec. Let.") (Doc. No. 314), with which this Court agrees:

> [T]his case is not like that of a common drug dealer buying and selling drugs without regulation, government oversight, and with no other concern other than making profits. In this case, the defendant opened a marijuana dispensary under the guidelines set forth by the State of California . . . . His purpose for opening the dispensary was to provide marijuana to those who, under California law, [were] qualified to receive it for medical reasons.

Sent. Rec. Let. at page 4.

In 2005, Lynch obtained a prescription for medical marijuana to treat his headaches. See Presentence Investigation Report ("PSR") ¶ 101 at page 20 (Doc. No. 259).[8] In order to obtain "medical grade" marijuana, he drove to various marijuana dispensaries operating publicly in Santa Cruz and Santa Barbara. Id.; see also Sent. Rec. Let. at page 6. Noting the dearth of such dispensaries in San Luis Obispo County where he resided, Lynch investigated opening such an enterprise. He researched the law on medical marijuana distribution. See paragraphs 2-3 of Declaration of Charles Lynch ("Lynch Dec.") (Doc. No. 246). By January 2006, he opened a medical marijuana dispensary in Atascadero, California. That venture was "short lived" because the city officials used zoning restrictions to close his shop. Sent. Rec. Let. at page 4 (Doc. No. 314); PSR at ¶ 10 (Doc. No. 259).

Prior to opening the CCCC in Morro Bay, Lynch took a variety of steps. They included, inter alia: 1) calling an office of the Drug Enforcement Agency ("DEA") where, according to Lynch, he inquired regarding the legality of medical marijuana dispensaries;[9] 2) hiring a lawyer (Lou Koory) and seeking advice in regards to his

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[8] As stated in the Government's Sentencing Position for Defendant Charles C. Lynch (Doc. No. 232) at page 1, "[t]he government adopts the factual findings in the PSR, including the summary of offense conduct and relevant conduct."

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

operations (see Lynch Decl. at ¶ 4, Doc. No. 246); 3) applying to the City for a business license to operate a medical marijuana dispensary, which he obtained (id. at ¶ 7); and 4) meeting with the City of Morro Bay's Mayor (Janice Peters), city council members, the City Attorney (Rob Schultz) and the City Planner (Mike Prater) (id. at ¶ 8). The aforementioned city officials did not raise any objections to Lynch's plans. However, the City's Police Chief issued a February 28, 2006, memorandum as to Lynch's business license application indicating that, while the medical marijuana dispensary might be legal under California law, federal law would still prohibit such an operation and "California law will not protect a person from prosecution under federal law."[10] Trial Exhibit No. 179; see also Trial Exhibit No. 180.

The CCCC was not operated as a clandestine business. It was located on the second floor of an office building with signage in the downtown commercial area. See Declaration of Janice Peters at ¶ 4 (Doc. No. 246). An opening ceremony and tour of

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or what exactly was said by the employee.

Lynch raised the telephone conversation as the basis for an "entrapment by estoppel" defense. See generally United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004). Given the verdict, it is clear that the jury found that Lynch had failed to meet his burden of establishing that defense. In so deciding, the jury did not necessarily find that Lynch had lied in regards to having phoned the DEA, talking to a DEA official, and/or (as a result of that discussion) concluding that his operating a medical marijuana facility would not violate federal or state law. This is because the jury was instructed in regards to the entrapment by estoppel defense that the defendant bore the burden of proving by a preponderance of the evidence each of the following five elements:

1) an authorized federal government official who was empowered to render the claimed erroneous advice,
2) was made aware of all the relevant historical facts, and
3) affirmatively told the Defendant that the proscribed conduct was permissible,
4) the defendant relied on that incorrect information, and
5) Defendant's reliance was reasonable.

See Jury Instruction No. 34 (Doc. No. 172). The jury was also instructed that "mere ignorance of the law or a good faith belief in the legality of one's conduct is no excuse to the crimes charged in the Indictment." Id.

[10] In response to the Police Chief's memorandum, on March 13, 2006, the City Attorney for Morro Bay issued a legal opinion and justification to approve and issue a business license for CCCC, even though "under federal law the distribution of marijuana even for medical purposes and in accordance with the CUA could still lead to criminal prosecution." See Exhibit 9 to Notice of Lodging of Mr. Lynch's Initial Position Re: Applicability of the Mandatory Minimum Sentence (Doc. No. 244).

the facilities were conducted where the attendees included the city's Mayor and members of the city council. Id. Both the Mayor and Lynch separately passed out their business cards to proprietors of commercial establishments within the immediate vicinity of the CCCC who were told that, should they have any concerns or complaints about the CCCC's activities, they should notify either the Mayor or Lynch. Id. at ¶ 5; see also Lynch Decl. at ¶ 6 (Doc. No. 246). No one ever contacted either the Mayor or Lynch to make a complaint. Id.

Lynch employed approximately ten people to help him run CCCC as security guards, marijuana growers, and sales staff. See PSR at ¶ 9. He worked at the store most days. Id. He ran background checks on prospective employees and did not hire anyone with a felony record or who was an "illegal alien."[11] See Lynch Decl. at ¶¶ 15, and 22 (Doc. No. 246). Employees signed in and out via an electronic clock and Lynch ran payroll through "Intuit Quickbooks." Id. at ¶¶ 22-23. Employees had to execute a "CCCC Employee Agreement" which contained various disclosures and restrictions.[12] See Exhibit 11 to Burkdoll Decl. (Doc. No. 236).

Lynch installed a security system which included video recording of sales transactions within the facility. Lynch Decl. at ¶ 17; see also PSR at ¶ 9. The CCCC kept "detailed business records" of its purchases and sources of the marijuana. See PSR at ¶¶ 37-38. It likewise had extensive records as to its sales, including copies of the customers' medical marijuana authorizations and driver's licenses. See Redacted Indictment ¶ B-4 of Count One on page 3 (Doc. No. 161). No one under 18 was permitted to enter unless accompanied by a parent or legal guardian. Lynch Decl. at ¶ 17. Entrance to the CCCC was limited to law enforcement/government officials,

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[11] Three of these employees (Justin St. John, Chad Harris and Michael Kelly) were 19 years old when hired. See Trial Exhibits. 117-18 and 123-24.

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

patients, caregivers and parents/legal guardians. Id. at 29.

Before being allowed to purchase any marijuana product, a customer had to provide both medical authorization from a physician and valid identification. Id. at ¶ 27; see also PSR at ¶ 21. The status of the doctors listed on the medical authorization forms were also checked with the California Medical Board website. Lynch Decl. at ¶ 25. CCCC also had a list of physicians who could re-issue expired medical authorization cards.[13] A customer would have to sign a "Membership Agreement Form" wherein the buyer had to agree to the listed conditions which included, inter alia: not opening the marijuana container within 1000 feet of the CCCC, using the marijuana for medical purposes only, abiding by the California laws regarding medical marijuana, etc. See Exhibit 10 to Burkdoll Decl. In addition, the customer had to execute a CCCC "Designation of Primary Caregiver" form wherein the buyer: 1) certified that he or she had one or more of the medical conditions which provide a basis for marijuana use under the CUA, and 2) named the CCCC as his or her "designated primary caregiver" in accordance with Cal. H & S Code § 11362.5(d) and (e). Id. at Exhibit 9. Evidence presented at trial showed that the CCCC not only sold the marijuana but also advised customers on which varieties to use for their ailments and on how to cultivate any purchased marijuana plants at their homes.

Nearly all of the persons who supplied the marijuana products to the CCCC

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[13] The original indictment included a second defendant, Dr. Armond Tollotte, Jr., who was charged with, inter alia, writing up physician's statements authorizing marijuana for customers to use at CCCC and other locations for cash payments but without first determining any medical needs of the customers. See Indictment at pages 3-6 (Doc. No. 1). Prior to Lynch's trial, Tollette pled guilty to the Count One conspiracy charge. See Tollette Plea Agreement at page 4-6 (Doc. No. 96). Part of the "Factual Basis" for the plea was an admission that "On November 11, 2006, defendant received and read a facsimile from the Morro Bay store warning defendant that [Confidential Source 1] was working for law enforcement." Id. at page 5. However, Tollette never stated or admitted that he conspired with Lynch, or whether Lynch knew or should have been aware of his illegal activity. The Government did not call Tollette as a prosecution witness at trial. Lynch has stated that he "never met Dr. Tollette until I was arrested." Lynch Decl. at ¶ 11. As stated on page 6 of the Sent. Rec. Let., "there is no dedicated [sic] connection between the defendant and Tollette such that Tollette was the only doctor referring customers to the CCCC and the CCCC, in turn, was sending potential customers only to Tollette."

(referenced as "vendors") were themselves members/customers of the CCCC. See Report of Investigation at ¶ 3, Exhibit 1 to Burkdoll Decl. Lynch documented "the weight, type, and price of marijuana that he purchased from "vendors." Id. Between CCCC's opening in April of 2006 to its closing in about April of 2007, CCCC paid vendors over $1.3 million for marijuana products. Id. at ¶ 4. During that period, the top ten suppliers were paid between $150,097.50 and $30,567.50. Id. Lynch was CCCC's third largest provider and received $122,565. Id. The second highest supplier was John Candelaria II, who was a CCCC employee during part of the relevant time. Id.

Lynch maintains that he did not open CCCC to make money and that he never got his initial investment back. See Lynch Decl. at ¶ 24. The DEA claims that, based upon CCCC's records between April 2006 and March 2007, CCCC had sales of $2.1 million. See ¶ 2 of Exhibit 1 to Burkdoll Decl. However, neither side has provided an actual/reliable accounting to this Court as to CCCC's business records to determine to what extent, if any, CCCC was a profitable venture.[14]

As noted in the Sent. Rec. Let. at page 5, Lynch hired certain employees "who, by their conduct and association to the CCCC, undermined the defendant's well-intended purpose of helping those in need of medical marijuana." For example, one employee (Abraham Baxter) sold $3,2000 worth of marijuana from the CCCC to an undercover agent away from the premises without the prerequisite production of any medical authorization. Id. However, there was "nothing to indicate that the defendant knew of Baxter's extracurricular activities other than defendant's own meticulous accounting should have alerted him of unexplained inventory reductions." Id. at page

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[14] The Government has submitted a July 15, 2008 expert designation letter from Lynch's counsel which stated that Defendant's expert (i.e. Carl Knudsen) would be expected to testify that the $2.1 million sales figure is incorrect and that "Lynch made less than $100 thousand from his enterprise." See page 1 of Exhibit B to Kowal Declaration attached to Government's Opposition to Defendant's Second Motion for New Trial (Doc. No. 201). However, Knudsen did not testify and no report or other evidence was received from him or admitted at trial.

6.[15] Baxter has submitted a videotaped statement that Lynch was unaware of Baxter's improper sales. See Doc. No. 277. Likewise, there is evidence of observations by San Luis Obispo County Sheriffs of two CCCC employees (i.e. John Candelaria and Ryan Doherty) distributing bags and packages to persons immediately outside of the CCCC premises or exiting the CCCC with such bags/packages and thereafter driving off in their respective vehicles. PSR at ¶¶ 26-27.[16] The Sent. Rec. Let. at page 5 states:

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

The USPO's above-stated conclusions are highly questionable. First, if the CCCC checked the status of the doctors who issued the medical marijuana authorization and found them to be in good standing with the California Medical Board (as Lynch claimed - see Lynch Decl. at ¶ 25 - and the Government did not rebut), on what other basis would the CCCC determine whether or not the customer had a legitimate need for the marijuana? There was no physician stationed at the facility to conduct medical exams. Second, the fact that certain customers were able to walk into the store and leave "on rolling shoes" does not preclude them from having certain conditions specified in the CUA such as cancer, AIDS or migraines. Likewise, the USPO's

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

[16] There is no evidence that all of the bags/packages contained marijuana products or that any purported marijuana therein came from the CCCC. As noted above, Candelaria on his own cultivated marijuana for sale to purchasers. Likewise, the transportation of marijuana by a primary caregiver would not have been in violation of the CUA or MMPA. Also, except for uncorroborated hearsay purportedly from Doherty (see pages 7-10 of Exhibit 18 to Burkdoll Decl., Doc. No. 236), there is no evidence that Lynch was aware of those incidents.

assumption that persons under age 21 are unlikely to "suffer from disease" is unfounded in the context of persons who have gone to doctors and obtained medical authorizations for medicinal marijuana. While it might be argued (based on speculation) that persons who are physically able to leave the store on "rolling shoes" or are under the age of 21 might be more likely to have obtained their medical authorization by fraud or through unscrupulous physicians such as Dr. Tollette, that argument/supposition would be insufficient to establish fault on the part of a marijuana dispensary such as the CCCC which has checked the standing of the issuing physician.

On March 29, 2007, DEA agents executed a search warrant at the CCCC and Lynch's home. PSR at ¶ 29. Processed marijuana, marijuana plants, hashish and other marijuana products were seized along with CCCC's business records. Id. at ¶¶ 29-34. The agents did not shut the facility down at that time and Lynch continued to operate the CCCC for another five weeks. Id. at ¶ 30.

As calculated by the USPO, the total amount of marijuana involved in this case is:

Actual Marijuana Recovered and Tested by DEA	5.617 kilograms
Marijuana Determined by Extrapolation of Business Records	496.200 kilograms
THC recovered and tested by DEA (marijuana conversion: 277.9 grams of THC is the equivalent of 1,389.5 grams of marijuana	1.389 kilograms
Total	503.206 kilograms

Id. at ¶ 52 (footnote omitted).

III. SENTENCING GUIDELINES

A. Offense Level Computation

Given Lynch's conviction on multiple counts, initially it must be determined whether there are groups of closely related counts as per §§ 3D1.1(a) and 3D1.2 of the United States Sentencing Commission, Guidelines Manual (Nov. 2009) ("USSG" or

"Guidelines").[17] Counts One (conspiracy to distribute marijuana), Four (possession with intent to distribute marijuana) and Five (maintaining a premises for the distribution of marijuana) can be grouped together (henceforth collectively "Counts 1/4/5") under USSG § 3D1.2(b) as they involve the same victim ("societal interest")[18] and actions which are part of a common plan. See PSR at ¶¶ 47-48. Counts Two and Three (distribution of more than 5 grams of marijuana to a person under the age of 21) are grouped together (henceforth collectively "Counts 2/3") under USSG § 3D1.2(b) because they involve the same victim (Justin St. John - the underage recipient) and connected transactions. However, Counts 2/3 are not grouped with Counts 1/4/5 because they involve separate victims/harms. See PSR at ¶ 49.

1. Counts 1/4/5

When calculating the offense level for a group of counts, one uses the most serious (i.e. highest offense level) of the individual counts. USSG § 3D1.3(a). As to Counts One, Four and Five (as alleged and proven at trial), Count One is the most serious. For a conspiracy charge under 21 U.S.C. § 846, the base offense level is determined pursuant to the Drug Quantity Table set forth in USSG § 2D1.1(c). Here, there is sufficient evidence that the amount of marijuana and related marijuana products involved as to Count One was between 400 and 700 equivalent kilograms of marijuana-containing substances (see PSR at ¶ 52) which would fall within USSG § 2D1.1(c)(6) for a base offense level of 28 as to Counts 1/4/5.

In the PSR at ¶ 55, the Probation Office proposed an additional 4 level increase pursuant to USSG § 3B1.1(a) which so provides: "[i]f the defendant was an organizer

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[17] The November 2009 Edition of the Guidelines Manual was issued after Lynch's conviction. Typically, clarifying but not substantive amendments to the Guidelines are applied retroactively, unless the retroactive application would disadvantage the defendant and give rise to an ex post facto clause violation. See United States v. Lopez-Solis, 447 F.3d 1201, 1204 (9th Cir. 2006). In this case, the November 2009 Edition does not materially alter any Guidelines provision which is applicable in this case.

[18] As stated in USSG § 3D1.2, comment (n.2): "For offenses in which there are no identifiable victims (e.g. drug . . . offenses, when society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed."

or leader of a criminal activity that involved five or more participants or was otherwise extensive . . . ." The Government proposes increasing the base number not only pursuant to USSG § 3B1.1(a) but also by an additional level under USSG 2D1.2(a)(2) for "sales to minors." See Government's Amended Response to Presentence Report at page 1 (Doc. No. 251). For the reasons stated below in its discussion of the safety valve element in 18 U.S.C. § 3553(f)(4), this Court would not find Lynch to be an "organizer/leader" for purposes of enhancing his criminal sentence. As to the Government's citation to USSG § 2D1.2(a)(2), the Court would find it to be literally applicable.

In sum, the offense level for Counts 1/4/5 would be 29.

2. Counts 2/3

Counts Two and Three involve the distributions of marijuana in amounts over 5 grams to Justin St. John who was between 19 and 21 years, in violation of 21 U.S.C. § 859. The applicable guideline for the crime is USSG § 2D1.2. The USPO in the PSR attempts to utilize § 2D1.2(a)(1) which provides for "2 plus the offense level from 2D1.1 applicable to the quantity of controlled substance directly involving . . . an underage . . . individual . . . ." The evidence at trial was that St. John (an employee at the CCCC who had a medical marijuana authorization) was given 17.5 and 14 grams of marijuana on two separate occasions. See PSR at ¶ 59. The Probation Office then notes that, based upon CCCC's records, there were 277 underage customers and that, if one were to take the average amount of marijuana which St. John had received on those dates (i.e. 15.75 grams) and multiplied it by 277, the resulting amount would be 4.363 kilograms. That amount of drugs, under USSG § 2D1.1(c)(14), would give a base offense level of 12, which plus 2 under § 2D1.2(a)(1) would equal 14. Id.

However, this Court would find USPO's methodology to be based on pure speculation - that the average of the amounts which St. John (a CCCC employee) received on the two aforementioned occasions should be used as a multiplier for the

277 underage customers.[19] Instead, this Court would select the 13 offense level in USSG § 2D1.2(a)(4) which is utilized where the other subsections are not applicable.

3. Total Offense Level

Because the offense level for the Counts 2/3 group is more than 9 levels below the Counts 1/4/5 group, no additional enhancement for an "adjusted combined offense level" is added to the Counts 1/4/5 group total of 29 pursuant to USSG § 3D1.4.

In light of the above, the total offense level in Lynch's case is 29.

B. Lynch's Criminal History and Resulting Guidelines Range

According to the PSR, Lynch does not have any prior arrests or convictions which would be applied in determining his criminal history category. See PSR at ¶¶ 76-79. Therefore, he falls within category I. The Sentencing Guidelines range for an offense level of 29 and a criminal history category I would be 87 to 108 months.

C. Mandatory Minimum Sentences

The convictions of the crimes in Counts One, Two and Three provide for statutory minimum sentences unless some exception can be found to avoid their application.

In Count One, the jury found Lynch guilty of violating 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), 846, 856 and 859, including a specific finding that the crime involved "at least 100 kilograms of a mixture or substance containing a detectable amount of marijuana" and "at least 100 marijuana plants . . . ." See Verdict at pages 2-3 (Doc. No. 175). 21 U.S.C. § 841(b)(1)(B)(vii) provides that such amounts require that the defendant "shall be sentenced to a term of imprisonment which may not be less than 5 years . . . ."

The jury convicted Lynch of Counts Two and Three charging him with

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[19] For example, it is noted that in the Redacted Indictment provided to the jury (Doc. No. 161) in paragraphs 5 and 6 on page 4, there is reference to six distributions of marijuana to Justin St. John, one of which was only 3 grams. Further, St. John cannot be considered a typical or average CCCC customer since he was one of its employees and at least one of the distributions was supposedly a birthday gift.

distribution of marijuana to persons under the age of 21 in violation of 21 U.S.C. §§ 841(a)(1) and 859(a). In doing so, the jury specifically found that the amounts involved in such count exceeded 5 grams. See Verdict at pages 4-5. Under 21 U.S.C. § 859(a), the "term of imprisonment under this subsection shall not be less than one year."

D. Sentencing Positions

Using an offense level of 32 and the criminal history category I which resulted in a guidelines sentencing range of 121 to 151 months, the USPO's recommendation was to utilize the mandatory minimum sentence of 60 months and four-year period of supervised release as to Count One. The USPO stated:

> It is the undersigned officer's position that a sentencing range of 121 to 151 is excessive and that the nature and circumstances of the offense as well as the defendant's history and characteristics provide ample reasons to justify a sentence below this guideline range. The defendant has no prior convictions. Prior arrests were either dismissed or rejected for prosecution. He is a college graduate with skills in computer programming. He owns and operates a computer business which he expects will earn income in the future. His family and friends are very supportive of him and do not believe that he should be the victim of his conflict in federal and state laws. The defendant is now on the verge of losing his home. His credit card accounts are high as he shifts debt from one account to another to make ends meet.

See Sent. Rec. Let. at page 6.

Using an offense level of 33 and criminal history category I which resulted in a guidelines sentencing range of 135 to 168 months, the Government also concurred that 60 months incarceration followed by four years of supervised release was an appropriate sentence. See Government's Amended Sentencing Recommendation for Defendant Charles C. Lynch at page 1 (Doc. No. 252). As stated by the Government:

> As explained below, while a sentence well below the Guidelines is appropriate, a significant period of incarceration is warranted given: (1) defendant's sales to numerous minors, (2) the fact that defendant always knew he was violating federal law, (3) the fact that defendant's business violated state law, and was pervaded by transactions and behavior far from the contemplation of