

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

**DEFENDANT-APPELLANT'S REPLY TO OBJECTION TO MOTION
FOR EXTENSION OF TIME TO FILE 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, replies to the government's objection to his request for a ninety-day extension of time to file the third cross-appeal brief. The government significantly distorts the facts in its opposition, as detailed in the attached declaration of counsel.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: February 13, 2017

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:

Mr. Lynch operated a medical marijuana dispensary in Morro Bay, California, with the blessing and support of the city's government, including its mayor and city council. He was prosecuted for violations of federal drug laws that carry mandatory minimum sentences, and is on bond pending appeal.

Mr. Lynch's first cross-appeal brief originally was due on October 20, 2010. However, the parties were engaged in discussions about the possibility of a mutually agreeable disposition of the case until August 2011. I was not a party to those discussions, which were conducted by then-Federal Public Defender Sean K. Kennedy. Because of the possibility that this case might have been resolved without the need for appellate briefing, and in light of the heavy caseload that I carry as a federal public defender, I did not begin intensive work on Mr. Lynch's case until Mr. Kennedy informed me that those discussions had concluded.

I then spent several months reviewing the extensive record in the case, which includes approximately 3000 pages of transcripts, 400 docket entries, and a trial file with 20 banker's boxes of material. Because the trial record was incomplete, I had to file applications in district court to obtain the missing records, a process that took some time. I ultimately distilled several dozen issues preserved in district court to the eight I presented in the first cross-appeal brief. I also

coordinated the filing of two amicus curiae briefs in support of Mr. Lynch's claims. I filed the 80-page first cross-appeal brief on July 3, 2012.

The government's second cross-appeal brief initially was due on August 27, 2012. The government lodged the operative version of that brief on March 14, 2014; this Court accepted the brief for filing on April 11, 2014. The government's brief is 149 pages long. It raises two new cross-appeal issues, and the responses to many of Mr. Lynch's claims raise issues that I will need to address in the first instance in his third cross-appeal brief. These issues include harmless error, which requires a renewed look at the trial testimony and evidence in its entirety.

While the government was preparing its second cross-appeal brief, I was assigned to coordinate clemency petitions for the Central District of California, in response to a presidential initiative. The clemency work was time-sensitive, and took up a substantial amount of my time. Because of my clemency work, deadlines in other cases, and an emergency surgery that left my father critically ill in intensive care on the east coast for three months, I sought and received two extensions of time, of six and four months, respectively, to prepare and file the third cross-appeal brief. The government did not object to either request. Following those requests, the third cross-appeal brief was due on March 12, 2015.

However, in December 2014, Congress enacted and the President signed into law an appropriations bill that contained a rider prohibiting the Department of Justice from spending funds to prevent States from implementing their medical

marijuana laws. Within weeks of the rider's enactment, which time included the December holidays, I drafted novel briefing on the rider's application to Mr. Lynch's case, shared that briefing with the government as a courtesy before filing, and—within twenty-four hours of receiving a response from the government—filed a motion for relief in this Court. Proceedings on that motion concluded on June 22, 2015, without substantive resolution and with instruction that Mr. Lynch re-raise his arguments in his third cross-appeal brief.

Because preparation of the third cross-appeal brief might have been unnecessary in light of the appropriations rider, and mindful of my obligation as a 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 appropriations litigation and time-sensitive matters in other cases.

I was scheduled to begin a year-long maternity leave in October 2015, and had several cases, including Mr. Lynch's case, that required briefing or argument before that time. My supervisor instructed me to focus on resolving those multiple matters before my leave, and reassigned preparation of Mr. Lynch's third cross-appeal brief to another appellate attorney. Mr. Lynch's trial attorneys—who are not counsel of record on appeal—were not available to handle the brief, either due to their own workloads or their having left the office.

The newly assigned attorney had no prior experience with Mr. Lynch's case, and required a great deal of time to come up to speed on the record and issues.

While on leave, I frequently consulted with the newly assigned attorney; offered whatever guidance I was able to give; and asked his assistance in promptly filing the third cross-appeal brief. Despite my efforts, the newly assigned attorney made little progress on the brief.

In August 2016, while I was still on leave and the newly assigned attorney was responsible for this case, this Court held that the appropriations rider applies to criminal cases, and directed criminal defendants challenging their convictions based on the rider to seek relief in district court. *See United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). That decision became final on November 29, 2016, when the Court denied a petition for rehearing.

I returned from leave on November 1, 2016, and reassumed full and sole responsibility for Mr. Lynch's appeal. On December 12, less than two weeks after *McIntosh* became final, I filed a motion seeking relief in district court. The court held a hearing on that motion on February 2; I received a transcript of that hearing yesterday. Based on the outcome of that hearing, I expect and intend to file an additional motion in this Court in short order. As I explained in my request for an additional ninety days to file the third cross-appeal brief, after I file that motion, I will be able to turn my attention back to Mr. Lynch's substantive case.

Contrary to the government's speculation, at no time have I sought to delay this case for the sake of delay. It is in Mr. Lynch's interest to resolve this case as soon as possible, and I am making every effort to do so.

Executed on February 13, 2017, in Los Angeles, California.

/s Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, I electronically filed the foregoing **DEFENDANT-APPELLANT'S REPLY TO OBJECTION TO MOTION FOR EXTENSION OF TIME TO FILE 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