

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

**DEFENDANT-APPELLANT'S REPLY TO OPPOSITION TO MOTION TO
FILE OVERSIZE 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, replies to the government's opposition to his request to file an oversize third cross-appeal brief.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: July 20, 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:

On July 3, 2012, I filed an 80-page, 20,450-word first cross-appeal brief in this case. On November 1, 2013, the government lodged a 190-page, 42,241-word second cross-appeal brief. This Court rejected the government's proposed brief, and ordered the government to file a brief of 28,000 words or fewer. On March 14, 2014, the government instead lodged a 149-page, 32,951-word second cross-appeal brief, which the Court accepted on April 11, 2014.

Three days ago, on July 17, I lodged a 79-page, 18,504-word third cross-appeal brief, and filed a motion for leave to file an oversize brief. Late last night, the government filed a 12-page opposition to my motion.

The government complains the third cross-appeal brief refers to an already fully-briefed motion ("the *McIntosh* motion"), opposition, and reply, which a motions panel of this Court denied without prejudice to being re-raised in the third cross-appeal brief.

As I explained in the third cross-appeal brief:

Lynch understands the motions panel's order to follow the Court's usual practice and defer consideration of the fully briefed motion, opposition, and reply to the merits panel, rather than require the Parties to rewrite each of those pleadings. If the Court instead wishes Lynch to incorporate all of the arguments in his motion and reply into this brief, he will file a revised version.

(CA No. 10-50129, ECF No. 152, at 2 n.2.) This understanding was based on my decade of practice in this Court, year of clerking for a judge of this Court, and consultation with the Chief of Appeals in my office, who agreed.

This approach does not prejudice the government. In its final brief, the government need only respond to the third cross-appeal brief's one-paragraph citation to a newly decided case, not previously discussed in the *McIntosh* motion or opposition. By contrast, the government's proposed approach would require it to write an entirely new response to a revised claim. Because the Court will schedule oral argument following the filing of the third cross-appeal brief, without regard to the timing of the government's final merits brief, the government will have only a short timeframe within which to prepare and file that brief. I therefore only saw the approach I took in the third cross-appeal brief as *benefiting* the government.

This approach also does not require the Court to act "like pigs, hunting for truffles buried in briefs." (CA No. 10-50264, ECF No. 8 (internal quotation marks omitted).) There are a single motion, opposition, and reply for the Court to rule on. There are discrete exhibits attached to those filings, which the Court must review whether they remain so attached or are presented as new, supplemental exhibits.

In referring to the fully briefed motion, opposition, and reply in the third cross-appeal brief, I was not attempting to evade word limits. Even if I cut and pasted the *McIntosh* motion and reply in their entirety into the third cross-appeal brief, that brief still would be significantly shorter than the second cross-appeal

brief. I therefore had no concerns about word limit, only about following what I understood the Court's order to direct.

Instead, it appears the government, by its remarkable opposition, is attempting to gain additional time—which otherwise might not be allotted due to calendaring of argument—to file its final merits brief.

If the Court prefers that I incorporate the arguments in the fully briefed motion and reply into the third cross-appeal brief, I will do so.

There are plenty of contentious issues in this case already. I did not even conceive of the possibility that, by following the Court's regular practice, which in no way prejudices the government, I might be introducing yet another one.

Executed on July 20, 2017, in Los Angeles, California.

/s Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, I electronically filed the foregoing **DEFENDANT-APPELLANT'S REPLY TO OPPOSITION TO MOTION TO FILE OVERSIZE 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.

Lorena Macias
LORENA MACIAS