

09-16852

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**JAMES ROTHERY and ANDREA
HOFFMAN,**

Plaintiffs - Appellants,

v.

**COUNTY OF SACRAMENTO, et
al.,**

Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:08-cv-02064-JAM-KJM
The Honorable John A. Mendez, Judge

**JOINT MOTION BY DEFENDANTS –
APPELLEES FOR FURTHER STAY OF
APPELLATE PROCEEDINGS**

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I. RELIEF SOUGHT

Appellees County of Sacramento, Lou Blanas, John McGinniss, Tim Sheehan and Kamala D. Harris, move this Court for an extension of the current stay of proceedings in this matter. At present, appellees' answering briefs are due September 6, 2011. Appellees request that the current stay be extended until ninety (90) days following issuance of the Ninth Circuit's mandate in *Mehl v. County of Sacramento*, No. 08-15773.

II. POSITIONS OF ALL COUNSEL

All appellees, through the undersigned counsel, join in this Motion for Further Stay of Appellate Proceedings.

All appellants are represented by Gary W. Gorski. Mr. Gorski has not responded to requests regarding this motion for further stay of proceedings. (See ¶7 of the attached Joint Declaration.)

III. NEED FOR EXTENSION OF THE CURRENT STAY

The present appeal has been stayed several times pending the resolution of other appeals, particularly *Mehl v. County of Sacramento*, No. 08-15773. This Court's present stay order was entered June 8, 2011, and stays proceedings until September 6, 2011. (Dkt. # 27.) As set forth in that order, "At or prior to the expiration of the stay of appellate proceedings, the

appellees shall file the answering briefs or file a motion for appropriate relief.”

There is good reason to stay the present appeal pending resolution of the *Mehl* appeal. There is considerable overlap between *Mehl* and the present case. Both cases involve a constitutional challenge to California’s Concealed Carry Weapon (CCW) statutes, and to the application of those statutes by the Sacramento County Sheriff. The Sacramento County Sheriff, the County of Sacramento, and the California Attorney General, are appellees in both cases. Appellants’ counsel and appellees’ counsel are the same in both cases.

In *Mehl*, this Court *sua sponte* entered a stay of submission after oral argument pending issuance of the Ninth Circuit’s mandate in *Nordyke v. King*, No. 07-15763. *Nordyke* likely will determine what standard of review the Ninth Circuit will apply to Second Amendment challenges to state statutes that regulate the possession of firearms. *Mehl* necessarily will resolve many of the issues presented in the present appeal. A further stay will allow the parties to better brief the Second Amendment issues presented here, and will allow the Ninth Circuit to avoid potentially conflicting or inconsistent decisions on the constitutionality of California’s CCW licensing regime.

Accordingly, appellees request that the current stay be extended until ninety (90) days following issuance of the Ninth Circuit's mandate in *Mehl v. County of Sacramento*, No. 08-15773.

Dated: August 11, 2011

KAMALA D. HARRIS
Attorney General of California

/s/ GEORGE WATERS

GEORGE WATERS
Deputy Attorney General
*Attorneys for Appellee
Kamala D. Harris*

Dated: August 11, 2011

LONGYEAR, O'DEA & LAVRA

/s/ JERI L. PAPPONE

JERI L. PAPPONE
*Attorneys for Appellees
County of Sacramento, Lou Blanas,
John McGinnis, Timothy Sheehan*

**JOINT DECLARATION OF JERI L. PAPPONE AND
GEORGE WATERS IN SUPPORT OF APPELLEES'
MOTION FOR FURTHER STAY**

WE, Jeri L. Pappone and George Waters, declare as follows:

1. We are attorneys licensed to practice law before all courts in the State of California and are admitted to practice before this Court. Jeri Pappone is an associate of the law firm of Longyear, O'Dea & Lavra, LLP, counsel of record for Defendants/Appellees, County of Sacramento, Lou Blanas, John McGinnis, and Tim Sheehan. George Waters is a Deputy Attorney General for the State of California and counsel of record for Defendant/Appellee Kamala D. Harris, Attorney General of the State of California.

2. In the present *Rothery* appeal, appellants' opening brief was filed on May 6, 2010. (Dkt. # 11.) Thereafter, appellate proceedings, including the filing of appellees' answering briefs, have been stayed by a series of court orders dated May 24, 2010 (Dkt. # 15), August 16, 2010 (Dkt. # 18), October 18, 2010 (Dkt. # 20), January 18, 2011 (Dkt. # 22), March 24, 2011 (Dkt. # 25), and June 8, 2011 (Dkt. # 27). At present, appellees' answering briefs are due on September 6, 2011.

3. We are also counsel of Record for Defendants/Appellees in the pending 9th Circuit case of *Mehl v. Lou Blanas, et al.*, Case No. 08-15773.

4. The *Mehl* appeal is closely related to the present *Rothery* appeal. Appellants' counsel and appellees' counsel are the same in both cases. Both cases involve a constitutional challenge to California's Concealed Carry Weapon (CCW) statutes, and to the application of those statutes by the Sacramento County Sheriff. The Sacramento County Sheriff, the County of Sacramento, and the California Attorney General, are appellees in both cases. *Mehl* has been argued before this Court, and thereafter the court *sua sponte* withdrew the appeal from submission pending the decision by the Court in *Nordyke v. King*, No. 07-15763. (See Exhibits A and B hereto, Court orders of September 11, 2009 and July 20, 2010.)

5. The Ninth Circuit issued an opinion in *Nordyke* on May 2, 2011. On May 23, 2011, a petition for rehearing en banc was filed. On June 13, 2011, the Ninth Circuit called for a response. No order on the en banc petition has issued.

6. Appellees have exercised diligence in this matter, but will have only one opportunity to address the Second Amendment and related issues raised by appellants, and will not be able to adequately present their cases without analyzing the Ninth Circuit's final opinion in *Nordyke*. Further, because the present appeal is strikingly similar to the *Mehl* appeal (both cases involve a constitutional challenge to California's Concealed Carry

Weapon (CCW) statutes, and to the application of those statutes by the Sacramento County Sheriff), it is appropriate to await the Court's application of *Nordyke* to *Mehl* prior to any further briefing in *Rothery*. The requested continuation of the stay to a date until ninety (90) days following issuance of the Ninth Circuit's mandate in *Mehl* is therefore reasonable and will enable appellees' counsel to fulfill their obligations to their clients and to this Court.

7. On July 9, 2011, counsel Jeri Pappone attempted to contact Plaintiffs/Appellants' counsel, Gary Gorski, in order to obtain his consent to this motion for continued stay of the appellate proceedings. She left a telephone message at his telephone number of record, attempted to fax a letter to the fax number he listed in his pleadings, e-mailed a message to him, and mailed a letter by U.S. mail. She was able to discover a new e-mail through Mr. Gorski's filed pleadings in another case, but his fax number is not valid. All manner of contact has gone unanswered. The last time any of Defendants/Appellees' counsel communicated with Mr. Gorski was on March 22, 2011, at which time he stated that he had no objection to an earlier motion to stay appellate proceedings pending this Court's rulings in *Nordyke* and *Mehl*. (See Dkt. # 24, p. 5, ¶12 [Declaration in Support of Joint Motion for Further Stay of Appellate Proceedings].)

Declarants declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

EXECUTED this 11th day of August, 2011, at Sacramento, California.

LONGYEAR, O'DEA & LAVRA, LLP

/s/ JERI L. PAPPONE

JERI L. PAPPONE
*Attorneys for Appellees
County of Sacramento, Lou Blanas,
John McGinnis, Timothy Sheehan*

KAMALA D. HARRIS
Attorney General of California

/s/ GEORGE WATERS

GEORGE WATERS
*Attorneys for Appellee
Kamala D. Harris*

SA2009102233

EXHIBIT A

FILED

UNITED STATES COURT OF APPEALS

SEP 11 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

<p>DAVID K. MEHL; LIK T. LAU,</p> <p>Plaintiffs - Appellants,</p> <p>and</p> <p>FRANK FLORES,</p> <p>Plaintiff,</p> <p>v.</p> <p>LOU BLANAS; SACRAMENTO COUNTY SHERIFF DEPARTMENT; SACRAMENTO COUNTY; BILL LOCKYER, Attorney General, State of California; RANDI ROSSI, State Firearms Director and Custodian of Records,</p> <p>Defendants - Appellees.</p>
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No. 08-15773

D.C. No. 2:03-CV-02682-MCE-
KJM
Eastern District of California,
Sacramento

ORDER

Before: SCHROEDER and BERZON, Circuit Judges, and ROTH,* Senior Circuit Judge.

This appeal is withdrawn from submission pending decision by the *en banc* panel of this Court in *Nordyke v. King*, No. 07-15763.

* The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 20 2010

DAVID K. MEHL; LIK T. LAU,

Plaintiffs - Appellants,

and

FRANK FLORES,

Plaintiff,

v.

LOU BLANAS; SACRAMENTO
COUNTY SHERIFF DEPARTMENT;
SACRAMENTO COUNTY; BILL
LOCKYER, Attorney General, State of
California; RANDI ROSSI, State Firearms
Director and Custodian of Records,

Defendants - Appellees.

No. 08-15773

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

D.C. No. 2:03-CV-02682-MCE-
KJM
Eastern District of California,
Sacramento

ORDER

Before: SCHROEDER and BERZON, Circuit Judges, and ROTH, Senior Circuit
Judge. *

Submission of this case will remain vacated pending issuance of the mandate
in *Nordyke v. King*, No. 07-15763.

* The Honorable Jane R. Roth, Senior United States Circuit Judge for
the Third Circuit, sitting by designation.

CERTIFICATE OF SERVICE

Case Name: **James Rothery, et al.** No. **09-16852**
v. County of Sacramento

I hereby certify that on August 11, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

JOINT MOTION BY DEFENDANTS – APPELLEES FOR FURTHER STAY OF APPELLATE PROCEEDINGS

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 11, 2011, at Sacramento, California.

Brenda Apodaca
Declarant

/s/ Brenda Apodaca
Signature