No. 12-30208

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellant,

vs.

JERAD JOHN KYNASTON - 1, SAMUEL MICHAEL DOYLE - 2, BRICE CHRISTIAN DAVIS - 5, JAYDE DILLON EVANS - 6, and TYLER SCOTT MCKINLEY - 7
Defendants-Appellees.

On Appeal From The United States District Court
For The Eastern District of Washington
USDC No. CR-12-00016-WFN
The Honorable Wm. Fremming Nielsen

DEFENDANTS-APPELLEES' MOTION TO STRIKE

ROBERT R. FISCHER
Federal Defenders of E. Washington
10 North Post, Suite 700
Spokane WA 99201
Telephone: 509-624-7606
Facsimile: 509-747-3539
Email: robert_fischer@fd.org

Attorney for Jerad John Kynaston - 1

GEORGE PAUL TREJO, JR.
Law Office of George Trejo
701 North First Street, Suite 100
Yakima WA 92901-2203
Telephone: 509-452-7777
Facsimile: 509-575-0803
Email: gptrejo@the trejolawfirm.com

Attorney for Samuel Michael Doyle - 2

DAVID MATTHEW MILLER
Miller & Prothero
421 West Riverside, Suite 868
Spokane WA 99201
Telephone: 509-747-8157
Facsimile: 509-747-8165
Email: millerlaw2010@hotmail.com

Attorney for Bryce Christian Davis - 5

NICOLAS V. VIETH
Vieth Law Offices, Chtd.
912 East Sherman Avenue
Coeur d' Alene ID 83814
Telephone: 208.664.9494
Facsimile: 208.664.9448
E-Mail: nick@viethlaw.com

Attorney for Jayde Dillon Evans - 6

RICHARD D. WALL
Richard D. Wall, PS
221 West Main, Suite 200
Spokane WA 99201
Telephone: 509-747-5646
Facsimile: 509-747-5646
Email: rdwallps@comcast.net

Attorney for Tyler Scott McKinley - 7

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PLEASE TAKE NOTICE that the defendants-appellees ("Defendants"), by and through their attorneys of record respectfully request this Court for an order striking the Plaintiff-Appellant's ("Government") Appendix and the entirety of Section VI B of the Brief for Appellant ("Opening Brief").

BAIL STATUS

Jerad John Kynaston, defendant 1; Samuel Michael Doyle, defendant 2; Brice Christian Davis, defendant 5; Jayde Dillon Evans, defendant 6; and Tyler Scott McKinley, defendant 7, are all out on bond.

INTRODUCTION

Defendants hereby move to strike the Government's Appendix (Dkt. 9-2, pp. 1-73) attached to the Opening Brief along with the entirety of Section VI B of the Opening Brief (Dkt. 9-1, pp. 31-41). In gross violation of the rules governing appellate procedure, the Government's Appendix includes eight (8) documents consisting of 73 pages that were not part of the district court's record in this case. The Government made no designation of the record, instead, it improperly attached the Appendix to its opening brief in a veiled attempt to expand the record and give some weight to a new argument never raised at the district court level. *See* Government's opening brief, pp.31-41, (Issue B) ("This argument was not directly made in the District Court." p.32). These additional documents and the

argument it intends to support should therefore be swiftly stricken. F.R.A.P. 10(a); Circuit Rule 10-2.

ARGUMENT

It is fundamental to appellate practice that the record on appeal consists of: "(1) the official papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." F.R.A.P. 10(a); *see also* Circuit Rule 10-2 (the "complete record on appeal" consists of "the official transcript[s]" and the "district court clerk's records of original pleadings, exhibits and other papers filed with the district court").

Thus, the "record on appeal is generally limited to 'the original papers and exhibits filed in the district court.'" *Barcamerica Int'l USA Trust v. Tyfiel Importers, Inc.*, 289 F.3d 589, 593-94 (9th Cir. 2002) (emphasis in original). Documents "not filed with the district court … are not part of the clerk's record and cannot be part of the record on appeal." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988); *see also, Lowry v. Barnhart*, 329 F.3d 1019, 1025-26 (9th Cir. 2003) (noting that "the 'excerpts of record' are just that: 'excerpts" of the "record,'" and that "[t]his limitation is fundamental").

In our situation, the Government has attempted to supplement and expand the record by including 73 pages of additional materials that they have attached

and titled "Appendix for Opening Brief." This is not an Appendix. An Appendix is: "(A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order, or decision in question; and (D) other parts of the record to which the parties wish to direct the court's attention." F.R.A.P. 30(a)(1). Furthermore our Circuit Rules place even more emphasis telling us: "[i]n the Ninth Circuit the appendix prescribed by F.R.A.P. 30 is not required. Instead, Circuit Rule 30-1 requires the parties to prepare excerpts of record." Circuit Rule 30-1.1(a). This is, plain and simple, the Government's attempted supplementation and expansion of the record to bolster a new and novel argument. *See* Government's Opening Brief at pp. 31-41.

Although this Court has inherent authority to supplement the record in "extraordinary cases," and unless there are "unusual circumstances, [it will] consider only the district court record on appeal." *Lowry*, 329 F.3d at 1024 (*citing Barilla v. Erwin*, 886 F.2d 1514, 1521 n. 7 (9th Cir. 1989)). Despite this, the Government attempts to put these extraneous documents before the Court to bolster an argument that was never raised at the district court level. The Government does not allege, nor is it the case, that extraordinary circumstances exist such as to justify putting these documents before the Court.

Lowry v. Barnhart, 329 F.3d 1019, holding is clear and expressly limits what material outside the record courts of review may consider, and advised against the sort of appellate free-for-all the Government seeks:

> ***Save in unusual circumstances, we consider only the district court record on appeal.*** Federal Rule of Appellate Procedure 10(a) explains which materials constitute the record. Fed. R. App. P. 10(a). And Circuit Rule 30-1 provides that the appellant (and, if necessary, the appellee) shall prepare "excerpts" of that record. *See* 9th Cir. R. 30-1.1(a). The rather obvious implication is that the "excerpts of record" are just that: "excerpts" of the "record."
>
> ***This limitation is fundamental***. As a court of appeals, we lack the means to authenticate documents submitted to us, so ***we must be able to assume that documents designated part of the record actually are part of the record***. To be sure, the fact that a document is filed in the district court doesn't resolve all questions of authenticity, but it does ensure that both opposing counsel and the district court are aware of it at a time when disputes over authenticity can be properly resolved. ***Litigants who disregard this process impair our ability to perform our appellate function.***
>
> There are exceptions to the general rule. We may correct inadvertent omissions from the record, take judicial notice, and exercise inherent authority to supplement the record in extraordinary cases. ***Consideration of new facts may even be mandatory, for example, when developments render a controversy moot and thus divest us of jurisdiction***. One constant runs through all these exceptions, however: Only the court may supplement the record. "[It is a] basic tenet of appellate jurisprudence . . . that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below." Litigants should proceed by motion or formal request so that the court and opposing counsel are properly apprised of the status of the documents in question.
>
> Sadly, this is not the first time a party has graced us with so-called "excerpts of record" that have never before seen the light of courtroom day.

329 F.3d at 1024-25 (Kozinski, C.J.) (emphases added) (sanctioning party for inclusion of one extra-record document in excerpts of record).

In our case, the Government attempts to supplement the record with 73 pages of purported legislative history, then refers to it throughout their brief as appendices functioning as "excerpts of record." *See* Government's Opening Brief pp. 31-41 and Appendix pp. 1-73. These are not, nor have they ever been part of the record.

In addition, those portions of the Government's opening brief which purport to rely on such improper evidence, should be stricken. *See Barcamerica*, 289 F.3d at 595 (striking documents not before district court and those portions of opening brief which relied upon them); *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.,* 450 F.3d 930, 944 (9th Cir. 2006) (same); *United States v. Maddox*, 614 F.3d 1046, 1047 (9th Cir. 2010) (striking portion of brief referring to evidence that was not a part of the district court record). Specifically, issue VI B of Government's opening brief relies in its entirety upon these extraneous documents. Their argument does not stand and is entirely void of merit without these improper additions to the record; as such, the argument itself is in error and must be stricken.

CONCLUSION

FOR ALL OF THE ABOVE REASONS, this Court should issue an order striking the improper appendix and related portions of the Government's opening brief, and sanction the Government in the amount of reasonable attorney's fees in bringing this motion to strike and addressing their extraneous material outside the record.

RESPECTFULLY SUBMITTED this 8th day of February, 2013.

/s/ Robert R. Fischer
ROBERT R. FISCHER
Federal Defenders of E. Washington
Attorney for Jerad John Kynaston - 1

/s/ George Paul Trejo, Jr.
GEORGE PAUL TREJO, JR.
Law Office of George Trejo
Attorney for Samuel Michael Doyle - 2

/s/ David Matthew Miller
DAVID MATTHEW MILLER
Miller & Prothero
Attorney for Bryce Christian Davis - 5

/s/ Nicolas V. Vieth
NICOLAS V. VIETH
Vieth Law Offices, Chtd.
Attorney for Jayde Dillon Evans - 6

/s/ Richard D. Wall
RICHARD D. WALL
Richard D. Wall, PS
Attorney for Tyler Scott McKinley - 7

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 27(d) this Motion to Strike is proportionally spaced, has a typeface of 14 points and does not exceed 20 pages in length.

DATED this 8th day of February, 2013.

VIETH LAW OFFICES, CHTD.

/s/ Nicolas V. Vieth
Nicolas V. Vieth

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED this 8th day of February, 2013.

VIETH LAW OFFICES, CHTD.

/s/ Nicolas V. Vieth
Nicolas V. Vieth