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Respectfully submitted,

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## MEMORANDUM OF POINTS AND AUTHORITIES

The government opposes defendant's motion for a twelfth extension of time for defendant time to file his third brief on cross-appeal. While the government has not objected to reasonable requests for extensions in this matter, and is always strongly inclined to agree or defer to such requests as a matter of professional courtesy, the instant request in light of the record represents an abuse of that courtesy, as well as this Court's prior considerable efforts to accommodate defendant's numerous requests for additional time. The requested three-month extension would bring the total time granted to defendant to file a single, responsive brief into a fourth year, as part of an appeal that has been pending since 2010. The motion fails to justify such an extraordinary period of delay, lacks the required assertion by counsel that the extension will be sufficient to complete the brief, nor provides any details about what progress has been made during the last three years where defendant has been represented by two appellate counsel and four other counsel of record in the district court.

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Defendant's criminal judgment and commitment order was issued on April 30, 2010, and defendant filed a notice of appeal soon thereafter. (District Court Docket No. ("CR") 328, 330; CTA 1). The government cross-appealed.

(CR 336, CTA 7). Defendant filed his first brief on cross-appeal in July, 2012. (CTA 38). After this Court denied on December 31, 2013, the government's first request to file an oversized brief, the government successfully filed its second brief on cross-appeal on March 14, 2014. (CTA 76, 79). On April 11, 2014, this Court set May 11, 2014 as the initial due date for defendant's final brief, the third brief on cross-appeal. (CTA 80).

On May 6, 2014, the Court granted defendant's unopposed requests for a six-month extension upon counsel's representation that counsel could begin work on the brief by September 2014, and that a "realistic" filing date would be November 12, 2014. (CTA 81 at 5 (motion); CTA 82 (order)). On November 5, 2014, this Court granted defendant's unopposed motion for a further four-month period of delay upon counsel's reference to the press of other appellate work and family matters, and the representation that a "realistic" filing date for the third-brief on cross-appeal, would be March 12, 2015. (CTA 88 at 5-6; CTA 89).

On December 16, 2014, the President signed into law a budget bill, which became the Consolidated and Further Continuing Appropriations Act of 2015, and contained an appropriations rider about medical marijuana which would become the subject of subsequent litigation in this matter. Pub. L. No. 113-235, 128 Stat. 2130 (the

“appropriations rider”). Approximately two months after the appropriations rider was passed, on January 31, 2014, defendant sent a letter to the government stating his intention to file a civil motion for injunctive relief to enforce the appropriations rider with respect to his case. (See CTA 96 at 1, CTA 97 at 1 n.1). Instead, on February 24, 2015, defendant filed in this Court a motion -- later designated “urgent” -- for an order based on the appropriations rider that the government cease spending funds on this case. Alternatively, defendant asked that the issue be remanded to the district court. (CTA 91, 95). In reply, the government asked to be allowed to respond to defendant’s motion on the appropriations rider as part of its final brief on cross-appeal so that the issues could be decided by the panel hearing the entire appeal. (CTA 94, 97).

During the pendency of this motion, on March 5, 2015, defendant filed his request for his third extension of time (of three months) to file his brief. (CTA 93). In this motion, notwithstanding the requirements of Ninth Circuit Rule 31-2.2(b)(6), defendant began a practice based on his interpretation of the appropriations rider of not notifying the

government or obtaining its position on the extension request. (Id. at 6-7).

On April 13, 2015, a motions panel of this Court denied defendant's urgent motion without prejudice to defendant renewing his arguments about the appropriations rider in his third brief on cross-appeal. The panel also denied defendant's alternative request for remand, without prejudice to defendant seeking an indicative ruling in the district court pursuant to Fed. R. App. P. 12.1. (CTA 100). The Court granted defendant until June 12, 2015 to file the third brief on cross-appeal. Defendant sought reconsideration or rehearing *en banc*, which the Court denied on June 22, 2015. (CTA 101, 112). Upon denying the *en banc* request, the Court *sua sponte* granted defendant a fourth extension to file the third brief, until August 21, 2015. (CTA 112).

Notwithstanding the motion panel's prior fourth extension, on August 14, 2015, defendant requested a fifth extension for a further three months on counsel's representation that counsel had not worked on the third brief due to other appellate work, and that a second appellate counsel from the same office would be working on the matter

due to the first counsel's planned leave. (CTA 113). Despite this Court's denial of defendant's urgent motion that the government stop spending money on the case due to the appropriations rider, defendant continued his practice of not notifying the government of his extension requests. (CTA 113 at 7-8). On August 26, 2015, this Court granted the fifth extension of the third brief until November 19, 2015, stating that further extensions would be "disfavored." (CTA 114). Defendant's second appellate counsel entered his appearance the same day. (CTA 115).

Defendant's second appellate counsel subsequently sought and obtained five more extensions of time to file defendant's third brief, totaling an additional 13 months. (CTA 119, 121, 123, 125, 127). In granting these extensions, this Court said, for a second time, that further extensions would again be "disfavored," and twice said that further extensions would be "strongly disfavored." (CTA 121, 123, 125). In none of defendant's requests for these extension did counsel notify the government or obtain its position. Each request was also substantially similar, containing a recitation of counsel's other appellate work and related responsibilities, without setting forth

extraordinary circumstances or the progress being made on, or priority given to, defendant's third brief. (CTA 118, 120, 122, 124, 126).

On November 7, 2016, defendant's first appellate counsel filed a request for an eleventh extension of time, for a further three months. (CTA 128). The request was based on the representation that counsel wished to file a new motion based on the appropriations rider, and a Ninth Circuit opinion interpreting the rider that had been issued several months previously, in August 2016. (CTA 128 at 3). The request made no mention of what progress had been made on the third brief, including during the long time during which the second appellate counsel had been working on the appeal. On November 22, 2016, this Court granted defendant's eleventh request for an extension, until February 13, 2017. (CTA 129).

On December 12, 2017, twenty months after this Court had denied defendant's "urgent" motion under the appropriations rider and referenced the indicative motion procedure in the district court under Fed. R. App. P. 12.1, defendant filed a motion in the district court seeking an indicative ruling under the appropriations rider. (CR 452). The government opposed the motion arguing, among other things, that

the motion was untimely, and that the issue in it should be raised in defendant's third brief on cross-appeal, as referenced in the motion panel's April 13, 2015 order. (CR 458). On February 6, 2017, the district court denied defendant's request for an indicative ruling on the appropriations rider without prejudice. (CR 466).<sup>1</sup>

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Defendant's motion for a twelfth extension lacks the required representation pursuant to Ninth Circuit Rule 31-2 that defendant has "exercised diligence" and, importantly, that "the brief will be filed within the time requested." 9th Cir. R. 31-2(b)(5) (emphasis added). Rather it appears, and it is the government's considered view based on the record, that defendant has no present intention of filing his final cross-appeal brief at any time. Defendant seeks instead to delay indefinitely final resolution of his appeal and

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<sup>1</sup> The government disagrees with defendant's unsupported characterization of the district court's ruling on the motion recognizing that the motion raised "substantial issues." (CTA 13). Had the court so found, it could have issued a ruling to that effect pursuant to Fed. R. Crim. P 37(a)(3) and Fed. R. App. P. 12.1 (b), and defendant would no doubt be seeking further appellate delay in the form of a limited remand under those provisions. The central ruling of the district court was that the case would be disposed of faster and more efficiently if defendant were to raise his arguments about the appropriations rider in defendant's next appellate brief.

the government's cross appeal in the hope that unforeseen changes in the law may improve his appellate prospects while he remains on bail. The record shows a pattern of relying on serial extensions based on thin or incomplete justification, and the current motion for further delay is insufficient in light of the record.

In addition to lacking a representation that the requested extension will be the last one, defendant's motion provides the Court with no information about what use has been made of the Court's prior eleven extensions over three years or what tasks remain to be completed. For example, defendant provides no information about why defendant's second appellate counsel was unable to finish the brief in the more than a year that counsel worked on it, or why the second appellate counsel is no longer able to assist on completing the brief. Nor does the motion explain what progress was made in the years that the first appellate counsel has been working on the case.

The motion instead seems to presume that the second appellate counsel never existed, and the first counsel made no progress on the brief in the multiple years during which the first counsel had been requesting extensions. This is an unacceptable sleight-of-hand in light of the long period this brief has been pending and his Court's repeated prior warnings that further extensions would be disfavored. It is also unacceptable because this is not a case where

defendant can reasonably point to a lack of legal resources to finish the brief. Not only has defendant had two appellate counsel, but, as reflected in the district court docket, defendant has four former or current public defenders as counsel of record representing him in the district court including the appellate chief of the office of the federal public defender. These counsel remain involved in the case. One of defendant's four trial counsel recently filed a motion for bond modification, another has filed similar motions during the pendency of this appeal, and a third attended the hearing on defendant's recent motion. (E.g., CR 386, 389, 396, 401, 448, 451).

Like most of defendant's eleven other extension requests, defendant's motion contains a list of appellate matters to which one of defendant's appellate counsel is assigned. (CTA 130 at 4-5). Yet all of these matters have become active far more recently than the current appeal, and all appear to have arisen during the three years defendant's third brief has been due. Defendant's motion does not explain why the third brief cannot be given priority over these matters given that it has been the subject of orders disfavoring further extensions and has been pending far longer. Further, a review of defendant's eleven prior extension requests shows that none of these matters were included in the list of cases relied on by defendant's two appellate counsel to justify prior extensions. This provides additional evidence that defendant's counsel has

made progress on the third brief, at best, its lowest priority. The continuous citation to a changing group of new matters has become a means of indefinitely avoiding the completion of this appeal.

Defendant's reference to his recent indicative motion in the district court on the appropriations rider also does not justify a further three-month extension, but rather undermines defendant's argument for further delay. This Court referenced the procedure for bringing an indicative motion based on the appropriations rider in its order of April 13, 2015. (CTA 100). Yet, defendant waited almost twenty months after that order to bring an indicative motion in the district court based on the appropriate rider - just weeks before its brief in this Court was due after repeated warnings that further delay would be disfavored. That defendant relied in his motion on an August, 2016 court decision regarding the appropriations rider does not support such substantial delay. Case law is always developing, but defendant cannot delay prompt resolution of appellate matters indefinitely in the hope of better case law or use each new case to delay completion of the current one.

Moreover, defendant's indicative motion was denied, a result which closes the possibility of a remand to the district court and should speed, rather than slow final appellate review. Defendant's vague assertion that the district court's denial warrants further time for counsel to somehow "analyze" issues

strains credulity. To the extent defendant seeks to raise arguments about the appropriations rider in his third brief, he is poised to promptly and efficiently do so. Defendant has now filed detailed pleadings with extensive exhibits based on the appropriations rider in both this Court and the district court. (CTA 91, 95-96, 98-99 (defendant's original appellate motions and exhibits for relief based on rider)); 101 (motion for reconsideration or *en banc* review); CR 453, 463 (recent district court pleadings for indicative ruling on appropriations rider). Using this thorough and recent briefing on the appropriations rider, defendant should be able to promptly brief any argument on these same issues in his third brief. The appropriations rider -- passed over two years ago -- does not justify further delay.

The other issues to be addressed in the third brief also do not support the current extension motion. While the government recognizes that this case contains a lengthy record and complexity justifying reasonable extensions to complete briefing, defendant has already been given more than ample time to complete his third brief. The main bulk of defendant's third brief is defendant's optional reply to issues that defendant himself raised and briefed in his opening brief. It is true that the government raised a new sentencing issue and a request for reassignment in its cross-appeal, but those new issues only cover 23 pages in the government's brief. (CTA 79 at 122-145). They hardly

justify the unusual delay already granted, nor further extensions. Moreover, defendant's third brief was pending for ninth months before the appropriations rider was passed, and has now been delayed for more than two additional years since then without further progress on this long-pending appeal.

For all these reasons, this Court should deny defendant's motion requesting a further three-month extension to file his third brief on cross-appeal, and order defendant to promptly file the brief.