

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant

C.A. No. 10-50219, 10-50264
D.C. No. CR 07-689-GW
(Cent. Dist. Calif.)

v.

GOVERNMENT'S OPPOSED MOTION FOR
LEAVE TO FILE OVERSIZED BRIEF;
DECLARATION OF DAVID KOWAL

CHARLES C. LYNCH,

Defendant-Appellant/
Cross-Appellee

Plaintiff-Appellee United States of America, by and through its counsel of record, respectfully moves this Court for leave to file an answering brief exceeding the word count limitations set forth in Federal Rule of Appellate Procedure 28.1(e)(2)(B), 32(a)(7)(C) and Ninth Circuit Rule 32-1.

This motion is based upon the files and records of this case

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and the attached declaration of Assistant U.S. Attorney David Kowal.

DATED: November 1, 2013

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

/S/ David Kowal
DAVID KOWAL
Assistant United States Attorneys

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

DECLARATION OF DAVID KOWAL

I, David Kowal, hereby declare and state as follows:

1. I am Assistant United States Attorneys in the Central District of California and was responsible for preparing the government's answering brief and brief on cross-appeal ("answering brief") in United States v. Lynch, CA No. 10-50219, 10-50264, which I co-prosecuted in the district court. Because this case involves a cross-appeal, the government's word limit is an additional 16,500 words.

2. The nature of the case, the length and complexity of the proceedings, and the volume of evidence relevant to defendant's claims on appeal and the government's cross-appeal support the government's motion to file its proposed oversized brief. This case involves an appeal from convictions in a narcotics conspiracy involving a marijuana store. Defendant was convicted following a 10-day jury trial involving approximately 19 witnesses and approximately 200 exhibits. Importantly, there was also extensive pre-trial and post-trial litigation such as pre-trial motions, four new trial motions, six sentencing hearings, voluminous sentencing briefs, and numerous rulings by the district court over the entire course of proceedings that covered over two years. The issues raised in defendant's opening brief cover the great majority of this procedural and factual history. The government's cross-appeal addresses

further issues with respect to defendant's sentence.

3. The need for an oversized answering brief is also supported by the nature of defendant's opening brief. Defendant filed an oversized opening brief, consisting of approximately 20,400 words. Defendant also filed 16 volumes of excerpts of record. Two amicus briefs were also filled on an issue the government addressed in its answering brief. Each argument section in defendant's brief often raised numerous discrete issues that the government had to address in its answering brief. For example, defendant raised evidentiary challenges to 10 different categories of evidence that the government had to respond to in its answering brief, and often each category included more than one witnesses or exhibit. Defendant also raised, five different challenges to jury instructions relevant to its affirmative defense (AOB 46-57), as well as two other more general challenges to instructions by the district court containing several sub arguments. (AOB 57-68). These issues were raised in addition to three further sentencing issues, and a challenge to the district court's denial of a new trial motion. (AOB 40-42, 78-80).

4. The oversized brief is also supported by nature of the issues and how they were raised. The government's proposed answering brief is approximately 42,360 words absent the caption and signature pages, much longer than defendant's opening brief.

However, there are good reasons for this difference and for the large size of the answering brief. Often, defendant raised an issue or argument while providing little information about how the issue arose or how it was ruled on in the district court. Thus, the government's response took far more pages to properly address the topic. For example, in one section of defendant's brief covering approximately two-pages, defendant uses bullet points and short descriptions to raise evidentiary challenges to six separate items of evidence or events at trial. (AOB 36-38). While the government's answering brief sought to group similar evidentiary items and issues together for efficiency, an intelligible response required at least some description of what each challenged item of evidence was, how it arose at trial, and how it was ruled on below, as well as answering defendant's argument. Thus, in this example, it took the government approximately 10-pages to respond to the issues that were raised in a little more than two.

5. Another example is defendant's appeal of a new trial motion in the district court involving allegation that the government violated its constitutional obligations under Brady by suppressing evidence useful to the defense. (AOB 40-43). In approximately three pages defendant raised an issue of importance to the government that was the subject of lengthy briefing in the district court and de novo review. The opening brief, however, contains little

information about the factual or procedural background which is, critical to addressing the issue. Hence, the government's response to the issue, much of which is a description of that background, is more than twice as the opening briefs.

6. In comparing the government's brief to the opening brief it is also noteworthy that the government's answering brief addressed three significant issues not addressed in the opening brief: two issues on cross-appeal and a challenge to the threshold validity of defendant's affirmative defense (an argument which impacts the majority of the issues in the opening brief). These additional issues took approximately 12,000 words to address. Without them, the government's brief is only approximately one-third longer than defendant's brief.

7. Finally, as noted above, much of the government's task in the answering brief was to set forth clearly the factual and procedural background accompanying the issues the Court needs to address. Thus, approximately 40 percent of the proposed answering brief is not argument or legal analysis, but a recitation of that factual and procedural background.

8. The answering brief was originally approximately 20 percent longer, but I have worked diligently with my appellate section to reduce its length without impairing the government's presentation of the arguments and without inhibiting the Court's

ability to address the issues.

9. Today, I sent an email to one of defendant's appellate counsel, Deputy Public Defender Alexandra Yates, informing her of this request for leave. She emailed me that appellant does not oppose "some reasonable extension of the word limitation," but opposes an extension of the length requested.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated:

November 1, 2013

/s/ David Kowal
David Kowal
Assistant U.S. Attorney

9th Circuit Case Number(s) 10-50291, 10-50264

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s/ David Kowal

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