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March 28, 2018

Molly C. Dwyer
Clerk, Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States v. Charles C. Lynch*, CA Nos. 10-50219, 10-50264
Scheduled for Argument: April 13, 2018, Pasadena, California

Dear Ms. Dwyer:

Defendant-Appellant/Cross-Appellee Lynch submits this letter pursuant to Federal Rule of Appellate Procedure 28(j), advising the Court of pertinent new authority.

In *United States v. Kootswatewa*, __ F.3d __, 2018 WL 1439610 (9th Cir. Mar. 23, 2018), this Court provided additional guidance on the admission of prior consistent statements pursuant to Federal Rule of Evidence 801(d)(1)(B).¹ In that case, right after an alleged sexual assault, the victim made statements to a police officer inculcating the defendant. *See id.* at *1. At trial, the defense mainly attacked the victim as lying to avoid getting into trouble. *See id.* at *4. Defense counsel previewed this argument in her opening statement, and returned to it on cross-examination. *See id.* This Court explained that the victim’s prior statement was inadmissible to rebut the defense’s accusation because the victim’s “alleged motive to fabricate her story to avoid being disciplined by her mother arose before [she] spoke to the officer.” *Id.* at *5.

But that was not the end of the matter. For on cross-examination, counsel also “suggested through her questions that [the victim] had two separate motives for fabricating her story: She wanted to avoid getting in trouble with her mother, as alluded to during opening statement; and, in addition, she was complying with her mother’s instructions about what to say during her in-court testimony.” *Id.* at *4. As to this secondary motive, suggested only on cross, the prior statement was admissible. *See id.*

¹ *Kootswatewa* addressed the revised Rule 801, but the relevant changes are stylistic.

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It did not matter that “defense counsel asserted two different improper motives, and [the] prior statements to the officer rebutted only one of them.” *Id.* at *5. Rule 801 “does not require that a prior statement rebut all improper influences or motives suggested by [opposing] counsel. It is sufficient if the prior statement tends to rebut one of them.” *Id.*

So too in Lynch’s case. The government suggested on cross-examination that Lynch fabricated the contents of his DEA call for trial. This may not have been the government’s only, or even main, theory. But Lynch was entitled to rebut it.

Sincerely,

/s Alexandra W. Yates

Alexandra W. Yates
Deputy Federal Public Defender