No. 16-50428

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,
Plaintiff/Appellant,

v.

STEVEN LAVINSKY,
Defendant/Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 16-cr-161-R
Hon. Manuel L. Real

ANSWERING BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

On October 11, 2016, the District Court for the Central District of California entered a judgment of conviction under 18 U.S.C. §§ 2252A(a)(2)(A) and (b)(1) against Appellee Steven Lavinsky ("Mr. Lavinsky"). (Excerpts of Record ["ER"] 126-131.)[1] The Government timely filed its Notice of Appeal on November 14, 2016. (ER 132.) This Court has jurisdiction under 18 U.S.C. § 3742(b)(1).

STATEMENT OF ISSUES

1. The District Court sentenced Mr. Lavinsky to 48 months of custody with lifetime supervised release, under 18 U.S.C. §2252A(b)(1), which specifies a five-year mandatory minimum sentence. The District Court explained that 48 months of custody was sufficient because of the lifetime supervision requirement.

Did the District Court properly exercise its inherent constitutional sentencing power when it imposed the 48-month sentence, despite the statutory five-year mandatory minimum sentence?

2. The Government sought three extensions for filing its opening brief, based on under-staffing at the Justice Department ("DOJ"), on DOJ officials' failure to give approval for filing the brief, and on DOJ's desire to "re-evaluate" the case after the circulation of the "Sessions Memo." The Court granted two extensions, and the Government then failed to meet the filing deadline set by the

[1] References herein are to the Government's Excerpts of Record filed concurrently with its untimely opening brief.

Court. After the late filing, the Appellate Commissioner granted the Government's third request for an extension of time.

Should the Government's appeal be dismissed for failure to prosecute where the Government failed to file its brief by the date ordered by this Court, and failed to meet the criteria for extensions established by this Court's Rules?

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Mr. Lavinsky respectfully requests oral argument.

FACTS AND PROCEDURAL HISTORY

A. Background Facts

On June 9, 2016, Mr. Lavinsky pled guilty to violating 18 U.S.C. § 2252A(a)(2). ER 6-43. The Government recommended a sentence of 84 months in prison, "representing a significant downward departure from the Guideline range." ER 53:13-16. The Government acknowledged "that significant mitigating factors exist with respect to [Mr. Lavinsky]." ER 56:6-7.

Those mitigating factors, which Mr. Lavinsky set forth in his sentencing memorandum, included the following facts. When Mr. Lavinsky was five years old, his parents divorced, and he moved from Topeka, Kansas to New Jersey with his mother. ER 73:25-74:8. Mr. Lavinsky's mother had difficulty obtaining employment after the divorce, and suffered a period of "extreme depression" and "alcohol abuse characterized by out-of-control behavior." *Id.* Mr. Lavinsky's

mother and father both remarried; Mr. Lavinsky's stepfather was "a stern and harsh man" who "would frequently become incensed and launch into screaming rages and bullied [Mr. Lavinsky]," while his father and stepmother treated him "as an unwanted and unsightly appendage during periods of visitation" after they began having their own children. 75:5-16.

When Mr. Lavinsky was eight years old, during his mother's period of alcoholism, a teenage babysitter repeatedly sexually abused Mr. Lavinsky. ER 74:17-75:2. Mr. Lavinsky's abuser forced him to repeatedly engage in oral sex, a fact which Mr. Lavinsky did not disclose until adulthood. *Id.*

By thirteen, Mr. Lavinsky was drinking alcohol and smoking marijuana. ER 75:17-18. He also became aware that he was homosexual, but hid his sexuality from his friends and peers, for fear that he would be subject to discrimination, social isolation and abuse. ER 75:18-22. Mr. Lavinsky's drug and alcohol abuse escalated in college, where he also began to suffer panic attacks. ER 75:25-76:2. With the assistance of therapy, Mr. Lavinsky began to handle his anxiety, and he graduated from Pennsylvania State University in 1980. ER 76:3-7.

In 1987, after entering into a stable romantic relationship, Mr. Lavinsky began attending alcoholics anonymous ("AA") meetings, and ceased using alcohol and drugs. ER 76:8-10. He was sober for the next two decades, remained involved in AA, and had healthy committed romantic relationships. He obtained a

Master's in Science in Organizational Behavior from the University of Pennsylvania. ER 76:8-14.

In 1994, Mr. Lavinsky moved to Tel Aviv, Israel, where he lived for the next decade. ER 76:17-18. He served as secretary and treasurer of his local AA chapter, organized a recreational softball league, volunteered at Israel's version of Meals on Wheels, and volunteered to help immigrants acclimate and learn Hebrew. ER 76:21-77:18. During this time, Mr. Lavinsky sought help in Sex Addicts Anonymous ("SAA") to help him overcome his desires to view pornography of men that resembled his childhood abuser. ER 78:7-11.

In 2004, Mr. Lavinsky's stepfather died, and he moved back to the United States to be closer to his mother. ER 78:17-18. He continued his charitable work, volunteering at a local hospital and teaching English as a Second Language classes for free at the local library. ER 78:27-79:1.

In 2009, Mr. Lavinsky's father committed suicide. ER 79:25-26. The emotional toll of his father's death caused Mr. Lavinsky to relapse into alcoholism. ER 80:3-6. Mr. Lavinsky's alcohol relapse coincided with a dependency on painkillers, which were prescribed to him after several surgeries in 2008. ER 79:18-21.

On July 17, 2012, FBI agents executed a search warrant at Mr. Lavinsky's residence and found images of child pornography. ER 80:9-10. Since that date,

Mr. Lavinsky has dedicated himself to treatment and rehabilitation. ER 80:10-11. Mr. Lavinsky began regularly attending AA and SAA meetings, acting as secretary for his AA chapter, ER 81:9-92:27, and attending more than 100 SAA meetings between August 2012 and March 2013 alone. ER 80:11-16. Mr. Lavinsky also successfully completed the Intensive Outpatient Program at the Sexual Recovery Institute in Los Angeles in October 2012. ER 80:17-19. He also began intensive individual psychological treatment with Dr. William Feuerborn to receive "therapy for sexual addiction and sexual offending, specifically aimed at preventing future offending behavior." ER 81:3-7.

As part of Mr. Lavinsky's SAA treatment, he maintained an account with Covenant Eyes, a security software which blocks problematic websites, monitors internet activity, and provides a report to his SAA sponsor. ER 83:12-19. Covenant Eyes reported no violations for Mr. Lavinsky's account. ER 83:19-20.

In 2013, Mr. Lavinsky began working at an Audi dealership in Long Beach, where he became "a top employee." ER 82:22-83:2. Seeking to aid others in their recovery, Mr. Lavinsky enrolled in a certification course at Health Staff Institute to become a drug and alcohol counselor. ER 83:26-28. He volunteered at a local drug rehabilitation center, and completed the certification course in November 2014. ER 84:1-5. Mr. Lavinsky also became a volunteer at a homeless shelter in 2015. ER 84:5-8.

The Court also considered the reports of two clinical psychologists who concluded that Mr. Lavinsky was "in the low risk category with regard to any future sexual offenses" and "would not represent a foreseeable danger or risk to the community in terms of the commission of any sexual offenses or violent behavior." ER 84:10-86:5 (discussing reports of clinical psychologists Paul Lane and Monica Blauner).

B. Sentencing

On October 11, 2016, Mr. Lavinsky appeared for sentencing. ER 110:5-13. The district court sentenced Mr. Lavinsky to 48 months' custody, with a fine of $20,000, and a lifetime term of supervised release. ER 113-114.

The Government objected to the sentencing as below the statutory mandatory minimum. ER 118:12-16. In response, the district court explained that it had determined that 48 months was a sufficient sentence, given the imposition of lifetime supervision: "I think I understand the circumstances of lifetime supervision by the Government, that there will be no need to be any more than 48 months." ER 118:20-23.

C. Procedural History

On November 14, 2016, the Government filed its Notice of Appeal. ER 132. That same day, this Court ordered the Government to file its opening brief by March 15, 2017. Doc. 1. On March 15, 2017, the Government filed its first

request for an extension of time. Doc. 8. This Court granted the Government a 30-day extension, with the new filing date set for April 14, 2016. Doc. 9.

On April 14, 2016, the day its brief was due, the Government moved for an additional extension, on grounds that it needed more time because of post-transition staffing shortages at the United States Attorney's Office, and the Government's desire to consolidate multiple cases for appellate evaluation. Doc. 10. Mr. Lavinsky opposed the motion, arguing that the Government had had more than six months to decide whether to appeal, and had failed to show good cause when requesting a briefing schedule extension. Doc. 11.

On May 22, 2017, this Court granted the Government's request for an extension, giving it until May 30, 2017 to file its opening brief. Doc. 14. The Court stated in its order that additional requests for extension would be "strongly disfavored." *Id.* Despite the Court's warning, the Government requested a third extension the very next day, on May 23, 2017. Doc. 15. The Government's asserted "good cause" for this third extension request was twofold: that "[t]he Office of the Solicitor General has not yet authorized the government to persist in or forgo its appeal in this case," Doc. 15 at 2, and that because of a new policy memo circulated by the new Attorney General, the Department wished to "re-evaluate" pending cases. *Id.*

Mr. Lavinsky opposed the Government's request for a third extension, again

arguing that the Government had had more than enough time, and had not shown good cause. Doc. 16. While the Government's motion for a third extension was pending, the Government filed its opening brief on May 31, 2017, after the May 30, 2017 filing deadline had expired. Doc. 19. The Government' opening brief makes no mention of this Court's deadline, nor did the Government file an accompanying letter stating that a motion for an extension of time is pending, as required by this Court's Rule 31-2.2. On June 15, 2017, this Court granted the Government's motion for a third extension to file its opening brief. Doc. 20.

SUMMARY OF ARGUMENT

Issue 1: Statutory mandatory minimum sentences are unconstitutional.

Caselaw of this Court is to the contrary, but Mr. Lavinsky preserves his arguments for review by an en banc panel of this Court and by the Supreme Court. Statutory mandatory minimum sentences are unconstitutional because they violate the constitutional imperative of separation of powers. Fashioning an individual sentence based on the facts of an individual case is a quintessential judicial power. The Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), should apply equally to statutory mandatory minimums as to mandatory Sentencing Guidelines, because the animating principle in *Booker* is separation of powers, and the mandatory guidelines that *Booker* rendered advisory had, per *Mistretta v. United States*, 488 U.S. 361 (1989), the same legislative authority as statutory

provisions in the United States Code. Additionally, the history of sentencing practices in the United States shows that the proliferation of statutory mandatory minimum sentences is an anomaly, and is inconsistent with both historical practice and historical understanding of the separation of powers.

Issue 2: The Government must follow this Court's rules, just like the rest of us. This is the rare case in which this Court should strike the Government's untimely brief and dismiss the Government's appeal for failure to prosecute. The Government has utterly failed to provide the good cause required by this Court's rules. The Government's requests for special treatment would be utterly absurd if made by any other litigant: My client hasn't made up its mind; my client hasn't hired a decision-maker with authority to decide what to do; my client wishes to "re-evaluate" its legal decisions. The Government is free to understaff its departments, free to withhold filing authority from its local offices, and free to change its mind. But those actions and inactions simply do not, as a matter of law, constitute good cause for filing extensions under this Court's rules. This Court should hold clearly that the Government does not get to play by its own set of procedural rules.

ARGUMENT

I. STANDARD OF REVIEW

A district court's authority to depart below a statutory mandatory minimum sentence involves questions of statutory construction and constitutional law, and therefore requires de novo review. *United States. v. Vilchez*, 967 F.2d 1351, 1353 (9th Cir. 1992).

"The grant or denial of an extension of time for appeal is an appealable order reviewed under the abuse of discretion standard." *Nat'l Indus., Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1264 (9th Cir. 1982).

II. THE DISTRICT COURT HAD THE CONSTITUTIONAL AUTHORITY TO IMPOSE A 48-MONTH SENTENCE

Mr. Lavinsky seeks to preserve for review by an en banc panel of this Court, and by the Supreme Court, the argument that statutory mandatory minimums are unconstitutional, and that statutory provisions such as the provision under which Mr. Lavinsky was sentenced should be treated as "advisory" pursuant to the constitutional remedy imposed by the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005).

Mr. Lavinsky acknowledges prior decisions of this Court that are reasonably read to foreclose that argument as a matter of Circuit law. *See United States v. Wipf*, 620 F.3d 1168, 1170-71 (9th Cir. 2010); *United States v. Luong*, 627 F.3d 1306, 1312 (9th Cir. 2010); *United States v. Ching Tang Lo*, 447 F.3d 1212 (2006);

United States v. Sykes, 658 F.3d 1140, 1146 (9th Cir. 2011). These cases include language fairly read to hold that district courts lack the power to sentence below a statutory mandatory minimum.[2] Mr. Lavinsky intends to seek review of that proposition by an en banc panel of this Court and by the Supreme Court.

A. Statutory Mandatory Minimums Unconstitutionally Invade the Judiciary's Inherent Sentencing Power

Mr. Lavinsky's below-mandatory minimum sentence should be affirmed as a valid exercise of the District Court's inherent power to fashion individual sentences for criminal defendants. That power was created by Article III of the United States Constitution. Congress violates Article III when it imposes mandatory minimum sentences with no avenue for the exercise of discretion. Reading the statute to prohibit the sentence the District Court imposed would

[2] To be sure, the cases are potentially distinguishable in two respects: First, in the prior cases—unlike in this case—the district court imposed the mandatory minimum sentence, the defendant appealed, and this Court found no error in the application of the man-min. By contrast, in this case, the district court imposed a below-man-min sentence, and the government has appealed. Second, in the prior cases, the defendant's principal argument was statutory (§ 3553), not constitutional (preservation of separation of powers by imposing the *Booker* remedy). Mr. Lavinsky acknowledges that this Court, in the *Lo* decision, included the following footnote: "Lo contends that, if he is subject to the minimum sentence, in accordance with *Booker*, the minimum should be an advisory minimum, not a mandatory minimum. There is nothing in *Booker* to suggest that statutorily mandated minimum sentences are merely advisory if the sentence is based on facts found by a jury by a preponderance of the evidence." *Lo*, 447 F.3d 1234 1234, n. 15. To the extent that the panel considers this footnote to be part of the holding of the case and therefore binding precedent, Mr. Lavinsky preserves the argument that it is wrongly decided and/or superseded.

impermissibly invade the judiciary's authority to sentence criminal defendants. Accordingly, as in *Booker*, the statute should be read as advisory, creating a presumption of reasonableness for sentences at or above the minimum. Any statutory construction that renders a below-man-min sentence per se prohibited and reversible is unconstitutional, and should be saved, following *Booker*, with a construction that allows for such sentences to be imposed subject to reasonableness review.

B. The *Booker* Remedy Should Apply to Mandatory Minimums

The full *Booker* analysis should apply to statutory man-mins. The mandatory Guidelines the Court held unconstitutional in *Booker* had the full statutory authority of any provision of the U.S. Code—that is the holding of *Mistretta*, in which the Court held that Congress could validly delegate its statutory authority to the Sentencing Commission. Accordingly, as a matter of logic, if the mandatory sentencing provisions found in the Guidelines Manual needed to be transformed into advisory provisions to preserve the separation of powers, then so too must the mandatory sentencing provisions found in Title 18.

Booker is fundamentally about **defending the constitutional terrain of judges**.[3] *Booker* is not fundamentally about jury factfinding.[4] Booker itself made

[3] Undersigned counsel began his legal career as a federal appellate clerk back in 2005, the year *Booker* was decided, and it has shaped much of his subsequent practice as a prosecutor, academic, and defense attorney. He has often had

this clear. The *Booker* "merits" opinion proposed maintaining the Guidelines and Sentencing Reform Act as mandatory, and requiring jury factfinding for facts necessary to a sentence. *Id*. at 247-48. But the *Booker* "remedial" opinion *rejected* the jury factfinding option, and instead wrote juries *out* of the sentencing process, endorsed judicial factfinding, and made the Guidelines advisory. Indeed, the remedial opinion includes fully twenty pages explaining why the Court is rejecting jury sentencing and expanding judicial discretion. *Id*. at 246-267.

This history is well known to every attorney, as is the fact that ninety-nine out of every hundred defendants who have benefitted from the *Booker* remedy pled

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occasion to reflect that the *Booker* revolution was a revolution for judges, not juries. (Undersigned counsel worked on cases as an appellate clerk that had been tried between *Blakely* and *Booker*, in which the government had attempted to anticipate the Court's merits decision in *Booker* by charging in the indictment, and proving to the jury beyond a reasonable doubt, the facts it wished to preserve for use at sentencing. The *Booker* remedial opinion turned federal criminal practice down another road, the road we have stayed on since. The fact that we are on that road—and not the road of charging and proving sentencing facts—is evidence enough for the core proposition underlying this appeal: *Booker* is not about juries. It is about preserving the constitutional sentencing power of judges. And therefore it should apply to statutory man-mins just as much as to the Guidelines.

[4] This has been evident to commentators from the beginning. *See, e.g.*, Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L.J. 387, 388 ("*Booker*'s conceptual core—what we might call the tao of *Booker*—is best understood not in terms of vindicating the role of juries and the meaning of the Sixth Amendment's jury trial right, but rather in terms of vindicating the role of judges and the meaning of sentencing as a distinct criminal justice enterprise defined and defensible in terms of the exercise of reasoned judgment"); Berman, *Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. Crim. L. & Criminology 653, 655, 675-76 (2005) ("[T]he prescribed remedy in *Booker* was not, as th[e merits opinion] would seem to connote, a larger role for juries in the operation of the federal sentencing system.")

guilty and never set eyes on a jury. *See, e.g.*, *United States v. Staten*, 466 F.3d 708 (2006) (*Booker* applies to defendants who pleaded guilty). And given that the *Booker* remedy eliminated the need for sentencing-factor charging and proof, *Booker* has had *no effect whatsoever* on what juries hear and what they vote on. Rather, the *Booker* remedial majority identified the constitutional evil in the Sentencing Reform Act regime as being the creation (in the mandatory Guidelines) of statutorily-prescribed sentences that were *imposed on the judge*. And the remedy for that constitutional evil was to expand the *judge's* power to impose sentence as justice required, notwithstanding the legislatively-imposed commands of the Guidelines.

Booker, in short, preserves the sentencing *judge's* power to fashion a sentence, against attempted Congressional interference with that power through mandatory statutory sentencing commands. The mandatory Guidelines were, logically, legally, and functionally, simply a set of hundreds of statutory mandatory minimum sentences. They were promulgated by duly delegated Congressional authority and had all the force of statutes. *Mistretta v. United States*, 488 U.S. 361, 371-73 (1989). And the Court crafted its constitutional remedy by imposing an "advisory" status upon another statute—18 U.S.C. § 3553—that had required mandatory compliance with the Sentencing Guidelines. In short, everything the Court did in *Booker* with respect to the Guidelines, it can and should do in this case

with respect to statutory man-mins.

And the Court has expressly rejected and overruled its sole decision declining to apply the logic of *Apprendi* to mandatory minimums, *Harris*. In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Court expressly acknowledged that *Harris v. United States*, 536 U.S. 545, 583 (2002) was inconsistent with its later sentencing cases, and overruled *Harris* in *Alleyne*. *Alleyne* is an implicit endorsement of the proposition that *Booker* is about a *judge's* inherent constitutional power to do justice by fashioning individual sentences.

However broadly or narrowly one reads *Alleyne*, *Harris* is no longer law. Accordingly, the Government's reliance on *Dare* and *Harris* (Br. at 13) is misguided. *Alleyne*, *supra*, at 2155 ("*Harris* is overruled.") The Government's argument that the *Harris* Court "refused to extend *Apprendi* to mandatory minima…" is two decades out of date. *Harris* is overruled, and the Court overruled it *because* it predated the expanded *Apprendi*/*Booker* jurisprudence that has developed since 2005. And the *Apprendi*/*Booker* framework continues to expand. *Alleyne* held that the *Apprendi*/*Booker* framework does apply to statutory mandatory minimums just as it does to the Guidelines. It is time for this Court, and the Supreme Court, to address the argument that the *Apprendi* line of cases logically and constitutionally applies to mandatory minimums—and renders them an invasion of a core Article III judicial power, and hence unconstitutional. "Time

and subsequent cases have washed away the logic," *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (applying *Apprendi* and *Booker* to state statutory sentencing regime), of caselaw assuming the constitutionality of mandatory minimums.

The Supreme Court in *Alleyne* did not have before it the argument that statutory mandatory minimums are unconstitutional, so it did not decide that question. Indeed, the Supreme Court has never squarely addressed the question, post-*Booker*, whether statutory mandatory minimums improperly invade the constitutional realm of the judiciary.[5] And since *Alleyne*, the Court has not taken a case posing that issue. The Court should take this case.

C. In Voiding the Mandatory Provisions of the Sentencing Reform Act, the Court Resurrected the Pre-SRA Scope of Judicial Discretion to Sentence Below Man-Mins

Booker should be read to entail judicial discretion to sentence below statutory minimums for another reason, as well: by invalidating the Sentencing Reform Act's mandatory sentencing provisions, the Court implicitly resurrected the pre-SRA power of sentencing courts to sentence below man-mins. Neither this Court nor the Supreme Court have decided the question whether the

[5] To be sure, other courts have rejected the argument that *Booker* applies to mandatory minimums at all. *See, e.g.*, *Beaupierre v. Virgin Islands*, 55 V.I. 623, 641 (2011) ("The Court's ruling [in *Booker*] had nothing to do with the propriety of mandatory minimum sentences…."). Mr. Lavinsky, however, thinks that the *Booker* ruling has a lot to do with the propriety of mandatory minimum sentences, and wishes to preserve that argument for the Supreme Court. And he notes that in the eleven years between *Harris* and *Alleyne*, courts said the same thing about *Apprendi* and mandatory minimums.

Apprendi/*Booker* repudiation of the mandatory Guidelines structure of the Sentencing Reform Act also impacts that Act's removal from the district courts of their previously-recognized inherent power to sentence below mandatory minimums.

As the Sentencing Commission has explained, prior to 1916, federal courts had the discretion to "avoid[] imposing a term of imprisonment, even for offenses carrying a mandatory minimum penalty, by suspending the sentence or by placing the defendant under the supervision of a state probation officer." United States Sentencing Commission, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011), Chap. 2, *History of Mandatory Minimum Penalties and Statutory Relief Mechanisms*, p. 31 ("Report to Congress").

In 1916, in *Ex Parte United States*, 242 U.S. 27, 37 (1916), the Supreme Court held that absent Congressional authorization, district courts lacked power to suspend sentences or impose probation as an alternative to prison. Report to Congress at 31. In response, Congress, in 1925, gave the district courts that authorization, in the Federal Probation Act (codified at 18 U.S.C § 3651). *Id*. This power—the power to disregard a statutory man-min when "the ends of justice" are best served thereby—remained in force until 1987 with the passage of the Sentencing Reform Act. *Id*.

Then, in 2005, *Booker* invalidated the Sentencing Reform Act to the extent that it imposed mandatory sentencing guidelines on judges. *Booker*, 543 U.S. at 245. Mr. Lavinsky wishes to argue that in so doing, *Booker* restored the power that district courts had had, prior to the SRA, to sentence below man-mins in the interests of justice—as the District Court did in this case. The argument is simple: If the Sentencing Reform Act improperly invaded the constitutional ambit of the judiciary in creating mandatory guidelines—*Booker's* holding—then its less-remarked effect of removing the hitherto well-recognized power to sentence below a statutory minimum was *also* arguably unconstitutional.

The Court has not addressed this argument, nor has it decided whether the *Booker* remedial opinion should be applied to mandatory minimums in the same way it applied to mandatory Guidelines: namely, that mandatory minimums should be considered advisory just as the Guidelines are, with a presumption of legality, and searching review for sentences under the minimum—but that, just as with the Guidelines, it is unconstitutional to make them mandatory and binding.

D. The Supreme Court Has Not Squarely Addressed these Arguments

The Supreme Court has discussed mandatory minimums in several cases, to be sure, and it has assumed, or taken for granted, their existence as recently as *Alleyne*. However, none of these prior cases squarely presented the Court with a case in which a district court exercised its Article III power to impose, in the

interest of justice and with due consideration of all relevant facts, a sentence below a man-min, and the Government appealed the sentence and argued that the district court had no such power. And the Court has not yet been squarely asked to apply the same remedial construction to statutory man-mins that it applied to the mandatory Guidelines in *Booker*.

Mr. Lavinsky preserves those arguments for presentation to the Supreme Court. This case forces us to ask a basic question about the role of courts in our constitutional framework: Do we, as a society governed by three separate and equal constitutional branches, want our federal trial judges to have the discretion to review the individual facts of a case and impose a sentence in accordance with the interests of justice, notwithstanding the existence of a statutory mandatory minimum?

III. THE GOVERNMENT'S APPEAL SHOULD BE DISMISSED FOR FAILURE TO PROSECUTE

A. The Government Failed to Show Diligence and Substantial Need

This Court should overturn the Appellate Commissioner's June 15, 2017 Order granting the Government's motion for a third extension of time, Doc. 20, strike the Government's brief, and dismiss the Government's appeal for failure to prosecute.

In order to receive an extension to file a brief under this Court's rules, a party seeking an extension must show "diligence and substantial need." Circuit

Rule ("CR") 31-2.2. The Government's motions for extensions of time showed neither. Moreover, the Rule specifically states that a conclusory statement about the press of business is *not* sufficient grounds for an extension. Yet such a conclusory statement is *precisely* what the Government offered: DOJ is busy and understaffed, and they haven't given us the green light yet. The Government has given three reasons for requesting an extension, all variations on the theme "My client has not made up its mind." Doc. 15 at 2 ("The Office of the Solicitor General has not yet authorized the government to persist in or forgo its appeal in this case."). None of the variations is a sufficient basis for a briefing extension.

Variation One: "Understaffing." The Government argued that it couldn't file its brief because the new Administration had not sufficiently staffed the Department of Justice. Doc. 10, Declaration of Jean-Claude Andre ("Andre Decl.") at ¶ 4.a-b (explaining that the government needed an extension because "staffing issues related to the recent Presidential transition" (including the President's failure to nominate any U.S. Attorneys and the absence of a Solicitor General) had prevented the department from making a decision as to whether to appeal this case).

Variation Two: "Consolidated Review." The Government argued that it couldn't file its brief because officials at Main Justice wished to review multiple cases simultaneously. Doc. 10, Andre Decl. at ¶ 4.a. At first there were four such

consolidated cases; then a fifth was added. Until Department officials had reviewed all of them, the Government couldn't make a decision on any of them.

Variation Three: The "Sessions Memo." Finally, the Government added a third reason: the new Attorney General had circulated a memo directing all offices to seek and defend the harshest possible sentences, including all potentially applicable enhancements and mandatory minimums. *See Memorandum Re. Department Charging and Sentencing Policy*, May 10, 2017, *available at*: https://www.justice.gov/opa/press-release/file/965896/download. In light of that memo, the Government said, it needed extra time to "re-evaluate" the case "afresh". Doc. 15 at 3.

These three variations are three ways of saying the same thing: my client hasn't made up its mind yet. This Court should clearly hold **that that is not a good enough reason**. The United States is different in many ways from an individual or corporate client—but there is absolutely no reason why it should be treated differently in this respect. And this Court would *never* countenance an extension request from an attorney for an individual or corporate client which asked for more time because the client had not made up its mind. Indeed, no lawyer for an individual or corporate client would consider making such an argument. (Instead, that lawyer would tell his or her client: "You need to make up your mind by the deadline, or you don't get to appeal.")

Mr. Lavinsky does not doubt that what happened is what the Government says happened: officials at Main Justice didn't get around to making their decision because the Department was under-staffed and/or distracted with other issues. Doc. 15, at p. 2 § 4(a). But as a legal matter, Mr. Lavinsky requests that this Court reject the Government's assumption that the failure of DOJ staffers to provide direction to the USAO constitutes good cause for a briefing extension.

And Mr. Lavinsky requests that this Court reject the Government's assumption that it is exempt from this Court's requirement that it provide evidence of diligent attempts to comply with this Court's scheduling orders. The Government provides a conclusory statement that it "exercised diligence with respect to this appeal," but offers no specifics as to *how* it attempted to comply with this Court's briefing schedule. Doc. 15 at 4. The Government does not offer any information that it did *anything* to attempt to file its opening brief on time, in accordance with the Court's orders. No other litigant in front of this Court receives such deference—particularly when additional extensions are "strongly disfavored." Doc. 13.

This Court has precedent—old precedent, but closely on point—for striking the Government's brief and dismissing this appeal. This Court has done just that in similar circumstances: In *United States v. Morin*, 221 F.2d 800 (9th Cir. 1955), the Government complained that the federal government had underfunded the local

USAO, so that the attorneys there were overworked. The Government (argued the Government attorney) had "failed for many years to supply sufficient attorneys properly to conduct litigation in this Court of Appeals." *Id.* This Court denied the Government's motion for an extension, despite an affidavit from the assigned Assistant United States Attorney stating that he had diligently "attempted to prepare the within brief during overtime hours and to that end has worked three to four nights each week over the past thirty days and for three to four hours each night." *Id.* This Court noted:

> Suppose the Standard Oil Company of California should move for an extension of time on the same grounds, namely, that for many years it had retained a number of attorneys too small for the proper conduct of its litigation, and they had been too busy in other matters for their client to care for a case in the Court of Appeals? To drop into the vernacular, it is likely that the members of the bar would indulge in coarse laughter, knowing as they do that the United States is not a favored litigant in this court.

Id.

The Government here has a far less compelling argument than the Government in *Morin*. The Government does not argue that there aren't enough attorneys to do the work—the Government just says no one gave the go-ahead. And the Government makes no claim—let alone a persuasive showing—that any attorneys were going all-out to try to complete the brief on time.

The Government simply should not be granted preferential treatment by this Court on this issue. This Court should not reward the Government's failure to

pursue this appeal with diligence, and its failure to providing a legitimate reason for its delay. Sometimes courts should enforce their procedural rules. This is such a case—indeed, in this case, the Government is affirmatively appealing the District Court's sentence and arguing *for* strict enforcement of procedural rules when it comes to the man-min. The Government wants this Court to *reject* the District Court's exercise of its power to do justice according to the individual merits of the case, and to demand strict compliance with a 60-month minimum sentence. There is no play in the joints, the Government argues, that can encompass the 48-month sentence the District Court handed down. Rules are rules. Yet when it comes to its own compliance with strict procedural rules, the Government expects to be waved through with a wink and a nod. This is not fair. Mr. Lavinsky has a Due Process right to have certainty, under this Court's Rules, as to whether his sentence is final or not. He has suffered great prejudice already from the prolonged uncertainty about whether the Government will appeal. He has a right to know how long he will be incarcerated and a right to finality in this case. This Court recognizes individuals', and society's, interest in finality: at some point, if you don't act, the book is closed. If Mr. Lavinsky had given this Court the reasons the Government gave ("I haven't decided yet"), he would have forfeited his right to appeal. Both sides should be held to the same standard.

B. The Court Should Strike the Government's Opening Brief

This Court granted the Government a second extension to file its opening brief, due on May 30, 2017, with the warning that "[a]ny further motion for an extension of time to file the opening brief is strongly disfavored." Doc. 13. While the Government's third motion for an extension to file its opening brief was pending, the Government untimely filed its opening brief on May 31, 2017. Doc. 18. This Court should strike the Government's opening brief as untimely, and dismiss the appeal for lack of prosecution.

"If the appellant fails to file a brief within the time provided by FRAP 31(a) or an extension thereof, the Court may dismiss the appeal pursuant to Circuit Rule 42-1." CR 31-2.3. Circuit Rule 42-1 provides that "[w]hen an appellant fails to…file a timely brief…an order may be entered by the clerk dismissing the appeal."

This Court has authority to strike the Government's opening brief from the record. *Recinos De Leon v. Gonzales*, 400 F.3d 821, 822 (9th Cir. 2005) (striking the Government's untimely answering brief). In *Recinos De Leon*, the Government received three extensions to file its answering brief. *Id.* at p. 821–22. The Government then missed its deadline, but late-filed its brief along with an "unopposed motion that [the Court] accept the tardy filing" due to the Government's declaration that its "Office of Immigration Litigation is understaffed

and its attorneys overworked." *Id.* at p. 822.

This Court struck the Government's answering brief from the record, stating "the government and its attorneys, *like any other party*, must timely request extensions if they are unable to file legal papers when due. Additionally, at some point, scarcity of personnel and resources is no more a reason for the government than for other parties for filing legal papers… late." *Id.* (emphasis added).

Likewise, this Court should strike the Government's late-filed opening brief and dismiss its appeal. The Government had seven months to prepare its opening brief concerning a single issue, but instead failed to timely file by the Court's May 30, 2017 deadline. The Government failed to show diligence and substantial need for a third extension. Accordingly, the panel should reverse the order granting the Government a third extension, strike the Government's opening brief from the record, and dismiss the Government's appeal for failure to prosecute.

IV. CONCLUSION

For the foregoing reasons, Mr. Lavinsky respectfully requests that this Court affirm his sentence and/or dismiss the Government's appeal for failure to prosecute.

Dated: July 11, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

United States v. Lavinsky, No. 16-50428

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that Defendant-Appellant's Opening Brief is proportionately spaced, in typeface of 14 points or more and contains 5,598 words, excluding parts of the Brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

Dated: July 11, 2017

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STATEMENT OF RELATED CASES

United States v. Lavinsky, No. 16-50428

Per Ninth Circuit rule 28-2.6, Defendant-Appellant is not aware of any related cases.

Dated: July 11, 2017

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United States v. Lavinsky, No. 16-50428

I hereby certify that I electronically filed Appellant's Opening 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 on July 11, 2017.

Dated: July 11, 2017

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