

Circuit and is based on the files and records in this case and the attached declaration of David Kowal.

DATED: September 3, 2013

Respectfully submitted,

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s/ David Kowal
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DECLARATION OF DAVID KOWAL

I, DAVID KOWAL, hereby declare and state as follows:

1. I am an Assistant United States Attorney (AUSA) in the Central District of California.

2. I am responsible for preparing for the government the second cross-appeal brief in United States v. Charles Lynch, C.A. Nos. 10-50219 and 10-50263. Pursuant to this Court's order granting defendant's motion to file a late, oversized first cross-appeal opening brief, the second cross-appeal brief was originally due on August 27, 2012, and then extended by orders of the Court at the government's request to September 19, 2013. For the reasons set forth below, the government requests a 21-day extension of time to file that brief such that the brief will be due on October 10, 2013. This is the government's sixth request for an extension. The period requested is the minimum amount of time the government believes that it will need to complete its work on its second cross-appeal brief, including consulting with other offices of the Department of Justice and obtaining relevant new information, as further set forth below.

3. Previously, after a delay granted due to default in preparation of transcripts by the court reporter, this Court granted defendant 12 further extensions of time to file his opening brief which totaled a period of approximately one year, nine months. These extensions included five extensions of time

covering more than six months after the Court ordered that further requests for extension of time by defendant would be "disfavored." Defendant was also granted leave to file a late and oversized opening brief.

4. The government requests a 21-day extension in order to complete its preparation and review of its answering/opening brief in this matter.

5. The following circumstances, among others, support the requested extension of time:

(A) This is a complex appeal. Defendant's oversized opening brief raises at least 19 distinct legal and factual issues arising from extensive pretrial litigation, a ten-day jury trial, post-conviction litigation that included four new trial motions, and protracted sentencing proceedings that stretched out over 18 months. Defendant's opening submission also included 16 volumes of excerpts of record in support of these issues. The government is also preparing a cross appeal raising issues concerning defendant's sentence which will add additional excerpts from the voluminous lower court record. Moreover, two amicus briefs have been filed on behalf of the defendant. Since the last extension, the parties were unable to resolve the case through settlement, despite extensive efforts.

(B) Among other things, the government needs additional time to pursue new materials relevant to its cross

appeal. In preparing the government's cross appeal, I have drafted a portion of the brief that challenges a significant sentencing decision by the district court and also seeks reassignment to a new district judge on remand should the government succeed in having the sentencing issue overturned, although I am still awaiting final authorization to include these issues in the cross appeal brief. Part of the analysis on the reassignment issue is whether the trial judge would have difficulty in putting out of his mind previously expressed views or findings during sentencing determined to be erroneous, and whether reassignment is advisable to preserve the appearance of justice. (See United States v. Jacobs, 855 F.2d 652, 656 (9th Cir. 1998)). Since the last extension for this appeal, I learned that the district court judge under review in this case also presided over a recent criminal trial, United States v. Gonzalez-Corn, CR 13-120-GW, which concluded on or about August 9, 2013. Gonzalez-Corn included AUSAs from my office and a defense counsel who was also one of the defense counsel in the present case. After Gonzalez-Corn concluded, I was told that the district court judge had made several comments during that trial about this matter on appeal including, among other things, reportedly calling his sentencing decision in this matter a "gift" to defendant. It is not certain whether any or all of these recent comments about this matter were transcribed on the record.

However, as soon as I learned that some of the comments were potentially made on the record, I immediately ordered the relevant transcripts on an expedited basis because the district court's comments would likely be relevant to the reassignment issues in the government's cross-appeal. I have been informed by the court reporters for Gonzalez-Corn that the expedited transcripts will be ready at approximately at the same time the government's brief is currently due, during the week of September 16, 2013. I need additional time to obtain, review and analyze these transcripts, and, if appropriate -- after expedited consultation with my office's appellate section and the Office of the Solicitor General -- include these material in the government's cross appeal brief along with a motion for judicial notice of the pertinent transcripts. This process will be complicated additionally by the overall complexity of the appeal, as described above, and the likely size of the government's brief and supplemental excerpts of record.

(C) Because this case involves a cross appeal, my office is consulting and working the Criminal Division of the Department of Justice in Washington, D.C. and the Office of the Solicitor General. As noted above, I understand from the appellate section of my office that this process has not yet been complete, including making final decisions on the various issues in the government's cross appeal. At the time of the

government's last extension, I expected this process to be complete by now. However, I understand that it has been unusually complicated and long due to unusual circumstances including developments since the last extension. First, some of the identical issues raised by the government's appeal in this case are also raised in several other pending Department appeals in other districts, lengthening and complicating the review and consultation process. Second, there have been two major national policy announcements made by the Department since the last extension that potentially bear on matters in this appeal. On August 12, 2013, the Department issued detailed new guidance on, among other things, the handling of prosecutions involving mandatory minimum sentences. This appeal and the cross appeal involve mandatory minimum sentences in a marijuana case. More recently, on August 29, 2013, the Department issued detailed new guidance on the handling of cases involving marijuana. I believe that the requested extension is needed to complete the unexpectedly complicated and lengthy process of consultation on the cross appeal between my office and the various sections of the Department, including consideration of these new policies since the last extension, and incorporate the results of that overall process into the government's brief.

6. I have exercised and will continue to exercise diligence with respect to this appeal. Although I have

substantial additional work responsibilities including active district court cases, appellate work, and other active investigations, I have and will continue to make completion of the government's brief my first priority. This request is not meant for the purposes of delay.

7. Although the Court noted in granting the government's last extension that further extensions would be disfavored, I believe there is good cause for this extension for the reasons set forth above, because defendant received several extensions after receiving a similar notice, because the extension is necessitated in significant part as a result of developments and events since the last extension, and because further time will cause no prejudice to the defendant. On the last point, I know that defendant is on bond pending appeal. I also know from my prior communications with her that defendant's appellate counsel, Alexandra Yates, will be on maternity leave during the entire course of this extension, and is expected to need additional time thereafter before she can begin work in preparing defendant's next brief.

8. On August 29, 2013, the chief of my office's appellate section, AUSA Jean-Claude Andre, contacted Ms. Yates supervisor, Michael Tanaka of the appellate section for the Federal Public Defender, regarding this requested extension. Mr. Andre has informed me that Mr. Tanaka told him that his office has no

objection to this extension request.

9. The court reporter is not in default with respect to any transcripts.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED September 3, 2013, in Los Angeles, California.

s/ David Kowal
DAVID KOWAL

9th Circuit Case Number(s) 10-50219; 10-50264

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