

CA NOS. 10-50219, 10-50264
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant,

v.

CHARLES C. LYNCH,

Defendant-Appellant/Cross-Appellee.

DC NO. CR 07-689-GW

**MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S THIRD
CROSS-APPEAL BRIEF**

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

HONORABLE GEORGE H. WU
United States District Judge

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Defendant-Appellant/Cross-Appellee Charles C. Lynch, by and through counsel of record Deputy Federal Public Defender Alexandra W. Yates, applies to this Court under Ninth Circuit Rule 31-2.2 for a ninety-day extension of time to file the third cross-appeal brief, to February 13, 2017. This motion is based upon the attached declaration of counsel, all files and records in this case, and any other information the Court may request.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: November 7, 2016

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

DECLARATION OF ALEXANDRA W. YATES

I declare under penalty of perjury that, to the best of my knowledge, the following is true and correct:

I am a Deputy Federal Public Defender in the Central District of California. I represent Defendant-Appellant/Cross-Appellee Charles Lynch in this appeal and cross-appeal. Mr. Lynch is on bond pending appeal.

Following numerous extensions of time, the third cross-appeal brief is due on November 14, 2016.

Mr. Lynch was prosecuted for and convicted of operating a medical marijuana dispensary in California. On appeal, he filed an oversized opening brief of eighty pages, which raised eight separate challenges to his conviction and sentence, most of which have multiple sub-issues. Two amici curiae filed supporting briefs. The government filed an oversized cross-appeal brief of 149 pages, which raised two additional cross-appeal issues; the responses to many of Mr. Lynch's claims raise issues that he will need to address in the first instance in the third cross-appeal brief.

After the filing of those briefs, Mr. Lynch filed a motion in this Court challenging the legality of the government's litigation of this appeal in light of federal legislation (Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015) that prohibits the Department of Justice from spending funds that prevent California, among other states, from implementing its medical

marijuana laws. A motions panel of this Court denied the motion without prejudice to renewing it in with the third cross-appeal brief. After two new amici curiae, including the authors of the relevant legislation, filed briefs in support of further review, the Court denied en banc review of the issue in June 2015.

Because preparation of the third cross-appeal brief might have been unnecessary in light of the congressional legislation, and mindful of my obligation as a deputy federal public defender to use my time and resources most efficiently, I had not prepared the third cross-appeal brief by that time, but instead focused my attention on Mr. Lynch's motion litigation and time-sensitive matters in other cases.

Shortly thereafter, another attorney from my office, Jonathan D. Libby, was assigned the responsibility for preparing the third cross-appeal brief, due to my impending extended leave of absence from the office. Mr. Libby, who had no previous experience with Mr. Lynch's case, requested and received six extensions of time to prepare and file the third cross-appeal brief during my leave. I returned to the office last week, and have resumed responsibility for Mr. Lynch's case.

In August, this Court decided *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), addressing the very argument Mr. Lynch advanced with respect to the Section 538 (now Section 542) legislation. This Court concluded Section 542 prohibits the Department of Justice from expending funds prosecuting individuals engaged in conduct permitted by state medical marijuana laws.

Because of concerns about some of the language in the *McIntosh* opinion, several defendants in that case have petitioned for rehearing. While I was preparing to return from leave, I coauthored an amicus brief in support of the *McIntosh* defendants' motion, which we filed two weeks ago today. One other amicus curiae also filed a brief in support of rehearing. The *McIntosh* petition remains pending with this Court.

At a minimum, based on this Court's decision in *McIntosh*, Mr. Lynch should be entitled to an evidentiary hearing to determine whether the government is enjoined from further litigating his case. If *McIntosh* is amended or reheard en banc, Mr. Lynch may be entitled to relief even without an evidentiary hearing. *McIntosh* also leaves open the possibility of dismissal in some cases.

I therefore am preparing a motion seeking, at a minimum, a *McIntosh* hearing for Mr. Lynch. I also am preparing to present oral argument in an unrelated appeal in this Court on November 9. I expect to file Mr. Lynch's *McIntosh* motion shortly thereafter.

Because I recently returned from an extended leave of absence and must refamiliarize myself with the facts and legal arguments in Mr. Lynch's substantive appeal; because I must first focus on Mr. Lynch's *McIntosh* litigation; and because that litigation might make the third cross-appeal brief moot, I am seeking a ninety-day extension of time to file the third cross-appeal brief, to February 13, 2017.

In light of Section 542, is Mr. Lynch's position that opposing counsel would violate federal statutory and constitutional law if they were to expend any resources on this case. I therefore have not contacted opposing counsel to ascertain their position on this motion.

The court reporters are not in default with regard to any designated transcripts.

Executed on November 7, 2016, in Los Angeles, California.

/s Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, I electronically filed the foregoing **MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S THIRD CROSS-APPEAL BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Lorena Macias
LORENA MACIAS