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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE GEORGE WU
UNITED STATES DISTRICT JUDGE PRESIDING

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United States of America,)
PLAINTIFF,)
VS.) NO. CR 07-689 GW
Charles Lynch,)
DEFENDANT,)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, FEBRUARY 2, 2017

KATIE E. THIBODEAUX, CSR 9858
U.S. Official Court Reporter
312 North Spring Street, #436
Los Angeles, California 90012

1 APPEARANCES OF COUNSEL:

2 APPEARANCES OF COUNSEL:

3

4 ON BEHALF OF THE PLAINTIFF, UNITED STATES OF AMERICA:

5

U.S. DEPARTMENT OF JUSTICE

6

U.S. ATTORNEY'S OFFICE

7

BY: DAVID KOWAL, AUSA

312 North Spring Street

Twelfth Floor

8

Los Angeles, CA 90012

9

10 ON BEHALF OF THE DEFENDANT:

11

FEDERAL PUBLIC DEFENDER'S OFFICE

12

BY: ALEXANDRA YATES, DFPD

13

-and- JOHN LITTRELL, DFPD

321 East 2nd Street

14

Los Angeles, CA 90012-4202

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1 LOS ANGELES, CALIFORNIA; MONDAY, FEBRUARY 2, 2017

2 10:28 A.M.

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6 THE COURT: All right. Let me call the matter of
7 United States versus Lynch.

8 Let me have appearances.

9 MR. KOWAL: David Kowal for the United States,
10 your Honor.

11 THE COURT: All right.

12 MS. YATES: Good morning, your Honor. Deputy
13 Federal Public Defender Alexandra Yates and John Littrell
14 on behalf of Mr. Lynch who is present on bond.

15 THE COURT: All right. We are here for this
16 motion. Let me ask a couple of questions.

17 First question I have is this case is very
18 strange in the sense that this appeal has been pending
19 for more than six years now. I have never heard of a
20 criminal appeal lasting this long. Why has it been
21 taking so long? Just out of curiosity.

22 MS. YATES: Yes, your Honor. I am the appellate
23 attorney. So I will answer that.

24 A significant amount of the time when this
25 case initially started in the appeals court was ongoing

1 attempts at negotiations. And we have gone back to the
2 table several times since. So there was a long delay for
3 that.

4 As the court is aware, the proceedings in this
5 case were very lengthy. There were a number of --

6 THE COURT: Not that lengthy.

7 MS. YATES: It was a 10-day trial with
8 four sentencing hearings and a number of pretrial issues
9 raised.

10 So, in any event, getting up to speed on the
11 record and sorting through those issues once attempted
12 negotiations had concluded took some time. We filed an
13 80-page opening brief.

14 The government then took over -- we took
15 significant time in doing that. The government then took
16 over a year in filing what ultimately was 150-page
17 answering brief. And that is where we are at now.

18 THE COURT: All right. That is more or less
19 irrelevant to the present motion, but I was just curious.

20 All right. These are some additional
21 questions. The basic motion here is for the court to
22 decide whether or not it will either entertain a motion
23 that I guess is made pursuant to the Ninth Circuit's
24 decision in McIntosh.

25 Let me just ask this question: Has any

1 district court in California actually held a McIntosh
2 evidentiary hearing?

3 MS. YATES: Would the court like me to approach
4 the lecturn?

5 THE COURT: As long as you speak into the
6 microphone, doesn't make any difference. And if so, what
7 was the result?

8 MS. YATES: There is no result. To the best of my
9 knowledge, your Honor, there is no court that has ruled
10 one way or the other post McIntosh.

11 THE COURT: No. That is not my question. My
12 question was has any court held a hearing pursuant to
13 McIntosh to make a determination that is suggested in the
14 closing portion of the McIntosh decision.

15 MS. YATES: No, your Honor. To the best of my
16 knowledge, all of the post McIntosh defendants have
17 hearings that are upcoming. Two of them are set for May.
18 Another one has a hearing on some preliminary questions
19 set for later this month. But the substantive hearing
20 has not yet been set, and I am not aware of any other
21 cases that are pending in district court.

22 THE COURT: All right. Has any district court in
23 the United States held or basically granted a motion to
24 enjoin the government the way that the defendant is here?
25 I know of three cases where the motions were denied but

1 those were pre McIntosh.

2 Has there been, since McIntosh, any decision
3 of any district court in any jurisdiction which granted a
4 defendant's request that is similar to the one that is
5 requested here.

6 MS. YATES: Not that I am aware of, your Honor,
7 but, also, two points. I am not aware of any district
8 court decision denying a similar request either. I
9 simply don't believe there has been a district court
10 decision. And the court is perhaps familiar with Judge
11 Breyer's decision in the Northern District in the Marin
12 Alliance Medical Marijuana case that predates McIntosh
13 but did grant an injunction. It was in a civil context
14 but similar to what we are asking.

15 THE COURT: Yes. But if that were the response, I
16 would refer to the Ninth Circuit's decision in Olive
17 versus Commissioner of Internal Revenue Service which was
18 like a civil context as well where that request was
19 denied.

20 MS. YATES: Yes, your Honor. But in Olive, if I
21 recall, the specific question was whether imposing a tax
22 interfered with the statement's implementation of its
23 medical marijuana laws.

24 THE COURT: I don't know if it necessarily was
25 imposing a tax. I thought that, in Olive, the question

1 was whether or not an owner of a medical marijuana
2 facility could take business deductions when the bar in
3 26, U.S.C., Section 280(e) precluded such deductions for
4 any trade or business consisting of trafficking in
5 controlled substances.

6 MS. YATES: That's right, your Honor. And the
7 ultimate holding in Olive was not in some way confined to
8 what McIntosh had to say in the criminal context.

9 THE COURT: Well, that is the question since
10 McIntosh doesn't reference Olive. I don't know whether
11 or not the court in McIntosh considered its prior
12 decision in Olive.

13 MS. YATES: Well, I would suspect, I think we
14 should expect that the court was aware of the decision.

15 THE COURT: Not really. I don't expect anything
16 of the circuit unless the circuit court tells me. But if
17 they don't indicate that they are referring to one of
18 their prior decisions that deals with the issue, I don't
19 know if they have considered it.

20 MS. YATES: Well, your Honor, I guess two-points.
21 One is Olive on its face, to the extent that we are
22 considering it relevant at all, and, again, it is pre
23 McIntosh, and it is the civil context.

24 THE COURT: No, no. I don't know if McIntosh --
25 let me see. Maybe it was McIntosh, but it was a Ninth

1 Circuit decision. And you are right, it is pre McIntosh.
2 It is a 2015 case.

3 MS. YATES: On its merits, your Honor, the
4 decision was only that the federal government was -- it
5 was acceptable for the federal government to disallow
6 these tax exemptions because the taxes in no way
7 interfered with the state's implementation of its medical
8 marijuana laws. People could still distribute, use.
9 Now, we may agree or disagree with that, but that was
10 what --

11 THE COURT: I would think that one of the primary
12 facets of an operation of a medical marijuana operation
13 is financial. And, therefore, if the government's action
14 is depriving these businesses of these deductions, it
15 would run these businesses out of business because if
16 they have no money or if their money is greatly reduced,
17 that would affect them much more so it seems than other
18 things that one can consider.

19 MS. YATES: Well, I don't know what the underlying
20 factual record was in Olive, and I think, based on what
21 the Ninth Circuit had to say, it must have been such that
22 the medical marijuana dispensary in that case did not
23 show facts indicating that it would have gone out of
24 business because what the Ninth Circuit, I think, quite
25 clearly said was this additional tax -- inability to

1 exempt these taxes doesn't interfere with your ability to
2 do these things under state law.

3 Then, we have McIntosh which is squarely on
4 point and very clearly says that federal prosecutions
5 where a defendant was authorized by state law does
6 interfere. So the court, I think, needs to in some way
7 reconcile these two precedents, and McIntosh is clearly
8 the one that is squarely on point.

9 THE COURT: Well, let's put it this way, it is a
10 question.

11 Let me hear from the government. Does the
12 government have any citations to any district court
13 decisions that have granted the relief that the
14 plaintiff -- sorry -- the defendant is seeking here?

15 MR. KOWAL: No, your Honor.

16 THE COURT: Okay.

17 MR. KOWAL: Our information is that all the post
18 McIntosh remands are still pending.

19 THE COURT: Okay. Addressing the motion itself
20 and the government's response to the motion, I disagree
21 with the government on one point. The government raises
22 an objection based on Rule 37 of the Federal Rules of
23 Criminal Procedure. I wouldn't agree with those
24 objections.

25 The court would initially note that the

1 defendant filed the motion, his motion to enforce the
2 provisions of -- it is either Section 538 or 542
3 depending upon the use so I will just refer to it as 538
4 since that was the initial one -- of the continuing
5 appropriations bill. He initially filed that in
6 February, February 24th of 2015.

7 And that was denied by the circuit court in an
8 order on April 13th of 2015 which also denied the
9 defendant's request for -- sorry -- and the Ninth Circuit
10 also denied the defendant's request for hearing en banc
11 in June of 2015. But in the April 14th order, the Ninth
12 Circuit stated that it was denying the defendant's
13 request to enjoin the Department of Justice from
14 continuing to expend funds in the case but without
15 prejudice for the defendant's raising the matter in his
16 third cross-appeal brief.

17 And so, therefore, I don't think that the
18 circuit was indicating there was any problem with raising
19 the argument, but, in addition, the circuit court in the
20 April 13th order also stated that the defendant's
21 alternative request for a limited remand to the district
22 court was denied without prejudice for renewal. If after
23 presentation to the district court, the district court
24 stated that it would grant the motion or stated that the
25 motion raises a substantial question.

1 And the circuit court cited to Federal Rules
2 of Appellate Procedure, Rule 12.1, not Rule 37. But the
3 language in Rule 12.1A, subpart A, parallels the language
4 of the Federal Rules of Criminal Procedure 37(a)(3). So
5 the government's contention that the present motion is
6 somehow improper, I would reject.

7 The government also makes a concomitant
8 contention that the defendant's present motion is
9 untimely. However, neither the Federal Rules of
10 Appellate Procedure 12.1 nor Federal Rule of Criminal
11 Procedure 37(a) defines what untimely means. And while
12 the government does cite to the case of United States
13 versus Amado, 841 F.3d 867, at Page 871, which is a Tenth
14 Circuit 2016 case, that case merely holds for the
15 proposition as cited by the government that, quote, the
16 substance of the motion not its former label controls its
17 disposition, end of quote. That, I obviously would agree
18 with, but I don't know how much that goes towards
19 resolving the issue of whether or not this present motion
20 is somehow untimely.

21 The government also argues that the best
22 source for the analogous time restraints would be under
23 28, U.S.C., Section 2255 which has a one-year limitations
24 period. Again, the court would disagree. I don't think
25 that 2255 is similar to this type of motion. That motion

1 is entirely different. This motion is primarily based on
2 an affirmative request based upon the congressional
3 enactments in the continuing appropriations that has a
4 provision in it. So, therefore, I don't think that it is
5 in any way, shape or form similar to a 2255. And so I
6 would find that the motion itself is either barred or
7 untimely under the rules.

8 Does anybody want to argue that point any
9 further?

10 MR. KOWAL: Two points, your Honor.

11 THE COURT: Sure.

12 MR. KOWAL: First, on the Rule 37 applicability,
13 one of the key parts is what is Rule 37 for?

14 THE COURT: I am not saying that it is
15 inapplicable. I am just saying even if you apply Rule
16 37, this motion, I don't think, would be barred.

17 MR. KOWAL: And we would argue it is. And I guess
18 what I would point out to you is the point of Rule 37 was
19 for motions where there is a need for further factual
20 development in the record.

21 All the examples and the advisory committee
22 notes are cases in which there is material or factual
23 material on which the court of appeals would not have
24 access.

25 THE COURT: Well, but the problem is that I think

1 in this particular situation, first of all, Rule 37
2 language also is adopted under the Federal Rule of
3 Appellate Procedure 12.1. There is virtually identical
4 language in, as I cited, as in 12.1 as with Rule 37. It
5 seems to me that and the fact that the Ninth Circuit
6 referenced to 12.1 in its discussion as to the defendant
7 potentially going to this court and seeking this court's
8 decision on the 12.1 process, I don't think that this
9 Rule 37 would bar what the defendant is now doing.

10 MR. KOWAL: I guess I would just say if the Ninth
11 Circuit knew that they were going back on a motion asking
12 for no further factual development and essentially asking
13 the court to reconsider a prior legal ruling, then it
14 would have likely --

15 THE COURT: Well, no.

16 MR. KOWAL: It did not prejudge whether Rule 37
17 would be appropriate or what the motion would be. Here,
18 they have admitted factual development is not
19 appropriate. I have cited to the court Ninth Circuit
20 case law which says that remand is not appropriate when
21 either there is a set factual record or a purely legal
22 issue.

23 THE COURT: Well, no, but there is, you know, I
24 think that the language of both -- well, the language of
25 12.1 clearly refers to a substantial issue. So it

1 doesn't necessarily have to be a factual issue per se.
2 It might simply be a situation where the circuit wants to
3 give the district court the opportunity if the district
4 court feels there is a substantial issue that could be
5 developed better for the court, circuit court, to rule
6 on.

7 I mean, it is various things. But I think in
8 terms of just the procedural argument, I am rejecting the
9 procedural argument. I think the government makes
10 another argument which is more interesting which I want
11 both sides to discuss. And I will get to that in a
12 moment. But in terms of just a straight procedural
13 argument, I am rejecting because I don't think I agree
14 with the government in this regard.

15 MR. KOWAL: The last point I would make in terms
16 of the 2255 analysis, I didn't point this out in our
17 papers, but the defense cited to Rule 2255 as the source
18 of its power to dismiss the case.

19 THE COURT: Well, that --

20 MR. KOWAL: That is pretty good evidence that it
21 is a good analogy. When that is what they are trying to
22 do is dismiss a preestablished conviction.

23 THE COURT: Well, I think that is an interesting
24 argument because it does segue into this question that I
25 have which I want the parties. It is the fundamental

1 question, I think, at this point in time. But insofar as
2 the procedural aspect of it is concerned, I will disagree
3 with the government in that regard and go to the next
4 issue.

5 And the issue is that, given this motion, the
6 court has three potential responses to the motions.
7 First of all, it can defer consideration of this motion
8 although, frankly, I never understood what that means
9 because, actually, I am considering this motion so I
10 can't defer it. I can defer a decision on it, but
11 actually deferring consideration of the motion, I never
12 understood that portion because it is nonsensical. I
13 have considered it because it has been made to me, and if
14 I didn't consider it, I couldn't rule one way or the
15 other even to defer.

16 So I don't understand that portion of it, but
17 I do understand that what may have been the intent is not
18 to render a ruling at this point in time for various
19 reasons. So that is how I kind of view that first
20 option.

21 The second option is I can give an indication
22 as to whether or not the court would grant or deny the
23 motion. And the third is that I can make the request for
24 the circuit court to remand the matter back to this court
25 for further proceedings and to hold a hearing.

1 And, frankly, I think that was kind of the
2 intent of the McIntosh court, not necessarily the Ninth
3 Circuit in this case, but of the McIntosh because the
4 McIntosh case, in that case, the circuit held that the
5 appropriations did create a bar, but that bar had to meet
6 certain, you know, requirements one of which is that
7 there will be a, I guess the word that the circuit
8 utilized was, that the conduct had to be completely
9 authorized by state law. And so the issue was whether or
10 not the defendant's conduct was completely authorized by
11 state law.

12 So that was the basis upon which I think a lot
13 of the other cases are referencing this matter back to
14 the district court. And the district court's -- I guess,
15 well, let me just ask, in the cases where the district
16 courts -- are the district courts -- well, the district
17 courts are holding a hearing, but they have all agreed to
18 hold hearings. Has any district court not agreed to hold
19 a hearing after McIntosh?

20 MR. KOWAL: No, your Honor. And, remember, the
21 different procedural postures.

22 THE COURT: I agree. We will get to that in a
23 second.

24 MR. KOWAL: It is an interlocutory appeal.

25 MS. YATES: I am not aware of another case.

1 THE COURT: Okay. All right. Then, I guess this
2 is the problem that I have with the defendant's motion at
3 this point in time, and this is what I want the parties
4 to address primarily.

5 You know, at this point in time, it seems to
6 the court that there really -- the issues that are
7 outstanding are really issues of law which need to be
8 resolved, and I don't see why this court would resolve
9 those issues of law especially since if I resolve those
10 issues of law myself at this point in time, the Ninth
11 Circuit simply does a de novo anyway. So it more or less
12 doesn't matter, I suppose I can throw in my hat and say,
13 well, I think this or that.

14 There is a question that I don't even know how
15 I would rule now. And that is as follows: As pointed
16 out by the government, this case is fundamentally
17 different from the other McIntosh types of cases because
18 in those cases, the McIntosh cases and I presume all the
19 others that have been arising, the defendants have not
20 been convicted. They have been indicted perhaps, or
21 there have been some other actions taken by the
22 government, for example, to post some forfeitures and
23 things of that sort.

24 But there is no case that I am aware of where
25 the defendant has actually been convicted, in other

1 words, gone to trial and been convicted by a jury. So,
2 therefore, that, to my mind, is a fundamental and big
3 difference because I don't understand even if I were to
4 order the government not to cease spending any money on
5 this case, I don't think that means that the defendant
6 gets a dismissal.

7 Or if it does, I think that is an issue that
8 is so important it really should be addressed by the
9 appellate court first. And it can decide that based on
10 what it has now. It doesn't need to do anything else to
11 make that decision. It can decide that for itself, and
12 if it decides that that can be a result, then I would
13 say, okay, I can understand. But I don't see why if I
14 order the government not to spend any more money, that a
15 dismissal is the result.

16 Now, I do understand that, as a practical
17 matter, what that may mean is that the government is no
18 longer allowed to argue anything. But does that mean
19 that the argument that the government forfeits its
20 position in this case because of the fact that it is not
21 allowed to spend the money? McIntosh doesn't address
22 that.

23 And it seems to me that unless something
24 happens, the defendant is still convicted. And so, in
25 other words, I don't see a basis for setting aside the

1 conviction due to the fact that the government can't
2 spend any money on the case because if that were the
3 case, for example, it seems to me that there are a lot of
4 people probably in prisons now that have been convicted
5 for medical marijuana type of offenses. Can they make a
6 motion now and say I want to be released because, you
7 know, this prosecution effects medical marijuana. And do
8 all those people -- and the government can't oppose which
9 obviously if the position of McIntosh is correct it can't
10 oppose, do those people get to go free as well? And if
11 the answer is yes, that is fine and dandy, I suppose, but
12 it is really not a decision for me to make at this point
13 in time. I think it is a decision for the circuit court
14 to make, and it is one that they can make on the basis of
15 the present record.

16 So that is kind of my position. Somebody want
17 to talk about that?

18 MS. YATES: I would be happy to, your Honor.

19 THE COURT: She beat you to it.

20 MS. YATES: Your Honor, McIntosh at Page 1172
21 says, once Congress has enacted legislation deciding on
22 its priorities, for example, by issuing an appropriations
23 rider, quote, it is for the courts to enforce them when
24 enforcement is sought, and, quote, courts can not ignore
25 that determination.

1 A bipartisan Congress has passed Section 542,
2 Section 538 repeatedly.

3 THE COURT: Let me stop. This is all kind of like
4 water under the bridge because Congress did not
5 decriminalize. Congress did not take marijuana from a
6 Schedule 1 to something else which is frankly what it
7 should do if it wants what it is -- I mean, you don't use
8 an appropriations bill to change a Schedule 1 drug last
9 time I looked. You can do it much easier. It is either
10 up to Congress or the executive branch, neither of which
11 has done that.

12 MS. YATES: I agree, your Honor, but what Congress
13 was plainly trying to do here was protect people like
14 Mr. Lynch. And, in fact, the drafters have singled him
15 out as someone that they were interested in protecting
16 from prosecution, from the government wasting taxpayer
17 dollars going after someone like Mr. Lynch who is the
18 poster child for medical marijuana. That was the entire
19 purpose of Section 542.

20 This court needs to read the appropriations
21 rider to have some effect. And if it doesn't apply in a
22 case like this, I am not sure where it does.

23 THE COURT: It certainly has an effect, I think,
24 insofar as unconvicted defendants because, I mean, that
25 was McIntosh. And, then, therefore, the circuit court

1 said, well, you have to make sure that they have complied
2 with all -- completely complied with all the provisions
3 of the state's medical marijuana enactments.

4 But that is not what we have here. It is a
5 different situation.

6 MS. YATES: Yes, your Honor. But I am just going
7 to go straight to the language of the rider itself. None
8 of the funds made available in this action to the DOJ may
9 be used to prevent any of the various states including
10 California from implementing their own laws that
11 authorize the use, distribution, possession or
12 cultivation of medical marijuana.

13 THE COURT: Let me just stop you. I understand
14 the arguments. It is not a question of my not
15 understanding the arguments or appreciating the
16 arguments, but the question is whether or not in this
17 situation, I should -- in other words, I don't have to
18 issue a decision on this.

19 As I said, I can defer it, making a ruling,
20 because I think this matter should really be addressed by
21 the circuit court because, again, and why should I, at
22 this point in time, say one thing or the other since the
23 circuit has already indicated that the defendant can
24 raise this issue on appeal, and it is supposed to raise
25 it in, I guess, their cross-appeal brief or whatever.

1 Why would I address it when it is an issue of
2 law to my mind. It is not an issue of fact. And very
3 well-versed. And so why should I address this?

4 MS. YATES: A few answers.

5 First of all, McIntosh specifically directed
6 district courts to be the one to address this in the
7 first instance, and that is why we have brought this.

8 THE COURT: If there is a factual issue.

9 MS. YATES: Well, if the court is saying there is
10 no factual issue here, we would ask the court to make a
11 specific finding that Mr. Lynch was fully authorized by
12 state law in the way that McIntosh contemplates. So that
13 my concern is that if we end up back in the Ninth
14 Circuit, the government is going to raise all sorts of
15 fact-based arguments about compliance and the Ninth
16 Circuit it going to say we need to send this back down
17 for a factual finding on compliance.

18 THE COURT: That is fine. Then they can send it
19 back down at this point in time, but, hopefully, they
20 will address the more important legal issue. I mean,
21 which they should be prepared to rule because that is the
22 issue at this point in time. So if they want to ignore
23 the legal issue -- the issue of law that is the elephant
24 in the room and send it back to me, then I will do this.
25 I will entertain whatever they want me to entertain.

1 But, again, it is an issue of law, not an issue of fact.

2 MS. YATES: Well, with respect, although not
3 perhaps as directly as the court may like. I would
4 suggest that McIntosh did address the legal issue. The
5 language that I was quoting from the rider, McIntosh then
6 interpreted to mean that when -- when the federal
7 government interferes with the state by prosecuting and
8 seeking to punish a defendant who would otherwise be able
9 to benefit from the state's non prosecution laws, that is
10 something that Congress has said you cannot spend funds
11 on.

12 So that is the language that McIntosh used and
13 Mr. Lynch squarely falls within that. What the
14 government would continue to do here is plainly seeking
15 to punish Mr. Lynch, someone who would have benefited
16 from the state's non prosecution laws.

17 So I think McIntosh, although it wasn't
18 dealing with the case in its procedural posture, makes
19 very clear based on its interpretation of the rider that
20 it applies in this particular case, and my concern is
21 that we keep, that we delay this issue, and the
22 government keeps spending funds, unauthorized, as a
23 constitutional violation that is a criminal law issue
24 under the Antideficiency Act, and it gets up the Ninth
25 Circuit.

1 THE COURT: Let me stop. If the Ninth Circuit was
2 really worried by it, it would have made a ruling
3 earlier.

4 MS. YATES: Well, that was pre McIntosh. When we
5 raised it, it was pre McIntosh. We have not brought this
6 in the Ninth Circuit post McIntosh. Once it has been
7 clear that the rider does apply in criminal cases. That
8 wasn't an open issue pre McIntosh. Now that that is
9 clear, we brought the motion here first because --

10 THE COURT: Well, no. You first brought it in the
11 Ninth Circuit. The Ninth Circuit entertained it. Even
12 though it was -- I mean, the panel prior to McIntosh
13 could have addressed the issue.

14 MS. YATES: Absolutely, your Honor. At that point
15 in time, however, no court has held that Section 542 or
16 then Section 538 applied in the criminal context. So the
17 court's decision to say, we can table this a little, I
18 think takes a different shape than would we have gone to
19 the Ninth Circuit post McIntosh.

20 Now, saying, yes, Congress has said the
21 Department of Justice is violating the law if they are
22 spending funds on these types of cases, and is it
23 emphatically the province of the courts, they say Marbury
24 versus Madison, to enforce the law. We don't have
25 anything from the Ninth Circuit in our case after that.

1 THE COURT: Again, so why shouldn't the Ninth
2 Circuit be the first to address the issue as to whether
3 or not the appropriations section should have this effect
4 on cases which are where the defendant has already been
5 convicted. In other words, to go and, again, because the
6 appropriations language is the language, and, frankly,
7 the court in McIntosh said don't look at the prior
8 legislative history in this regard, look at just the
9 language. It specifically said don't look at the history
10 of it. So I can't really look at the history of it in
11 considering it.

12 So I just look at the language, but I don't
13 know what the effect is in this particular situation
14 because, again, the circuit hasn't indicated to me how it
15 can affect it, and it is an issue of law.

16 MS. YATES: Your Honor, there is certainly nothing
17 novel about bringing a question of law to the district
18 court appropriately to rule on in the first instance,
19 and, then, that can be raised in the Ninth Circuit.

20 THE COURT: Not when I don't have to because,
21 again, this is 37 and the 12.1 are discretionary. There
22 was no obligation on my part to do it, and so, therefore,
23 why would I do it in this particular situation when
24 again, it would be subject to a de novo review. I don't
25 need at this point in time to develop any other record to

1 make a decision. I mean, it is what it is.

2 MS. YATES: Your Honor, unless we have a factual
3 finding that Mr. Lynch was in compliance, then the court,
4 the Ninth Circuit when it inevitably reads McIntosh and
5 says, yes, we said if it is interfering by attempting to
6 punish individuals who could have benefited from non
7 prosecution, Section 542 applies, but we don't have a
8 factual finding on compliance, it will send the case back
9 down. At that point, we have spent additional funds.
10 Congress was trying to --

11 THE COURT: The thing I don't understand, though,
12 is, again, if that were the case, the Ninth Circuit panel
13 in and of itself should have made that decision already.

14 MS. YATES: I agree, your Honor, but, at the time,
15 the argument we were presenting pre McIntosh and that we
16 still believe is the correct argument but McIntosh was
17 coming on was that this was a purely legal issue because
18 anybody with a colorable claim. So there was no reason
19 for the Ninth Circuit to think that factual development
20 would have been beneficial at that point in time. Now,
21 we have McIntosh which says we need hearings on this, or
22 in a fully developed record like this, I would argue, we
23 simply need a factual finding.

24 I do want to address the point about
25 legislative history because I think what McIntosh said

1 about that is a little bit more nuanced. McIntosh did at
2 one point earlier in the decision say that the text is
3 not a model of clarity, but, then, when it got to
4 actually interpreting the text of the rider, it used
5 ordinary dictionary definitions and came to a conclusion
6 based on that without any indication of ambiguity.

7 The court then says we don't need to look to
8 legislative history, it cannot alter the plain text of
9 the statute. And it cites a number of Supreme Court
10 cases which have held that when the text of an
11 appropriations rider or an appropriations provision is
12 clear, then whatever the legislatures may or may not have
13 wanted cannot alter that. But some of those Supreme
14 Court cases or at least one of them that McIntosh cited
15 actually do look at legislative history when there is
16 ambiguity. So I don't think McIntosh is saying you can't
17 consider --

18 THE COURT: The problem with that is that the
19 Ninth Circuit in Olive takes a rather entirely different
20 position than you are arguing in talking about how the
21 mere fact that a subsequent Congress adopts an earlier
22 appropriations provision. You can't infer the intent
23 from the earlier one. I mean, again, the language that
24 the Ninth Circuit uses at times is somewhat inconsistent.

25 And, so, I understand your argument, but,

1 again, it is kind of almost like it is standing at this
2 point. In other words, if he can't get the relief that
3 he wants because of this issue, shouldn't that issue be
4 resolved first if it is an issue of law. And if it is an
5 issue of law, the circuit can resolve the issue itself.

6 MS. YATES: He clearly has standing, your Honor.
7 He has a harm, the imminent possibility of going to
8 prison, that an order from this court either issuing an
9 injunction or a dismissal can --

10 THE COURT: Nothing will happen because no matter
11 what I do the issue is still going to go to the appellate
12 court. You think the government, if I make a ruling, is
13 going to say, oh, we are going to lay down our tools and
14 walk away. No. They are going to continue with the
15 appeal. It is already on appeal.

16 MS. YATES: Well, I think they should if this
17 court makes a ruling. And I don't know that we know what
18 the government would do in that situation. I also don't
19 think that we know if this court made a ruling that the
20 government was unlawfully spending funds on this case,
21 aside from dismissal, purely effectuated Section 542
22 saying this falls within the ambit of it and you can't
23 spend funds on this case. It is not clear to me how --

24 THE COURT: Let's put it this way, I could never
25 find that the government was unlawfully spending funds

1 unless I resolved the legal issue as to whether or not in
2 this context, it -- how the decision is rendered as to
3 whether or not my barring the government from spending
4 money in this matter will or can result in a dismissal of
5 the verdict, the jury verdict, against the defendant.
6 You know, and, frankly, the government has a right to
7 appeal that issue because it is a substantial issue.

8 And so the government is always going to
9 proceed until such time as the position is made by the
10 appellate court not by me. So, therefore, I don't
11 understand -- it just seems to me it is faster to just
12 let the thing go to the circuit court which now has the
13 issue because they can decide, you know, that if they
14 decide that it can affect the reversal, then you are dead
15 in the water. And if they say that it can, then, okay,
16 it can.

17 MS. YATES: I respectfully disagree, your Honor.
18 If the court did rule in our favor, to the extent the
19 government chose to appeal and was permitted to spend
20 funds appealing, I don't think it is clear that the Ninth
21 Circuit would rack that up with cross-appeals. The
22 court's ruling in some ways could moot the cross-appeals
23 or certainly government's ability to participate in
24 those. It seems like a preliminary question that needs
25 to be addressed.

1 THE COURT: I presume that even if the government
2 does not participate, I don't know what the answer is.
3 In other words, if the government was not allowed to say
4 anything more in this appeal, will that result and should
5 that result in a reversal of the jury verdict?

6 MS. YATES: That question is something that the
7 Ninth Circuit would properly need to --

8 THE COURT: Exactly.

9 MS. YATES: But the preliminary question of
10 whether Mr. Lynch was in compliance and whether Section
11 542 applies to him is something that we believe is surely
12 appropriate for this court to answer.

13 THE COURT: But in the long run, it will take more
14 time and effort because if I entertain this hearing, in
15 other words, the case would be remanded to me because,
16 again, the government is making arguments as to whether
17 or not he fully complied. And one of the questions, for
18 example, is that compliance determined at the time that
19 he initially opened it during the entire period of time
20 that he operated it, is it determined under the new
21 provisions of the current law in the State of California
22 as to what it takes to operate a medical marijuana
23 facility?

24 There are a lot of questions that have to be
25 answered. So, in other words, this is not a situation

1 where I would say, even today, I would give you an answer
2 because if I had -- the thing is sent back to me, it is
3 going to be sent back to me, and there are issues of both
4 fact and law that have to be resolved, and that is going
5 to take some time.

6 So the appeal would be stayed, I presume,
7 while I am doing all this. Once I make my decision, if I
8 said, yes, that he did sufficiently comply with all of
9 the requirements, the government still -- my order, if I
10 order the government not to spend any more money on this
11 matter, the government is going to appeal my order. And
12 they would have a right to do so. And I think there is a
13 substantial issue as to what the effect of my order would
14 be.

15 So, therefore, it is going to be in front of
16 the circuit court anyway. And so, I think it is faster,
17 it would be faster to let the proceedings go forward in
18 front of the Ninth Circuit for the circuit to say, on
19 this important issue, what is the effect. And at that
20 point in time, if it is one that they say, yes, it can
21 potentially result in the application of a dismissal,
22 then I will hold a hearing at that point in time.

23 But there are a lot of questions that, in
24 other words, it is not going to be faster for the
25 defendant to go the route that you want. It is going to

1 be faster for him to stay this thing get to the appellate
2 court and have the appellate court deal with this
3 fundamental issue.

4 Yes.

5 From the government.

6 MR. KOWAL: We agree.

7 THE COURT: Oh, gosh. That is unusual. That is
8 the first time I think you ever said that in this case to
9 the court.

10 MR. KOWAL: I don't think that is true. Of
11 course, the whole point of this is to slow things down.
12 It has been three years to get them to file their
13 appellate brief. If they wanted --

14 THE COURT: Let me stop you, Mr. Kowal. Both
15 sides have not acted that swift in processing this
16 appeal. I am not saying that I am blaming either side
17 because I understand there is a lot of things in
18 consideration, but I am not going to put the blame and
19 say that one side is attempting to stall this matter.

20 MR. KOWAL: Let me put it this way, your Honor
21 said this is a question of law. The defense have said
22 there is no further factual development needed. The
23 Ninth Circuit has said when you have an issue of law or
24 an application of law to fact, no further factual
25 development is needed. The circuit court is the

1 appropriate --

2 THE COURT: Let me stop. I think the reason the
3 defendant said that was the defendant made the argument
4 that the court had already concluded that I found the
5 defendant had met all the terms that were required by the
6 medical marijuana laws, et cetera. I don't think I made
7 that specific finding.

8 Now, I did say to that to a large extent that
9 the defendant had decriminalized his conduct, but that is
10 different than saying that he met all of the requirements
11 of the statute that were in existence because I don't
12 know what all the terms of those statutes were during
13 that point in time.

14 MR. KOWAL: Well, your Honor, again, that is a
15 legal question that you don't need a district court to
16 decide. The key issue is not that further complication.
17 The key issue is are we doing anything evidentially here.
18 And they are saying, no, the record is fully developed.

19 THE COURT: No. That is not quite -- I disagree
20 with that.

21 If I were to say that he did not meet all the
22 terms, they would insist on an evidentiary hearing, and
23 they would be entitled to an evidentiary hearing if I
24 were to conclude that. But the problem is I can't
25 conclude one or the other without holding an evidentiary

1 hearing on all these things.

2 But, again, I do agree with the government
3 that in the end, it would be faster for the appeal to
4 address the issue especially since the government is --
5 especially since the circuit court already indicated that
6 it was entirely appropriate for the issue to be raised
7 and decided on the -- on the, you know, the issue of the
8 appropriations.

9 And the mere fact that McIntosh has come down
10 doesn't necessarily mean that they cannot decide this
11 fundamental issue which I think controls this particular
12 portion of this case.

13 MR. KOWAL: Well, that's right, your Honor. The
14 court did allow this issue to be addressed. It is an
15 issue that they can fully resolve. And if you look at
16 Rule 37, the point of the deferring the ruling, meaning I
17 am not going to rule one way or the other, is the appeal
18 is going to narrow, change or change the circumstances so
19 much that there is no reason for me to rule and go
20 through this whole process now.

21 And, again, we have also raised the issue the
22 court of appeals may remand it back to you for further
23 findings. It may reassign the case to another judge.
24 These are all issues that have to be decided by the Court
25 of Appeals.

1 THE COURT: Don't raise my hopes. I suppose I
2 shouldn't say thing things like that because the Ninth
3 Circuit has a tendency to read any sort of jest in the
4 record as being a position that was taken by the court.

5 MR. KOWAL: It is just the point is that you are
6 right, your Honor, that the Ninth Circuit will either
7 narrow, obviate or handle all these things if it feels
8 that the record needs more development, it can say so
9 and, meanwhile, it can resolve everything else and we
10 have a full context.

11 And last point, McIntosh was remanded because
12 it was preconviction, an interlocutory appeal, of course,
13 the record wasn't developed at all, and the Rule 37
14 indicative procedure is a narrowly tailored unusual
15 procedure. And there is no reason to delay this Ninth
16 Circuit proceedings further by further proceedings here
17 until the Ninth Circuit rules.

18 THE COURT: All right. Anything else from the
19 defense?

20 MS. YATES: Yes, your Honor.

21 Faster does not necessarily mean fairer, your
22 Honor. We are asking the court to exercise its
23 discretion to entertain this motion.

24 THE COURT: That last argument that you made is
25 actually strange because I thought that the normal

1 phrasing of it is that -- I think you have to rephrase
2 that.

3 MS. YATES: Let me rephrase. We want to have this
4 happen as quickly as possibly. The cross-appeals have
5 taken some time, but we have always moved quickly on a
6 Section 542 litigation. Our goal is to get a ruling on
7 that as quickly as possible. It is my sincere belief
8 that the fastest way to accomplish that is to have this
9 court rule on Mr. Lynch's compliance. Mr. Lynch and
10 Congress, quite frankly, are also entitled to a ruling on
11 that.

12 THE COURT: Who knows what Congress is going to do
13 next?

14 MS. YATES: Well, they have, in a bipartisan
15 fashion -- one of the only things they seem to be able to
16 do in a bipartisan fashion, they keep reenacting this. I
17 don't think we have any reason to think it won't
18 continue.

19 And I would just encourage the court once more
20 to look to the language of McIntosh which I do think
21 squarely addresses the main issue that the court has.
22 McIntosh is very clear that when the government is taking
23 an action, DOJ is taking an action that seeks to punish
24 somebody who would not be punished in state court for
25 medical marijuana use, distribution, et cetera, that

1 interferes with the state's implementation.

2 There are no parameters on that that say it
3 must apply to people who are pretrial, and, of course, an
4 appeal is an integral part of a criminal case. His case
5 is not final. This is very different from somebody who
6 is already in prison who may well have a Section 542
7 claim, but we don't need to go there. His case is still
8 not final. So I really do think McIntosh has already
9 squarely addressed the legal issue. And so sending it up
10 to the Ninth Circuit so that they can consider a legal
11 issue that they have already considered and, then, of
12 course, say, yes, under McIntosh, this can apply to him
13 but we need to know if he was in compliance, we are
14 sending it back down is going to be justice delayed.

15 THE COURT: Not since, again, whether or not I --
16 again, you are asking me to make a finding, a legal
17 finding, and I don't know what the answer would
18 necessarily be in the matter because I don't necessarily
19 agree that a failure to appropriate funds for a
20 prosecution necessarily results in a reversal of a
21 conviction.

22 MS. YATES: Well, that is a separate issue, your
23 Honor. And if the court is going to go along with us to
24 the point of compliance with Section 542 --

25 THE COURT: Once the circuit says, yes, it does,

1 then, I could say, okay, let me go through the
2 evidentiary process, et cetera, et cetera. But why
3 should I engage in an evidentiary hearing which is going
4 to take considerable amount of time and the court's
5 efforts and basically stop the appeal process that can
6 address that very issue. I mean, why would I do that if
7 at some point in time, I presume in the near future,
8 because I guess even the Ninth Circuit will get tired of
9 briefing in this case, they are going to address that
10 issue?

11 MS. YATES: Couple of reasons.

12 One, your Honor, that in the meantime, we
13 believe the government is unlawfully spending funds I
14 won't beat that dead horse, but there are serious issues
15 there. And I think it is the obligation of the federal
16 courts to enforce Congress' legislation.

17 I don't think that we need to be concerned
18 about some extensive evidentiary hearing here. Yes, if
19 the court thinks the burden is on us to show compliance
20 that we haven't met that burden --

21 THE COURT: Clearly, it would be on the defendant
22 to bear the burden because the defendant is the one who
23 wants injunctive relief.

24 MS. YATES: I disagree, your Honor. This isn't a
25 typical injunction. This is a bit more sui generis.

1 Congress has already made the determination to enjoin the
2 DOJ. The question is just whether that injunction, so to
3 speak, should apply to this case.

4 THE COURT: Let me ask, then, why does the
5 McIntosh decision say if the DOJ wishes to continue these
6 prosecution, appellants --

7 MS. YATES: To continue spending funds.

8 THE COURT: Well, no. It says if wishes to
9 continue prosecution, appellants are entitled to
10 evidentiary hearings to determine whether their conduct
11 is completely authorized by state law.

12 MS. YATES: McIntosh makes very clear that it is
13 talking about enjoining spending. It doesn't reach the
14 issue of whether a dismissal should then follow. So this
15 isn't your typical enjoining a criminal prosecution
16 although we have argued that if the court enjoins the
17 Department of Justice from spending funds on this case,
18 it necessarily should also dismiss the case because there
19 is no other way to effectuate that order.

20 But we are not asking for your typical
21 injunction. This isn't like a civil injunction where you
22 have a balancing of irreparable harm and whatnot and the
23 plaintiff has to meet a certain standard. Congress has
24 already made the determination of that there should be an
25 injunction. The question under McIntosh is just whether

1 it applies to this case.

2 And if you look to Gonzalez versus O Centro
3 which is the closest case we have. Again, this is sui
4 generis. But the Supreme Court in that case said when
5 someone is seeking to enjoin enforcement of the
6 Controlled Substances Act, they need to make a colorable
7 claim to relief and the burden then shifts to the
8 opposing party to justify its actions. That is
9 consistent with what we have in state court.

10 And, of course, a McIntosh-type hearing, the
11 court is stepping into the state court's shoes,
12 effectively, in state court. The cases are very clear.
13 This is the Mower case and the Solis case that are cited
14 in the briefs. That to present an affirmative defense
15 under the Medical Marijuana Program Act, or the CUA, in
16 California, the defendant has the initial burden of
17 producing enough evidence to raise a reasonable doubt,
18 but the ultimate burden is on the government, or the
19 state there, is on the prosecution to prove beyond a
20 reasonable doubt that the affirmative defense doesn't
21 apply.

22 So our position is that the ultimate burden of
23 persuasion is on the government. The government has said
24 we don't have any additional evidence that we need to
25 present, and based on the record, they have not met that

1 burden. And we think that is a finding that this court
2 can easily make without an evidentiary hearing.

3 The only really relevant factual question
4 which we, again, think is squarely resolved by the
5 current record is the non profit issue. These other
6 issues that deal with the 2008 guidelines post date
7 Mr. Lynch's conduct. McIntosh says defendant had to be
8 strictly compliant with all relevant state laws. Non
9 binding advisory guidelines that came down after
10 Mr. Lynch closed his dispensary are in no way relevant to
11 whether he strictly complied with state law at the time
12 he had his dispensary. State law, at the time, was the
13 CUA and the MMPA. And the MMPA does allow store-front
14 dispensaries so long as they are not for profit.

15 So I really think the evidentiary question to
16 the extent there is any is a bounded one about non
17 profit, and, again, the record, even if the burden is on
18 us, I think we have met it. But the burden is on the
19 government. They say they have no further evidence to
20 present, and I think that the court could very well make
21 a factual finding that Mr. Lynch operated a
22 not-for-profit organization.

23 THE COURT: Anything else from the government?

24 MR. KOWAL: Just as the court has correctly ruled,
25 the Ninth Circuit has to decide whether a binding final

1 judgment by this court or the jurisdiction of the Court
2 of Appeals after the filing of notice of appeals and the
3 filing of briefs, whether there would be a remedy there
4 for defendant in that case either to prevent the
5 government from further arguing or unwinding a past
6 transaction that is clearly a past conviction.

7 Those are clearly legal issues as the court
8 resolve -- the Ninth Circuit has to resolve those first.
9 It should resolve them. I have other things to say about
10 that argument, but I think since that is the real
11 threshold question here, there is no reason for this
12 court to rule.

13 THE COURT: Also, one of the differences, because
14 this case, he has been convicted, he is on appeal, the
15 matter is really with the Court of Appeals. It is not --
16 I mean, it is not in front of me in the sense that the
17 litigation is in front of me. He has taken an appeal.

18 Even after I order the government insofar as
19 would I be ordering the government not to show up
20 anywhere and spend any money? I don't know. And if the
21 government is in front of the appellate court and not me,
22 really shouldn't it be the appellate court? In other
23 words, I can say, now, I can bar -- I can do things so I
24 can bar attorneys from showing up in the appellate court
25 and doing things in the appellate court.

1 If I have that power, I would like the circuit
2 to tell me because I will use it. And I will do things
3 that are, let's say, okay, I don't like what this
4 attorney has done, I am going to bar, I am not going to
5 allow him to go to the circuit court. Do I have that
6 power? I mean, it is interesting. I suppose I could
7 justify it in my twisted mind.

8 But, no, I think, really, again, it is a
9 serious issue. I don't think that either side is arguing
10 on the basis of some bad faith. I think both sides have
11 good arguments. But I don't think that there is an
12 obvious answer that is not -- other than a pure issue of
13 law and the matter is already geared up and the appellate
14 court can make that decision.

15 MS. YATES: Your Honor, there is no reason that
16 the cross-appeals need to necessarily be stayed while
17 this court handles this matter. This is an ancillary
18 proceeding, and the jurisdiction --

19 THE COURT: Let me stop you. I am not going to
20 make the appeal more complicated than it already is, and
21 to say that I am asking the circuit court to stay some
22 things and not stay others, again, I don't think I have
23 the authority to do any of that sort of thing insofar as
24 the appellate court is concerned. There, you simply you
25 have made the motion because you can make the motion. I

1 am not obligated at this point in time under either 37 or
2 12.1.

3 You know, you have made a good shot. I told
4 you why I am not going to do it. And it is
5 discretionary. Now, if the appellate court tells me I
6 have abused my discretion and they want me to hold
7 evidentiary hearings, I am always perfectly willing to
8 follow what they say despite what the government may say.
9 I am always perfectly willing to do that. So if that is
10 what they want, then I will do that. But, again, I think
11 that this is an important issue.

12 There is a fundamental issue that I would need
13 for -- for the circuit court to tell me about. And it
14 has already been geared up for them, and it is one that,
15 really, I think should be addressed even before I hold
16 the evidentiary hearing because, again, in part, the
17 evidentiary hearing the court says I am supposed to
18 consider the available remedies and things of that sort.
19 Well, I don't know what the available remedies are
20 because I have a question as to whether or not one of the
21 available remedies would be that, in effect, I would
22 order the case -- the convictions overturned because I
23 don't know whether or not that is, you know, I am allowed
24 basically even allowed to do that.

25 MS. YATES: I'm sorry. Your Honor, I don't want

1 to beat a dead horse. I do want to let the court know
2 the court does have the authority. I believe Roadway
3 Express, Inc. versus Piper, 447 U.S. 752, at 767, says
4 the power of a court over members of its bar is at least
5 as great as its authority over litigants. That is in the
6 context of a discussion about talking about the inherent
7 powers of federal courts that are necessary to exercise
8 of all others. So the court does the authority to tell
9 the members of the Department of Justice who are members
10 of the bar practicing in this court, that Congress has
11 said, they cannot spend funds on this case.

12 What the Ninth Circuit then says that means
13 for the Ninth Circuit case is a separate question that
14 this court could opine on but does not need to. All we
15 are asking this court to do is find that Section 542
16 applies to Mr. Lynch and that the government is enjoined
17 from spending funds. The practical implications of that
18 can be sorted out after the fact.

19 And just as a final point, your Honor, the
20 court does have the discretion not to entertain this
21 motion, but in the interests of justice, we would really
22 ask the court to entertain this.

23 THE COURT: Well, no. I already entertained it so
24 it is not a question of I am not entertaining it. But I
25 have a problem with granting the injunctive relief that

1 the defendant wants because, again, I do not know whether
2 or not I can lawfully for all intents and purposes
3 because I can order certain things but if the ultimate
4 effect is something that it would be unlawful, I don't
5 know whether or not I can do that.

6 And I want the circuit court to tell me can I
7 basically order the government to drop this case such
8 that the underlying conviction is overturned. That is
9 what I want them to tell me. Because if the answer is
10 no, then why am I doing this stuff? Why am I holding an
11 evidentiary hearing which I would have to hold. I have
12 already indicated that. And so if they tell me it is a
13 possibility that I can order that, that the conviction
14 would be overturned, set aside, okay. That is fine.

15 But I want them to tell me. Because one of
16 the things, for example, McIntosh talks about is the
17 courts must appreciate the temporal nature of these
18 appropriations because they can change at any point in
19 time.

20 So, again, that is the thing, that, again,
21 that is the reason why I think it is faster to get the
22 initial answer from the circuit court and that will
23 affect what happens and what I will do because if they
24 tell me that it will have no effect because I -- I cannot
25 overturn the conviction because of an appropriations bill

1 that isn't specifically addressed to it, then, okay, your
2 client is going to lose. If they say that I can, then I
3 will hold the evidentiary hearing to make sure that all
4 the I's are dotted, make sure that he has complied with
5 all the requirements, but, again, you know, there was a
6 period, extended period of time, well, not that extended,
7 but there was a period of time that he operated, and I do
8 not know whether all the requirements were always the
9 same.

10 And, conversely, I also don't know that if, in
11 fact, those requirements have been changed and been
12 lessened, whether or not he should get the benefit of
13 that or not, things of that sort, which all would have to
14 be litigated. And so rather than doing that, I will let
15 the circuit court to answer the question that I think is
16 the elephant in the room insofar as how to proceed in
17 this matter.

18 MS. YATES: Very well.

19 THE COURT: Anything else from either side?

20 MR. KOWAL: No, your Honor.

21 THE COURT: Okay. So I will deny the motion
22 without prejudice for, in essence, I will be saying that
23 I am deferring ruling on the motion because I think there
24 was a legal question that I think is properly addressed
25 to the circuit court and that it should address which

1 would assist me in deciding what I do would do next.

2 All right. And is there anything else I need
3 do in this matter?

4 MS. YATES: May I confer, your Honor?

5 THE COURT: Sure.

6 MS. YATES: No, your Honor. Thank you.

7 THE COURT: All right. Thank you. Defendant is
8 currently out on what, OR, bond?

9 MS. YATES: Effectively. He still has reporting
10 requirements.

11 THE COURT: So I will leave him out under all same
12 terms and conditions.

13 Thank you. Have a very nice day.

14 (Proceedings concluded.)

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CERTIFICATE

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I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: February 10, 2017

/s/ Katie Thibodeaux, CSR No. 9858, RPR, CRR

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MR. KOWAL: [20] 3/8 9/14
 9/16 12/9 12/11 12/16 13/9
 13/15 14/14 14/19 16/19
 16/23 32/5 32/9 32/19 33/13
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MS. YATES: [45]
THE COURT: [65]

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