

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
GRAND RAPIDS DIVISION

FILED - LN

05 DEC 29 AM 10:12

DAVID W. MCKEAGUE, CLERK  
U.S. DISTRICT COURT  
WESTERN DISTRICT MICH.

LORNE EUGENE OSBORN,  
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,  
Plaintiff-Appellee.

) APPEAL NO. 05-2606  
) Crim. No. 1:03-cr-00008  
) MOTION FOR LEAVE OF COURT TO  
) FILE OUT OF TIME APPEAL FOR  
) GOOD CAUSE AND MEMORANDUM OF  
) LAW IN SUPPORT

**David W. McKeague**  
**U.S. District Judge**

I  
PRELIMINARY STATEMENT

COMES NOW, Defendant-Appellant, Lorne E. Osborn, acting in pro-se in this case respectfully moves the district court for leave of court to file an out of time appeal for good cause.

This court should grant this motion and request based on the following significant reasons and precedent.

II  
STATEMENT OF THE CASE

On January 14, 2003, defendant-appellant Osborn was charged on federal charges in the Western District of Michigan, Grand Rapids Division for manufacturing marijuana in violation of 21 U.S.C. §841(a)(1); §841(b)(1)(B)(vii), and 18 U.S.C. §2. (SEE DOCKET SHEET ENTRY NO. 1; 1/14/03)

On June 3, 2003, Osborn pleaded guilty to count one pursuant to a plea agreement. Osborn was represented by Federal Public Defender, Sharon A. Turek. (SEE DOCKET SHEET ENTRY NO. 49; 6/3/03)

On September 9, 2003, Osborn's sentencing hearing was postponed to allow him to retain a different attorney. On April 20,

2003, Osborn was allowed to withdraw his guilty plea. (SEE DOCKET SHEET ENTRY NO. 64; 10/20/03)

On November 3, 2003, the district court entered an order of substitution counsel. Osborn's previous court-appointed attorney was replaced by attorney, Kenneth E. Marks. (SEE DOCKET SHEET ENTRY NO. 66; 11/3/03)

On April 13, 2004, Osborn proceeded to trial by jury and on April 15, 2004, was found guilty. On May 27, 2004, Osborn was sentenced to 210 months in prison, consecutive to his state sentence, and four years of supervised release. The court also ordered him to pay a fine of \$4,000.00 and \$100.00 assessment fee. The Honorable U.S. District Court Judge, David W. McKeague presided over this case. (SEE DOCKET SHEET ENTRY NO. 79-84)

On November 17, 2005, the district court filed as a notice of appeal a letter of correspondence from Osborn inquiring into the status of his appeal. (SEE DOCKET SHEET ENTRY NO. 88; 11/17/05) (SEE EXHIBIT (A))

No other judiciary proceedings have been held in this case in relationship to Osborn's current conviction and sentence.

III  
REASON'S DEFENDANT-APPELLANT SHOULD BE GRANTED LEAVE OF COURT  
TO FILE AN OUT OF TIME APPEAL

The defendant-appellant, Mr. Osborn asserts this court should grant him permission to file an out of time appeal for several compelling and significant reasons. Osborn contends this court should grant his request because he specifically requested his attorney to file an appeal but it appears counsel abandoned him.

(SEE SWORN AFFIDAVIT OF LORNE E. OSBORN)

It's Osborn's assertion after he was sentenced in the instant federal case on May 27, 2004, he was released to the state to complete his Michigan sentence of 38 months. Osborn asserts his attorney advised him not to be concerned because he would file a notice of appeal, and prepare a brief for the appellate court. (SEE SWORN AFFIDAVIT OF LORNE E. OSBORN)

On or about August 11, 2005, Osborn was released from the state authorities to start his current federal sentence. It's Osborn's contention after attempting to contact his attorney about the status of his appeal he became concerned because he couldn't get ahold of said attorney. This is when Osborn asserts he wrote a letter to the district court on November 17, 2005, inquiring about the status of his appeal. (SEE SWORN AFFIDAVIT OF LORNE E. OSBORN)

It's Osborn's contention he should be granted permission to file an out of time appeal because at no fault of his own he was denied his fundamental constitutional right to appeal his current conviction and sentence. It's well settled that a criminal defendant has a guaranteed right to the assistance of counsel in criminal proceedings. Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963).

This right is also guaranteed on a defendant's first direct appeal. Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, reh den 373 U.S. 905, 10 L.Ed.2d 200, 83 S.Ct. 1288


(1963); Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396, reh den 388 U.S. 924, 18 L.Ed.2d 1377, 87 S.Ct. 2094 (1967).

When in a criminal proceedings a defendant's attorney neglects to file a notice of appeal, counsel's failure may constitute ineffective assistance of counsel. Roe v. Flores-Ortega, 528 U.S. 470, 145 L.Ed.2d 985, 120 S.Ct. 1029 (2000).

Osborn contends this court should allow him an opportunity to file an out of time appeal because counsel's failure to file his appeal was completely out of his control. See, Fallen v. United States, 378 U.S. 139, 143-44, 12 L.Ed.2d 760, 84 S.Ct. 1689 (1964). Also See, Pioneer Investment v. Brunswick, 507 U.S. 380, 123 L.Ed.2d 74, 113 S.Ct. 1489 (1993); Stutson v. United States, 516 U.S. 193, 133 L.Ed.2d 571, 116 S.Ct. 600 (1996).

In the instant case this court should order an evidentiary hearing regarding this issue that presents one of compelling significant questions. The interest of justice requires such a hearing for the purposes of making a determination whether Osborn did in fact request that his attorney file a notice of appeal.

Respectfully Submitted,

  
Lorne Eugene Osborn  
Reg. No. #11323-040  
Federal Correctional Institution  
P.O. Box-33  
Terre Haute, Indiana 47808

CERTIFICATE OF PROOF OF SERVICE

I, hereby certify that on this 26, day of DECEMBER, 2005,  
a true copy of my "Motion For Leave of Court to File Out of Time  
Appeal" was duly served by the United States Postal Service. A  
true copy was mailed to the party below:

Mailed To:

Lorne E Osborn  
Lorne Eugene Osborn

U.S. Attorney (Grand Rapids)  
B. Rene Shekmer  
The Law Building  
330 Ionia Ave., NW  
P.O. Box-208  
Grand Rapids, Michigan  
49501-0208