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CHARLES C. LYNCH

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES C. LYNCH, Defendant.	NO. CR 07-689-GW CHARLES C. LYNCH'S CORRECTED POSITION REGARDING BAIL PENDING APPEAL Sent. Date: April 23, 2009 Sent. Time: 8:30 a.m.

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Charles C. Lynch, by and through his attorneys of record, Deputy Federal Public Defenders Reuven L. Cohen, John Littrell, Michael Tanaka and Guy C. Iversen, hereby sets forth his position regarding bail pending appeal.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: April 21, 2009

By /s/
REUVEN L. COHEN
Deputy Federal Public Defender

DATED: April 21, 2009

By /s/
JOHN LITTRELL
Deputy Federal Public Defender

DATED: April 21, 2009

By /s/
MICHAEL TANAKA
Deputy Federal Public Defender

DATED: April 21, 2009

By /s/
GUY C. IVERSEN
Deputy Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

In the event that the Court orders Mr. Lynch to serve a term of imprisonment, the defense requests that the Court permit him to remain free on bail pending appeal. This is an exceptional case, and Mr. Lynch need not be incarcerated while he pursues an appeal. He meets the statutory criteria for bail.

II.

MR. LYNCH IS ENTITLED TO BAIL PENDING APPEAL

Pursuant to 18 U.S.C. § 3143(b), a defendant is entitled to bail pending appeal if the court finds the following:

(1) by clear and convincing evidence, the defendant is not likely to flee or to pose a danger to the safety of any person or to the community if released;

(2) that the appeal is not taken for purpose of delay;

(3) that the appeal raises a substantial question of law or fact that, if determined favorably to defendant on appeal, is likely to result in reversal; an order for a new trial; a sentence that does not include a term of imprisonment; or a reduced sentence to a term of imprisonment less than the total of the term already served plus the expected duration of the appeal process.

United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985). Further, because this case is subject to the mandatory detention provisions of 18 U.S.C. § 3143(b)(2), Mr. Lynch must clearly show the existence of a fourth condition: "that there are exceptional reasons why detention would not be appropriate." 18 U.S.C. § 3145(c). Mr. Lynch can easily make each of these four showings.

A. Mr. Lynch Is Not A Flight Risk And Does Not Pose A Danger To The Community

Although the government argues to the contrary, there can be no serious dispute that Mr. Lynch poses neither a danger to the community nor a risk of flight. Mr.

Lynch's conduct while on bond during the entirety of these proceedings conclusively proves that he will not flee and that he is not a danger. He has been on bond since July of 2007. During that time, he has made every required court appearance and has complied with all conditions of his continuing release on bond. PSR ¶ 7. Even after his conviction, Mr. Lynch has maintained his strict compliance with the conditions of his bond. He has continued to drive the four hours from his Central Coast home to Los Angeles for his court appearances. He also makes the four-hour drive every other week in order to visit his Pretrial Services Officer, for whom he submits a urine sample and updates his officer as to all of the professional and personal developments in his life. He also tests randomly and frequently for drug use at an area closer to his Arroyo Grande home. He has never tested positive for any controlled substance under federal or state law.[1]

Except for the instant matter, he has no prior or subsequent criminal convictions and poses no danger. This Court has, at least implicitly, already found that Mr. Lynch is not a flight risk or a danger when it continued his release on bond pending his sentencing in this matter. There is no evidence to the contrary.

In opposition, the government serves up groundless speculation unrelated to the issues of danger or flight risk. The government first argues that Mr. Lynch exhibited a "continued reluctance to accept even minimal responsibility for his crime." Govt's

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[1] In the eighth month after his trial, Mr. Lynch became seriously ill. The debilitating headaches that have plagued him for years returned, confining him to his bed. One of his attorneys, out of concern for his client, visited him at his home. Mr. Lynch, who is nearly broke, had been prescribed an FDA-approved palliative that he could not afford. Mr. Lynch's attorneys, after witnessing and discussing their client's suffering, sought the position of United States Pretrial Services as to how the parties could allay Mr. Lynch's pain. Among other things, Mr. Lynch's attorneys inquired whether his pretrial officer would concur in a request that Mr. Lynch be permitted to smoke medicinal marijuana if he could secure the approval of the federal government, as have other persons who have written to this Court. *See, e.g.*, Lynch Pos. Re: Sentencing at Ex. 83 (Letter of Irv Rosenfeld). Mr. Lynch did not know that his attorneys had made this request until after Pretrial Services denied the request.

Pos. Re: Bail at 9. The argument is baseless. Mr. Lynch has taken full responsibility for his crime. Mr. Lynch has admitted time and again that he dispensed marijuana from his marijuana dispensary, in violation of federal law. Further, even if it were true, the government utterly fails to explain how that would make him either a danger or a flight risk.

The government next argues that Mr. Lynch should be detained because of his "remarkable request that he be allowed to smoke marijuana while under supervision by this Court." Govt. Pos. at 9. As noted above, Mr. Lynch's attorneys have asked his pretrial services officer (without Mr. Lynch's knowledge) that Mr. Lynch be permitted to smoke medical marijuana as a palliative for his pain. The request was denied. After it was denied, Mr. Lynch continued to do what he has done since the inception of this case – he followed the rules. If this Court denies his request to be able to smoke marijuana as his appeal makes its way through the courts, he will do what he has done since the inception of this case – follow the rules.

Despite the results of his drug tests, the government argues that "[g]iven the repeated pronouncements during this case about the absolute federal ban on the use of marijuana, [Mr. Lynch's] request evidences a lack of respect for federal rules or for the restrictions placed on [Mr. Lynch]." Govt. Pos. at 9. "Indeed," the government argues, "it also shows the high likelihood that [Mr. Lynch], a lifetime user of marijuana, will continue, whether or not permitted, to use marijuana while on bail." *Id.* Again, the government's argument is without substance. A defendant evidences a lack of respect for rules or restrictions placed upon him or her by violating or remotely breaking the rules. Mr. Lynch has done neither.

Finally, the government argues that the Court should take into account Mr. Lynch's "vocal network of ideologically-motivated supporters." *Id.* For what purpose? Surely, the government is not claiming that these persons exercising their right to free speech pose a danger to the community or that they are going to spirit Mr. Lynch away before he can be incarcerated. Whether Mr. Lynch has a network of

supporters has no bearing on whether he is a danger to the community or a flight risk. The government's arguments on flight and danger are not well-taken.[2]

B. Mr. Lynch's Appeal Presents Substantial Questions That if Determined Favorably to Mr. Lynch on Appeal Are Likely to Result in a Reversal or Reduced Sentence

Numerous potential appellate issues meet this standard. This case was lengthy and legally complex. The Court ruled issued long, written ruling on many motions and issues. These included motions to dismiss based on the government's destruction of evidence and selective prosecution, a motion to inform the jury of the mandatory minimum sentence in the event of conviction, and motions for new trial. If this Court determines that Mr. Lynch is subject to a mandatory minimum term of imprisonment, that issue would also be the subject of an appeal. The issues raised are not frivolous, and, if resolved in Mr. Lynch's favor on appeal would likely result in a reversal of his conviction, a new trial, or a sentence less than the amount of time he would have served during the pendency of the appellate process.

1. Substantial Question

As to this prong, Mr. Lynch need not show that his appellate issues are likely to result in reversal. Rather, "'substantial' defines the *level of merit* required in the question presented and 'likely to result in reversal or an order for a new trial' defines the *type of question* that must be presented." *Id*. at 1280. To be "substantial," a question must be "fairly debatable," or "fairly doubtful." *Id*. at 1283 (emphasis in original). In *United States v. Garcia*, 340 F.3d 1013, 1021 n.5 (9th Cir. 2003), the Ninth Circuit described "fairly debatable" questions as those that are "non-frivolous."

There are many issues that present a substantial question for appeal. For example, Mr. Lynch's motion for new trial raised several serious evidentiary issues, including the exclusion of his statement to his lawyer regarding the substance of his

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[2] Similarly, there is no dispute that the appeal is not for the purpose of the delay, and the government has not suggested that it is.

telephone conversation with the DEA (*before* opening his dispensary and well before his arrest and prosecution) and Abrahm Baxter's statement that Mr. Lynch had nothing to do with the sale of marijuana outside the dispensary in the Big 5 parking lot. Although the Court ruled against their admission, both at trial and in denying the motion for new trial, the issues are far from frivolous. That is, Mr. Lynch advanced substantial, written arguments in favor of the admission of each statement, and there is room to believe that the issues could be resolved differently.

In opposition, the government argues that none of the evidentiary issues "required application or resolution of new legal theories or issues that were unresolved at the appellate level, or even for which defendant was able to identify a conflict of authority." Govt. Pos. at 4-5. Mr. Lynch agrees that the issues may be resolved by reference to established case law, but that certainly does not make them insubstantial. *Handy*, 761 F.2d at 1281 ("The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable."). Novel or unresolved issues or issues where there is a conflict of authority may be a requisite for a successful petition for certiorari in the United States Supreme Court (and are sufficient to support bail on appeal), but that is not a requirement for this Court's finding of a "substantial" issue allowing bail on appeal. All that is required is that the issue be "fairly debatable" or "non-frivolous." *Garcia*, 340 F.3d at 1021 n.5.

Similarly, Mr. Lynch's motion to inform the jury of the mandatory minimum applicable to this case was based on the decision of Judge Weinstein in *United States v. Polizzi*, 549 F.Supp.2d 308 (E.D.N.Y. 2008). *Polizzi* is a scholarly and serious re-evaluation of the traditional prohibition of informing the jury about the penalty in view of the emerging Supreme Court jurisprudence[3] regarding the historic role of juries in sentencing and the importance of that practice in 1791 in giving meaning to the Constitution. Although the Ninth Circuit and United States Supreme Court have

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[3] *See, e.g., United States v. Booker*, 543 U.S. 220 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and *Crawford v. Washington*, 541 U.S. 36 (2004).

not yet adopted Judge Weinstein's analysis, the issue has not been resolved by either court since the *Apprendi*, *Booker*, and *Crawford* decisions. This is a also a "substantial" question.

With respect to his sentence, Mr. Lynch has offered several arguments against application of a mandatory minimum sentence, including use of the safety-valve, the doctrine of sentencing entrapment, and the Eighth Amendment prohibition against cruel and *unusual* punishment. Each of these arguments present a substantial question with respect to a mandatory minimum sentence and are "fairly debatable."[4]

2. Likely to Result in Reversal, New Trial, or Reduced Sentence

To be "likely to result in reversal or an order for a new trial," a question must be the sort of question that, if resolved in the appellant's favor, is likely to result in a reversal or new trial. *Handy*, 761 F.2d at 1280-1281. That is, the court need not determine that an appellate issue is likely, on the merits, to result in reversal, but rather that the question on appeal is the sort of question that is likely to result in reversal. Thus, for example, a question regarding the legality of a supervised release condition is not "likely to result in a reversal or an order for a new trial," whereas an erroneous ruling on a motion to dismiss that would, by definition, infect the entire trial is. In short: "The defendant . . . need not, under *Handy*, present an appeal that will likely be successful, only a non-frivolous issue that, if decided in the defendant's favor, would likely result in reversal or could satisfy one of the other conditions" of § 3142(b)(1)(B). *Garcia*, 340 F.3d 1013 n.5.

Again, the potential issues for appeal easily meet this standard. If the Ninth Circuit decided that the jury should have heard evidence that Mr. Lynch first reported the content of his conversation with the DEA, the conversation that provided the factual basis for his defense of entrapment by estoppel, a reversal of his conviction would likely result. Whether the DEA agent had spoken words that Mr. Lynch

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[4] In fact, this Court's solicitation of briefs on the issue suggests that the question is open to some doubt or debate.

reasonably relied upon as authorization for opening his dispensary was the primary disputed factual issue at trial. The government was allowed to insinuate that Mr. Lynch lied about his conversation. Because of the telephone records, the government could not credibly argue that Mr. Lynch had not made the call. Instead, it argued that he had lied about its contents. Mr. Lynch's prior consistent statement would have rebutted this argument, bolstered his credibility, and likely resulted in a different verdict.

The same is true for the exclusion of Baxter's statement exculpating Mr. Lynch for the illicit sale in the Big 5 parking lot. That evidence, and it comprised a disproportionate share of the government's case, helped the government unfairly portray Mr. Lynch as a common drug dealer. Although it is true that Mr. Lynch did not contest the sales that occurred within the dispensary and Baxter's statement was tied most closely to those facts, the broad brush of the Baxter transaction that the government used to tar Mr. Lynch's character likely leaked through to the jury's consideration of Mr. Lynch's testimony with respect to his defense. Had the jury known that Mr. Lynch had nothing to do with Baxter's illicit deal, it would likely have viewed his testimony with respect to the entrapment by estoppel defense more favorably, resulting in a different verdict.

Similarly, if the appellate court finds that the jury should have been informed that, according to the government, Mr. Lynch would have to serve no less than five years in a federal prison if the jury returned a guilty verdict, it will likely order a new trial. *See Polizzi*, 549 F.Supp.2d at 448 (failure to give instruction required new trial). This was an unusual prosecution in that Mr. Lynch was convicted for conduct that had the blessing of the state of the California and the officials of Morro Bay where his business operated. Mr. Lynch was a legitimate businessman with no criminal record. Had the jury known that their verdict would result in his service of a substantial and mandatory prison term, it is reasonably likely that at least one juror would have voted to acquit.

Finally, if this Court should finds that it is bound by law to sentence Mr. Lynch to the mandatory minimum prison term, and that decision is reversed on appeal, it is likely that his sentence would ultimately be reduced. As set forth in his sentencing position paper, all of the statutory sentencing factors in 18 U.S.C. § 3553(a), save for the guidelines, call for a sentence that includes the absolute minimum period of incarceration. The appellate process will likely span at least one year; a reasonable sentence under *Booker* and 3553(a) must surely be less than that. Thus, if he prevails on appeal, he would likely serve a reduced sentence.[5]

C. Exceptional Reasons

18 U.S.C. § 3143(b)(2) requires mandatory detention, following conviction, of violent offenders and those convicted of drug offenses with a maximum sentence of at least ten years in prison unless "it is clearly shown that there are exceptional reasons why detention would not be appropriate." 18 U.S.C. § 3145(c). The Ninth Circuit first gave meaning to "exceptional reasons" in *United States v. Garcia*, 340 F.3d 1013 (9th Cir. 2003).

Garcia declined to set any limit on the range of matters the district court could consider in making its determination. Instead, "the district court should determine the totality of the circumstances and, on the basis of that examination, determine whether, due to any truly unusual factors or combination of factors (bearing in mind the congressional policy that offenders who have committed crimes of violence should not, except in exceptional cases, be released pending appeal) it would be unreasonable to incarcerate the defendant prior to the appellate court's resolution of his appeal." *Id.* at 1019. The Circuit then provided examples of factors that alone or in combination could qualify as exceptional reasons under the statute. Many of these are present here.

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[5] The foregoing list of potential issues is illustrative, not exclusive. Other potential issues meet the criteria for posing a substantial issue likely to result in a reversal, new trial, or reduced sentence. These include the motions to dismiss for selective prosecution, destruction of evidence, and violation of the anti-commandeering principles inherent in the Tenth Amendment.

That the defendant's criminal conduct was aberrational could constitute an exceptional circumstance. *Garcia* explained one who no history of violence who acted violently in reaction to an unusually provocative situation, while guilty of a violent crime, may not be the type of violent person for whom Congress intended the mandatory detention rule. That would be even more likely if the "defendant led an exemplary life prior to his offense and would be likely to contribute to society significantly if allowed to remain free on bail." *Id*.

Mr. Lynch is certainly not your typical large-scale, dangerous drug dealer for whom Congress intended mandatory detention. He has no history of violence. Indeed, he has no criminal history at all. PSR ¶¶ 76-80. Nothing suggests that Mr. Lynch is a violent person who needs to be subject to mandatory detention.

Next, *Garcia* explained that the nature of the violent or criminal act itself may be significant. That is, "[v]arious factors may lead the district court to believe that the particular act committed by the defendant, while falling within one of these categories, is sufficiently dissimilar from the others in that category to warrant a finding of 'exceptional reasons.'" *Id*. This is, perhaps, the paradigmatic example of this exception. Mr. Lynch's criminal act is indisputably dissimilar to that of virtually every other person convicted of a federal drug offense subject to a maximum penalty of at least ten years in prison. Congress did not have Mr. Lynch in mind when it enacted the mandatory detention provision.

Federalism is another factor discussed by *Garcia* that applies to this case. Although rejecting that argument under the facts of the case, the Circuit noted that federalism could be a concern where "state law or policy affirmatively authorized or directed the acts for which the defendants were convicted under federal law." *Id*. at 1021 n.7. That is exactly the circumstance here. Mr. Lynch's criminal acts were explicitly authorized by local authorities and permitted under state law. This is yet another exceptional reason permitting him bail on appeal.

Finally, other factors noted by *Garcia* that exist here are that the defendant is exceptionally unlikely to flee or constitute a danger and that the appeal presents novel issues. *Id*. at 1020-21 & n.6. Contrary to the government's unfounded speculation, all the evidence shows that Mr. Lynch will not flee and poses absolutely no danger to the community. The defense submits that these facts are not reasonably open to dispute. Further, many of the issues posed by this case, including the requested instruction regarding the mandatory minimum and whether the mandatory minimum applies under the unique circumstances of this case, are novel – again supporting the finding of exceptional reasons for granting bail on appeal.

III.

CONCLUSION

For the foregoing reasons, Mr. Lynch respectfully requests that the Court grant his request for bail pending appeal.

Respectfully submitted,

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Federal Public Defender

DATED: April 21, 2009

By /s/
REUVEN L. COHEN
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