

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 forty-five-day extension of time to file the third cross-appeal brief, to May 15, 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: March 24, 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:

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.

On February 6, 2017, I sought a ninety-day extension of time to file the third cross-appeal brief, to May 15. The government objected to the request, and on February 14, the Court granted a forty-five day extension of time to March 31, the current due date. Further requests for extensions of time are disfavored.

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. After the government filed an opposition, I filed a reply to the motion. On February 2, 2017, the district court held a hearing and ruled that the motion presented several substantial issues, but declined to resolve the matter without guidance from this Court.

Within thirty days of the hearing, on March 3, I filed a pleading in this Court, providing formal notice of the district court's indicative ruling and asking the Ninth Circuit to remand for a *McIntosh* hearing or alternatively to consider Mr. Lynch's *McIntosh* motion on the merits and grant relief. I also asked the Court to resolve the motion separate from and prior to addressing the pending cross-appeals because (1) a favorable ruling on the motion might moot the substantive case, and (2) if the government's continued spending on this case is unlawful, the Court should not ignore that fact and allow further expenditures on appeal.

Late yesterday, following an extension of time, the government filed a fifty-six-page opposition to my twenty-seven-page motion, to which I now must respond. Although I had budgeted a few days to draft an expected reply, I will need significantly more time to respond adequately to such a lengthy document.

As I explained in my February 6th request for an extension of time to file the third cross-appeal brief, because of the potentially dispositive nature of the *McIntosh* issue, I needed to focus my attention on that briefing before I could turn my attention to Mr. Lynch's substantive case. That fact remains; I must draft the

McIntosh reply, which will take considerably more time than I anticipated, before I can return to working on the third cross-appeal brief.

In addition, as a deputy federal public defender with an active caseload, I cannot focus all of my time exclusively on Mr. Lynch's case. I have nonetheless endeavored in these past forty-five days to clear as much as possible off of my colloquial plate, so that I can focus on Mr. Lynch's third cross-appeal brief. I have sought—and will continue to seek—extensions of time to file briefs in my other pending appeals. Aside from a time-sensitive motion that I plan to file in *Evans v. Miller*, CA Nos. 13-55087 & 14-72470, next week, I am prioritizing Mr. Lynch's brief ahead of all other work. It is in Mr. Lynch's interest to resolve this case as soon as possible, and I am doing everything I can to meet my proposed deadline.

I therefore request a forty-five-day extension of time to file the third cross-appeal brief, to May 15, 2017. I have exercised diligence in preparing this case, and expect to file the third cross-appeal brief on May 15.

In light of Section 542, it 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. However, in separate briefing to this Court, the government has made clear that it objects to any further extensions of time.

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

Executed on March 24, 2017, in Los Angeles, California.

/s Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, 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.

Edith Ramirez
EDITH RAMIREZ