IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES C. LYNCH, Defendant-Appellant.	C.A. No. 10-50219 D.C. No. CR 07-689-GW (Central Dist. Cal.) **GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO FILE OVERSIZED THIRD BRIEF ON CROSS-APPEAL**
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CHARLES C. LYNCH, Defendant-Appellee.	C.A. No. 10-50264 D.C. No. CR 07-689-GW (Central Dist. Cal.)

Plaintiff-Appellee/Cross-Appellant United States of America, by and through its counsel of record, hereby opposes Defendant-Appellant/Cross-Appellee Charles C. Lynch's ("defendant") motion to file his and oversized third brief on cross-appeal, filed on July 17, 2017 (Court of Appeals Docket No. ("CTA") 151).

This opposition is based on the files and records in this case, the district court record, and the attached memorandum of points and authorities.

DATED: July 19, 2017

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant's proposed 79-page third brief on cross-appeal, already oversized and more than three years delayed, attempts to improperly incorporate by reference over 67 pages of additional prior briefing by defendant on a motion recently rejected by a three-judge motions panel of this Court. The proposed brief thus violates Circuit rules and precedent and directly contradicts the command of two motions panels that any arguments from the motion that defendant sought to renew before a merits panel be set forth "in the third cross-appeal brief." Defendant's filing of a non-compliant brief is especially problematic because, after 14 requests for extensions by defendant for this brief alone, this Court had expressly barred defendant from receiving further extensions of time to file his third brief on cross-appeal. Defendant's attempted incorporation by reference would force the government to expend its limited briefing space to respond to arguments unfairly set forth outside of defendant's brief and the rules and limits for briefing, and lacking in any of the hallmarks of coherence and specificity required by appellate rules. This Court should prevent this improper result by striking defendant's attempt to incorporate its motion argument in its oversized brief, and rule that defendant has abandoned any arguments with respect to that motion.

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Defendant's final brief, the third brief on cross-appeal, was initially due May 11, 2014. (CTA 80). After two extensions of time to file the brief (*see* CTA 82, 89), on February 24, 2015, defendant filed a motion in this Court seeking an order that the government cease spending funds on this case due to a appropriations rider passed by Congress concerning medical marijuana (the "rider"). (*See* CTA 91, 95). On April 13, 2015, a motions panel of this Court rejected defendant's motion based on the rider "without prejudice to renewing the argument *in the third cross-appeal brief*." (CTA 100 (emphasis added)). The Court also granted defendant third extension on the brief (*id.*), and subsequently denied defendant's petition for rehearing or review *en banc* while granting defendant a fourth briefing extension. (CTA 112). Defendant thereafter obtained eight more extensions on the brief, totaling more than 18 months. (CTA 114, 119 121, 123, 125, 127, 129, 133). The Court three times said that further extensions would be disfavored and twice "strongly disfavored." (*Id.*).

On March 3, 2017, almost three years after the third brief on cross-appeal was first due, defendant filed a 28-page motion under Federal Rule of Appellate Procedure 12.1 (the "Rule 12.1 motion") seeking a remand to the district court and other relief based on the rider. (CTA 137). Defendant's

motion also included over 200 pages of exhibits. (CTA 137-2). The government opposed the motion on multiple procedural and substantive grounds. (CTA 142). Among other things, the government asserted, as it had in response to defendant's 2015 motion (*see* CTA 94), and as the Court had indicated in its April 13, 2015 ruling, that any arguments concerning the rider should be raised in defendant's next brief on cross-appeal. (CTA 142 at 25-29). The government also asserted that the new motion was part of defendant's series of attempts to pursue every avenue to delay completion of the briefing of the case, and requested that the Court grant defendant no further extensions on his third brief on cross-appeal. (*Id.* at 1, 56). Defendant filed a thirteenth and fourteenth request for extensions (CTA 144, 149), and also filed a 37-page reply in support of his Rule 12.1 motion. (CTA 147).

On June 15, 2017, another three-judge panel of this Court denied defendant's Rule 12.1 motion, "without prejudice to renewing the arguments in the third cross-appeal brief." (CTA 150 at 2). The Court ruled that no motions for reconsideration would be entertained, that defendant's third brief was due within 30 days, and that no "further requests for extension of time will be entertained." (*Id.*).

On July 17, 2017, defendant filed an oversized 79-page third brief on cross-appeal. (CTA 152). In a one-and-a-half page introductory section,

defendant referenced his briefing on his Rule 12.1 motion, and said he was renewing that motion's arguments about the rider. (*Id. at* 1-3). Defendant referenced a subsequent opinion by this Court concerning the rider (*id.* at 2 (citing *United States v. Klienman*, 859 F.3d 825 (9th Cir. June 16, 2017)), but otherwise made no effort to set forth the arguments from his prior 67-pages of briefing from his Rule 12.1 motion, reference the applicable parts of the record, or cite any case law. In a footnote, defendant stated that he assumed this Court had "defer[ed] consideration" of the Rule 12.1 motion to the merits panel, and said that he would "rewrite" his prior pleadings "into this brief" if the Court "wished." (*Id.* at 2 n.2). Defendant also filed a short motion for leave to file an oversized third brief on cross-appeal which did not reference anywhere that defendant was seeking to incorporate 67-pages of prior motion briefing into the oversized brief. (CTA 151).

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Defendant's attempt to raise almost 70 pages of arguments from prior his motion briefing on the rider in his third brief on cross-appeal merely by referencing that prior briefing directly contradicts the orders of this Court in this case. Contrary to defendant's statement in his footnote, in denying both defendant's 2015 and 2017 motions concerning the rider, this Court said nothing about deferring its rulings to a later merits panel. (See CTA 100, 150).

Instead, this Court clearly denied both of defendant's motions (once also denying both rehearing and *en banc* review), and explicitly stated that defendant could renew his "arguments" from the motions "*in defendant's third brief on cross-appeal.*" (*Id.* (emphasis added)). The emphasized language unambiguously references "arguments" to be made in a specific "brief" -- the third brief on cross-appeal -- not motion pleadings to be incorporated by reference without any argument, organization, or analysis "in defendant's third brief."

Defendant's attempt to incorporate lengthy arguments through incorporation by reference without setting them forth in the brief itself also circumvents the limitations on the length of briefs set forth in Federal Rule of Appellate Procedure 28.1(e) and 9th Circuit Rules 28.1-1(b) and 32-2(a). To avoid such clear contravention of brief limits, appellate rules only permit incorporation by reference in cases with multiple parties where one party may "adopt by reference" a portion of another parties' brief. *See* Fed. R. App. P. 28(i); *.cf* 9th Cir. R. 28-1(b) (barring incorporation by reference to briefs from other courts or prior appeals). Defendant's violation of these principles is reinforced by the fact that he has sought to have this Court rule on his motion to file an oversized brief without acknowledging in that motion that he is also

seeking to incorporate 67 additional pages of motion briefing in that oversized brief.

Defendant's attempt to incorporate arguments by reference without developing them in the brief itself also violates Federal Rule of Appellate Procedure 28(a)(8), which requires that an argument in a brief to contain a party's contentions and reasons, with citations to case law and the record. Fed. R. App. P. 28(a)(8). This Court has consistently referenced this rule and its predecessors to hold that where a party's argument "was not coherently developed in [their] *briefs on appeal,* we deem it to have been abandoned." *United States v. Kimble*, 107 F.3d 712, 715-16 n.2 (9th Cir. 1997) (emphasis added); *see also United States v. Velasquez-Bosque*, 601 F.3d 955, 963 n.4 (9th Cir. 2010) (declining to consider argument made in passing and not coherently developed in brief); *United States v. Williamson*, 439 F.3d 1125, 1138 (9th Cir. 2006) (claim not supported by argument and legal authority was waived). The same result should apply here.

Indeed, defendant's prior Rule 12.1 motion makes little sense if incorporated blindly into his third brief on cross-appeal, as defendant desires. Significant portions of the parties' briefing on that 2017 motion concerned procedural infirmities with respect to defendant's Rule 12.1 motion that would will be at best ill-fitting, and likely irrelevant, if taken out of the context of an

appellate motion. (*E.g.*, CTA 142 at 9-28; CTA 147 at 2-8, 10-13). Indeed, defendant's primary request for relief in that motion was for the case to be remanded to the district court under Federal Rule of Appellate Procedure 12.1 without a decision on the other issues on appeal because, according to defendant, such a remand could "moot the appeal." (*See* CTA 137 at 27). Defendant's third brief on cross-appeal does not explain whether defendant still seeks an immediate remand or a partial adjudication of the rider issues on appeal, as requested in the prior motion. *See* Fed. R. App. P. 28(a)(9) (requiring brief to state "the precise relief sought."). Nor does the part of defendant's third brief referencing his Rule 12.1 motion and the rider provide the citations to defendant's previously-filed excerpts of record in this appeal. Instead, defendant is presumably relying on the 200 pages of exhibits attached to defendant's Rule 12.1 motion, without explicitly saying so, and without complying with the requirements for excerpts of record under Federal Rule of Appellate Procedure 28-2.8, 9th Circuit Rule 30-1 and similar rules. *See* 9th Cir. R. 30-1.4, 30-1.6, 30-2 (failure to comply with rules regarding excerpts may result in sanctions).

In sum, after over three years, while raising other numerous issues on appeal, defendant now asks this Court to sift through a pile of prior motion briefs on the rider in the hope that the Court will find something in his favor.

This Court has repeatedly rejected such invitations and instead held that it results in abandonment of the argument at issue. *See Williamson,* 439 F.3d at 1138 (Court will not "manufacture arguments for an appellant" who failed to present "specific, cogent argument[s] . . . especially where a host of other issues are presented for review.") (citations and internal quotation marks omitted); *Kimble*, 107 F.3d at 715-16 n.2; *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Given defendant's long history of delay, and his clear violations of this Court's orders and rules with respect briefing on the rider set forth above, defendant should not be given another opportunity to re-write his brief. Rather, this Court should rule, prior to the government preparing its fourth brief on cross-appeal, that defendant has abandoned any arguments regarding his prior motions and the rider, and the government need not respond to the cursory references to them in the third brief on cross-appeal. Were defendant instead given additional time to re-write his third brief it would in effect be rewarding defendant for his violations of this Court's explicit orders. It would also be a successful effort by defendant to "pursue every procedural avenue, no matter how unfounded or contrary to law, to delay completion [of] the appeal and cross-appeal in this matter," as the government described in its opposition

to defendant's Rule 12.1 motion. (CTA 142 at 1). Additional time for a re-write would also frustrate this Court's June 15, 2017 order, which responded to this assertion by the government, and more than three years of prior extensions to bar further extensions of time in briefing. (CTA 150 at 2).

It is also important and fair for the Court to rule on this motion prior to the government expending the time and resources on preparing its fourth brief on cross-appeal. Without such an advanced ruling, the government will be forced to spend a substantial portion of its allowed space in its final brief responding to defendant's arguments from his prior motions. This would be particularly unfair given that defendant will have circumvented the rules on brief length, as explained above, and because defendant has previously objected to the government filing an oversized brief in this case. (*See* CTA 73). The government would also be required in its limited time to prepare its final brief to sift through 67 pages of defendant's incorporated motion filings and additional pages of exhibits to determine which of defendant's arguments were still viable outside the context of a Rule 12.1 motion, and to essentially provide record citations and organizational clarity on the issues wholly absent from defendant's current presentation.

For all these reasons, this Court should rule that the arguments set forth in Section II.A. of defendant's proposed oversized third brief (CTA 152 at 1-3)

are not properly raised and have been abandoned, and order that the government need not respond to them in its final brief on cross-appeal. Alternatively, the Court should fashion a ruling that denies defendant's motion to file an oversized brief in its entirely (CTA 153), and orders defendant to file a brief compliant with this Court's orders and appellate rules without further delay.

9th Circuit Case Number(s) 10-50219, 10-50264

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