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 OPPOSITION TO MOTION TO FILE OVERSIZE FOURTH 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, files his opposition to the government's motion to file an oversize fourth cross-appeal brief.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: September 26, 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:

Procedural Background

In December 2014, while this appeal was pending, Congress enacted and then-President Obama signed into law a 2015 appropriations bill; it contained a rider prohibiting the Department of Justice ("DOJ") from spending funds to prevent states from implementing their medical marijuana laws. Congress has included the rider in every subsequent appropriations bill and short-term extension.

Shortly thereafter, in February 2015, Lynch moved this Court to enjoin the DOJ from spending funds on his case in violation of the rider. (Dkt. No. 91.)[1] A motions panel denied relief in a brief order, without deciding the merits and without prejudice to Lynch renewing the matter in his third cross-appeal brief or in Rule 12.1 proceedings in district court. (Dkt. No. 100.) Lynch sought en banc review of the motions panel's decision, and two groups of amici curiae, including the U.S. Representatives who authored the relevant legislation, filed briefs in support. (Dkt. Nos. 101, 103, 107.) This Court denied Lynch's motion for en banc review in June 2015. (Dkt. No. 112.)

[1] All docket citations are to CA No. 10-50129, unless otherwise specified.

In August 2016, while Lynch was preparing the third cross-appeal brief, this Court held that the appropriations rider applies to criminal cases, and directed criminal defendants challenging their convictions based on the rider to seek relief in district court. *See United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). That decision became final on November 29, 2016, when the Court denied a petition for rehearing.

Less than two weeks later, Lynch sought relief in district court. Specifically, he moved under Federal Rule of Appellate Procedure 12.1 for a written indication that the district court would grant or entertain a motion for injunctive relief or dismissal based on the existing record, or—if the court believed further factual development was necessary—hold a *McIntosh* hearing. The parties briefed the matter, and following a hearing on February 2, 2017, the court demurred, seeking preliminary legal guidance from this Court.

Within thirty days, Lynch moved in this Court for a remand or outright relief based on the appropriations rider. (Dkt. No. 137.) The government opposed, and Lynch replied. (Dkt. Nos. 142, 147.)

On June 15, shortly before Lynch was due to file his third cross-appeal brief, a motions panel denied Lynch's *McIntosh* motion "without prejudice to renewing the arguments in the third cross-appeal brief." (Dkt. No. 150.) The Court also stated, "No further requests for extensions of time will be entertained." (*Id.*)

On July 17, Lynch timely lodged his third cross-appeal brief. (Dkt. No. 152.) In his introduction and argument, Lynch challenged the DOJ's continued expenditure of funds on his case, based on the appropriations rider. (*Id.* at 1-3.) Specifically, under the "Argument" heading, Lynch included a subheading titled, "Lynch Renews His Motion To Enforce a Congressional Appropriations Rider That Prohibits the Department of Justice from Spending Funds on His Case." (*Id.* at 1.) He explained the origin of the rider, the Court's holding in *McIntosh*, and his position that he is entitled to relief based on the rider. (*Id.* at 1-2.) In doing so, Lynch referred to the fully-briefed motion, opposition, and reply. (*Id.* at 2.) He further acknowledged the motions panel's denial of his motion without prejudice and its instruction to renew his arguments in the third cross-appeal brief, stating, "Lynch hereby does so." (*Id.*) In a footnote, Lynch explained that he

> 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.

(*Id.* at 2 n.2.) Lynch then briefly addressed a new decision on the rider, *United States v. Kleinman*, 859 F.3d 825 (9th Cir. 2017). (Dkt. No. 152 at 2-3.) He requested an order prohibiting the DOJ from spending further funds on his case, and an order dismissing the underlying criminal case. (*Id.* at 1-3, 78.)

The government opposed Lynch's request to file an oversize brief because it objected to the manner in which Lynch renewed the appropriations issue. (Dkt. No. 153.) Lynch filed a reply, where counsel stated the following about Lynch's treatment of the appropriations-rider issue in his brief:

> This understanding [of how to renew the previously raised arguments] 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." [Citing Govt. Opp., CA No. 10-50264, Dkt. 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.

(Dkt. No. 154 at 3-4.)

On August 25, the Clerk of the Court ordered Lynch to file a revised third cross-appeal brief that included the appropriations-rider arguments, and to do so within one week, by September 1. Although Lynch's *McIntosh* motion and reply together totaled more than 13,000 words, the Court allotted fewer than 5,500 words for the revised arguments. (Dkt. No. 155; *see* Dkt. No. 156 at 2.)

Lynch sought a modest extension of fourteen days to complete the significant reworking of the cross-appeal brief necessary to comply with the order. In that request, counsel explained that she required additional time because:

- she needed to re-familiarize herself with the arguments in the motion and reply, which were filed almost six months earlier;
- condensing those arguments from 13,000 to 5,500 words required a substantial amount of time;
- she also needed time to prepare supplemental excerpts of record to accompany the brief, and to redo the tables on the lengthy brief; and
- she was unable to complete this work in the given seven-day timeframe because, among other time-sensitive, previously-scheduled and ordered work obligations, she was (and remains) lead counsel in *United States v. Dylann Roof*, Fourth Circuit CA No. 17-3, an appeal from a high-profile federal conviction and death sentence; her work on that case typically takes up the better portion of every working day; and the Office of the Federal Public Defender had reduced her caseload to accommodate her work on *Roof*, but in doing so did not budget time for her to revise the third cross-appeal brief, which she had lodged almost six weeks before the Court issued its order.

(Dkt. No. 156.)

In response, the Clerk of the Court denied the request for an additional fourteen days, vacated its order for revised briefing, and ordered Lynch's original third cross-appeal brief filed. (Dkt. No. 157 at 1.) The Court apparently relied on the motions panel's earlier statement, made while setting due dates for the third

and fourth cross-appeal briefs, that it would not entertain any further requests for extensions of time. (*Id.* (citing Dkt. No. 150).) The Court also referred to the merits panel "[t]he government's request (included in Docket Entry No. 153) that the court 'strik[e] 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' . . . for whatever consideration the panel deems appropriate." (*Id.* at 2 (citation omitted) (second alteration in original).)

The government has now lodged a proposed seventy-eight-page fourth cross-appeal brief. (Dkt. No. 164.) In its motion for leave to file an oversize brief, the government states that the brief's treatment of the original cross-appeal issues falls within the Court's applicable word-limitation, but represents it felt compelled to file an additional fifty-two pages in response to Lynch's discussion of the appropriations rider in his third cross-appeal brief. (Dkt. No. 163 at 1-2.)

The Oversize Portion of the Government's Fourth Cross-Appeal Brief Is Superfluous

The government's briefing on the appropriations rider largely rehashes the arguments that it made in opposition to Lynch's motion for *McIntosh* relief. This extended rehashing is superfluous because, assuming the merits panel correctly deems the appropriations issue properly presented, it will need no briefing beyond the motion, opposition, and reply already submitted to the Court. If the Court

instead finds—counter to law and facts—that Lynch somehow waived his appropriations argument, the government's briefing is equally unnecessary.

A waiver is an *intentional* relinquishment of a known right. *See United States v. Alferahin*, 433 F.3d 1148, 1154 n.2 (9th Cir. 2006). It follows that a defendant may waive a claim raised in district court by *intentionally* withdrawing it. *See United States v. Manarite*, 44 F.3d 1407, 1419 & n.18 (9th Cir. 1995).

Here, there was no intentional waiver. *See Alferahin*, 433 F.3d at 1154 n.2 (refusing to find waiver absent intent). As counsel explained in the third cross-appeal brief and Lynch's reply to the government's opposition for leave to file that brief, Lynch affirmatively intended to renew the appropriations issue. Indeed, Lynch (through that same counsel) has tried for years to obtain a ruling from this Court or the district court on the matter. In the third cross-appeal brief, counsel again attempted to do so in good faith, in a manner she believed consistent with this Court's orders and general practice, informed by her decade of practice almost exclusively in this Court and term as a clerk to a judge of this Court, and in consultation with the Chief of Appeals for the Office of the Federal Public Defender, who had a similar understanding of the Court's orders and practice. Importantly, the appropriations issue is a standalone one, submitted for the Court's resolution separate and apart from the merits of the substantive case—facts that informed counsel's good faith understanding of their proper presentation.

Although the Clerk of the Court ordered counsel to revise the brief, the order did not rule that Lynch waived his substantive arguments by improperly presenting them. Nor could it have. *See* Ninth Cir. R. 27-7 advisory committee note (delegating to court staff authority to resolve "non-dispositive procedural motions"); Ninth Cir. General Orders app. A (listing procedural motions court staff may resolve). To the contrary, by ordering Lynch to file a revised third cross-appeal brief incorporating the arguments in the *McIntosh* motion and reply, the Court affirmatively encouraged further presentation of those arguments.

And so, to find waiver, the merits panel would need to find that Lynch intentionally relinquished his appropriations-rider arguments by seeking a brief extension beyond the seven days allotted to file a substantially revised third cross-appeal brief. Again, there is no basis for so finding. The motions panel's June 15 order stating, "No further requests for extensions of time will be entertained," was made in the course of resetting the deadlines for the third and fourth cross-appeal briefs. (Dkt. No. 150 at 2.) The order did not purport to prohibit requests for extensions of time for other briefs, such as a *revised* third cross-appeal brief, nowhere contemplated by the order. The Court regularly allots additional time for such briefing. Had the motions panel intended otherwise, it likely would have said, "No further requests for extensions of time will be entertained *in this case*."

It was therefore reasonable for counsel to believe the motions panel had not, by its order, prohibited extension requests for briefs that, at the time of the order,

were neither envisioned nor discussed. Counsel's good-faith request for a modest extension of time, not clearly prohibited by the motions panel's order, does not demonstrate an intentional relinquishment of Lynch's appropriations claim.

What is more, Lynch *did* raise the appropriations issue in his third cross-appeal brief, by specifically stating the legal basis for his claim in a separately-captioned argument section, with discussion of the Court's most recent case on point, and a precise request for relief. *See Williams v. Woodford*, 384 F.3d 567, 587 n.5 (9th Cir. 2004) (considering party's argument, though "not extensive," made in eight-sentence footnote); *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 930 n.2 (2003) (finding issues "sufficiently raised and preserved" where party "offered minimal argument" but "did generally cross-reference with [a relevant case], albeit in a truncated analysis").

This case is a world apart from *United States v. Norales*, 597 Fed. Appx. 463 (9th Cir. Mar. 17, 2015) (mem.), an unpublished decision relied on by the government. (Dkt. No. 164 at 37.) There, the defendant affirmatively advised the Court, against his counsel's advice, that he did not wish to submit supplemental briefing on a potentially favorable new decision. *Norales*, 597 Fed. Appx. at 463-64. Under *those* circumstances, the Court held the defendant's "rejection of the opportunity to supplement his opening brief constitute[d] a waiver of his . . . argument to the extent it that it was affected by" the new case. *Id.* at 464. By

contrast, Lynch did not intentionally reject any opportunity to submit his arguments, as discussed above.

And this case is nothing like the other authorities cited by the government to support its waiver argument (Dkt. No. 164 at 35-39), which each involved a party's failure to develop its argument entirely, either by presenting "no argument, no legal authority, and no request for relief," *United States v. Williamson*, 439 F.3d 1125, 1138 (9th Cir. 2006), or making an undeveloped statement only "in passing," *United States v. Velasquez-Bosque*, 601 F.3d 955, 963 n.4 (9th Cir. 2010). Lynch extensively developed his appropriations arguments in his motion and reply, and adequately presented them in his third brief to avoid any waiver.

Finally, even assuming counterfactually that Lynch did not properly raise the appropriations issue, he meets all three exceptions to the Court's general rule against considering an improperly raised argument: "(1) for good cause shown or if a failure to do so would result in manifest injustice, (2) when it is raised in the appellee's brief, or (3) if the failure to raise the issue properly did not prejudice the defense of the opposing party." *United States v. Salman*, 792 F.3d 1087, 1090 (9th Cir. 2015) (internal quotation marks omitted). As to the third exception, where "both parties have had a full opportunity to brief this issue," as they did in the *McIntosh* motion, opposition, and reply, and will be able "to address it at oral argument, the Government cannot complain of prejudice." *Id.*

Because the appropriations issue is a live one for the merits panel, and because it already is fully briefed, the government's proposed oversize briefing is superfluous. The fully briefed motion, opposition, and reply are self-contained and do not engender confusion or require the Court to hunt for arguments. The issues presented in those three pleadings remain ripe for decision, save for the question of whether the rider applies to cases on appeal, which *Kleinman* resolved in Lynch's favor. The government needed do nothing more in its fourth brief than respond to Lynch's discussion of *Kleinman*'s impact on this case. Instead, the government chose to rehash its already-presented arguments, in an apparent attempt to have the last word on an issue raised by the defense.

Lynch has no objection to whatever additional words the government might need to adequately address *Kleinman* or raise its frivolous waiver claim. Cutting the remaining, redundant briefing should not be an arduous task, and presumably will not prolong resolution of this case, which has yet to be calendared.

In its motion for leave to file an oversize brief (Dkt. No. 163) and its discussion of potential waiver in the fourth cross-appeal brief (Dkt. No. 164 at 26-33), the government repeatedly implies Lynch has delayed resolution of this case unnecessarily. Lynch has responded to similar spurious suggestions in prior filings. (*See, e.g.*, Dkt. No. 132.) Aside from being meritless, the government's insinuations are irrelevant to the instant matter, and Lynch does not waste the Court's time by rehashing the procedural history of this case here.

Executed on September 26, 2017, in Los Angeles, California.

/s Alexandra W. Yates
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, I electronically filed the foregoing **DEFENDANT-APPELLANT'S OPPOSITION TO MOTION TO FILE OVERSIZE FOURTH 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