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7 UNITED STATES DISTRICT COURT
 8 DISTRICT OF ARIZONA

10 UNITED STATES OF AMERICA,)
 11 Plaintiff,)
 12 v.)
 13 JAY BERNARD GILLILLAND,)
 14 Defendant.)
 15

Nos. CR 04-1712-TUC-JMR
 CR 04-1747-TUC-JMR

**GOVERNMENT’S RESPONSE TO
 DEFENDANT’S MOTION TO
 WITHDRAW FROM HIS GUILTY PLEA**

16 The United States of America, by and through Diane J. Humetewa, United States
 17 Attorney for the District of Arizona, and Eric J. Markovich, Assistant United States
 18 Attorney, files this response to defendant’s motion to withdraw from his guilty plea.

19 The government opposes the defendant’s baseless and belated attempt to withdraw
 20 his guilty plea. The proffered reason for defendant’s eleventh hour attempt to withdraw his
 21 guilty plea - the inability to challenge state court’s denial of the motion to suppress
 22 evidence via a habeas petition under 18 U.S.C. § 2254 - has no bearing on or relevance to
 23 the federal charges. Even if § 2254 relief were available in connection with the state case,
 24 that relief would not affect the federal cases. Thus, the proffered reason for withdrawal is
 25 specious. Furthermore, the defendant does not make a claim of actual innocence or allege
 26 that his plea

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2 was not knowing or voluntary - both of which are factors that would weigh in favor of
3 permitting withdrawal of a guilty plea. Indeed, the government would be prejudiced if the
4 defendant were allowed to withdraw his guilty plea, given the four years this case has been
5 pending and the ten-and-a half months that have elapsed since the defendant plead guilty.
6 As discussed below, the facts weigh in favor of denying the defendant's motion to withdraw
7 his guilty plea.

8 **FACTUAL BACKGROUND**¹

9 On July 20, 2004, the defendant was arrested for possessing with the intent to
10 distribute two kilograms of cocaine. A criminal complaint charging defendant with a
11 violation of 21 U.S.C. 841(a)(1) was filed on July 21, 2004 (CR 04-1712-TUC-JMR).. On
12 August 18, 2004, a federal grand jury returned a two count indictment charging the
13 defendant with Conspiracy to Possess with the Intent to Distribute Cocaine (21 U.S.C. §
14 846), and Possession with the Intent Distribute Cocaine (21 U.S.C. 841(a)(1),
15 (b)(1)(B)(ii)(II)).

16 On July 27, 2004, a criminal complaint was filed charging the defendant with a
17 violation of 18 U.S.C. § 2252A(a)(2), Receipt of Child Pornography (CR 04-1747-TUC-
18 JMR). A federal grand jury returned a two count indictment on August 25, 2004, charging
19 the defendant with Possession of Child Pornography in violation of 18 U.S.C. §
20 2252A(a)(5)(B), and Receipt of Child Pornography in violation of 18 U.S.C. §
21 2252A(a)(2)(A).

22 The trials on these two indictments were continued thirteen times. (See Docket Entry
23 51, 53 in CR 04-1747-TUC-JMR and Docket Entry 101, 104 in CR 04-1712-TUC-JMR).²
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26 ¹The facts are taken from the Presentence Report prepared in connection with these two cases.

² The docket for CR 04-1747 and CR 04-1712 are attached as Exhibits A and B.

1 On May 24, 2007, the defendnant pleaded guilty to Count One in CR 04-1712-TUC-
2 JME(HCE), Conspiracy to Possess with Intent to Distribute Cocaine, and Count One in CR
3 04-1747-TUC-JMR(HCE), Possession of Child Pornography. The guilty plea hearing was
4 conducted before Magistrate Judge Hector C. Estrada.³ At the change of plea hearing, in
5 response to the court's questioning, the defendant stated that he was satisfied with the
6 services of his attorney, that he understood and wanted to waive the rights that had been
7 explained to him, that he agreed to be bound by the terms of the plea agreement, and that
8 no one had forced or coerced him to plead guilty. The defendant also acknowledged that
9 he understood the elements of both crimes and agreed to the factual basis detailed in his
10 plea agreement.

11 Magistrate Judge Estrada issued Findings and a Recommendation that the district
12 court accept the defendant's guilty plea to both charges, and gave the parties ten days to file
13 objections to the Findings and Recommendations. No objections were filed by either party.
14 This Court subsequently conducted a review of Magistrate Estrada's Findings and
15 Recommendations, and on June 8, 2007, the Court issued an Order adopting the Findings
16 and Recommendations of the Magistrate Judge and accepting the defendant's plea of guilty
17 to both offenses. (See Docket Entry 60 in CR 04-1747-TUC-JMR and Docket Entry 112
18 in CR 04-1712-TUC-JMR.)

19 Sentencing was initially set for August 30, 2007. At the request of the probation
20 office, the sentencing was continued to November 7, 2007. (See Docket Entries 61 in CR
21 04-1747-TUC-JMR and Docket Entry 116 in CR 04-1712-TUC-JMR.) The defendant
22 filed an unopposed motion to continue sentencing on October 31, 2007. (See Docket Entry
23 62 in CR 04-1747-TUC-JMR and Docket Entry 119 in CR 04-1712-TUC-JMR.) That
24 motion was granted and sentencing was reset to January 18, 2008. (See Docket Entry 63
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³ A transcript of the change of May 24, 2007 change of plea hearing is attached as Exhibit C.

1 in CR 04-1747-TUC-JMR and Docket Entry 120 in CR 04-1712-TUC-JMR.) The
2 defendant filed a second unopposed motion to continue sentencing on January 11, 2007.
3 (See Docket Entry 64 in CR 04-1747-TUC-JMR and Docket Entry 127 in CR 04-1712-
4 TUC-JMR.) That motion was granted and sentencing was reset for April 7, 2008. (See
5 Docket Entry 65 in CR 04-1747-TUC-JMR and Docket Entry 128 in CR 04-1712-TUC-
6 JMR.)

7 On April 2, 2008, the defendant filed a third motion to continue sentencing, a motion
8 to withdraw plea of guilty, and an objection to the Presentence Report. (See Docket Entries
9 66, 67, and 69 in CR 04-1747-TUC-JMR and Docket Entry 132, 133 and 134 in CR 04-
10 1712-TUC-JMR.) The government opposed the motion to continue sentencing. The parties
11 appeared before this Court on April 7, 2008, the scheduled sentencing date. At that hearing,
12 the Court ordered the government to respond to the defendant's motion to withdraw his
13 guilty plea. The government opposes the defendant's motion to withdraw his guilty plea
14 for the reasons discussed below.

15 ARGUMENT

16 “[T]he defendant has no ‘right’ to withdraw his plea.” *United States v. Rios-Ortiz*,
17 830 F.2d 1067, 1069 (9th Cir. 1987). The Ninth Circuit has made clear that “[a] defendant
18 may withdraw a guilty plea after a district court accepts the plea but before sentencing if
19 ‘the defendant can show a fair and just reason for requesting the withdrawal.’” *United States*
20 *v. Jones*, 472 F.3d 1136, 1141 (9th Cir. 2007) (*quoting United States v. Ortega-Ascanio*, 376
21 F.3d 879, 883 (9th Cir. 2004)(*quoting* Fed. R. Crim. Pro. 11(d)(2)(B)). “The defendant
22 bears the burden of showing a fair and just reason for withdrawal of a guilty plea...” *Rios-*
23 *Ortiz*, 830 F.2d at 1069. Such relief is not available for the asking but requires a substantial
24 showing due to the gravity involved in pleading guilty, which necessarily requires
25 expending judicial resources.

26 In *United States v. Hyde*, 520 U.S. 670, 676 (1997), United States Supreme Court
noted that to permit withdrawal of a guilty plea without any reason whatsoever “debases”

1 the judicial proceedings at the change of plea and subsequent acceptance of the defendant's
2 guilty plea. "After the defendant has sworn in open court that he actually committed the
3 crimes, after he has stated that he is pleading guilty because he is guilty, and after the court
4 has explicitly announced that it accepts the plea, the Court of Appeals would allow the
5 defendant to withdraw his guilty plea simply on a lark." *Hyde*, 520 U.S. at 676. The Court
6 concluded that to allow such groundless withdrawal "would degrade the otherwise serious
7 act of pleading guilty into something akin to a move in a game of chess." *Id.* at 677.

8 This Court accepted defendant's guilty plea long before this motion to withdraw
9 guilty plea was filed. Therefore, the defendant must show a "fair and just reason" in order
10 to prevail on his motion to withdraw his plea. Defendant has not met this burden of
11 demonstrating a fair and just reason for withdrawal of his guilty plea.

12 "Fair and just reasons for the withdrawal include inadequate Rule 11 plea
13 colloquies, newly discovered evidence, intervening circumstances, or any other reason for
14 withdrawing the plea that did not exist when the defendant entered his plea." *Jones*, 472
15 F.3d at 1141 (*quoting Ortega-Ascanio*, 376 F.3d at 883.). "Several factors enter the trial
16 court's decisional calculus. They include force of the proffered reason; the timing of the
17 request; the defendant's assertion of legal innocence (or the lack of such an assertion); and
18 the likely voluntariness of the plea, given the newly emergent circumstances." *United States*
19 *v. Doyle*, 981 F.2d 591, 594 (1st Cir. 1992). If the combined weight of these
20 circumstances tilts in the defendant's favor, then the court must also assess the prejudice
21 that will inure to the government. *Id.*; *see also United States v. Badger*, 925 F.2d 101, 104
22 (5th Cir. 1991).⁴

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26 ⁴ An appellate court reviews "a district court's denial of a motion to withdraw a guilty plea for abuse of discretion." *United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008). That is because the district court "has a special vantage point from which it may evaluate these factors." *Doyle*, 981 F.2d at 594.

1 1. The Proffered Reason

2 “A defendant may not renounce his guilty plea without advancing a plausible reason
3 for doing so.” *Doyle*, 981 F.2d at 594. The proffered reason for the defendant’s desire to
4 withdraw his guilty plea is that:

5 when he entered the plea agreement, [he] anticipated later 9th Circuit review of the
6 search conducted in this matter through a 2254 review of the State’s decision on his
7 Motion to Suppress. During the preparation of his appeal for the State case, it
8 became apparent that the only issue which will not be reviewed by the Federal
9 Courts under a 2254 review is that of a 4th Amendment Search and Seizure
10 violation.”

11 (Def. Mem. at 3.) Defendant further asserts that he stands a likely chance of succeeding in
12 the suppression of the evidence seized pursuant to the search warrant at the federal district
13 court level or at the Court of Appeals.

14 The proffered reason for withdrawal has absolutely no bearing on the federal charges.
15 If a state appellate court reverses the trial judge and suppresses evidence seized pursuant to
16 the search warrants, that decision only impacts the state case. The search warrants have
17 never been litigated in federal court and a state appellate court’s decision would have no
18 impact on the federal case.⁵ Moreover, even if the suppression motion litigated in state
19 court were reviewable pursuant to a § 2254 petition, that review would also only impact the
20 state case, not the federal case. The § 2254 petition would be directed at the state court’s
21 decision to deny the suppression motion in connection with the state charges. The
22 defendant cannot challenge the search warrants – either in his direct state appeal or in a §
23 2254 petition – as they relate to the federal charges because those warrants were never
24 litigated in federal court and the United States Attorney’s Office was not a party to the state
25 court proceeding.⁶

26 ⁵ Likewise, if the defendant litigates the search warrants in federal court, the federal court’s
decision would have no impact on the state case.

⁶See *Skoog v. City of Clackamas*, 469 F.3d 1221, 1230 (9th Cir. 2006) (A federal court gives
preclusive effect to a state court judgment only if the party against whom collateral estoppel is
asserted was a party to the first litigation or in privity with a party to that litigation, meaning that the

1 The defendant was clearly aware that he was waiving all federal appellate rights and
2 the right to collaterally attack his federal conviction when he plead guilty to the federal
3 charges. The fact that a federal court will not review a state court’s suppression ruling
4 under § 2254 may be a recent revelation to the defendant, but it is completely irrelevant
5 to the federal charges.

6 The defendant litigated the state case in order to preserve his appellate rights on the
7 suppression motion. He has retained his appellate rights in state court, but those appellate
8 rights only pertain to the state conviction. Similarly, any habeas rights that he may have in
9 connection with the state case only apply to the state conviction. The fact that the federal
10 courts will not review the denial of the state suppression motion in no way impacts the
11 federal case or the defendant’s guilty plea to the federal charges.

12 The defendant knowingly and voluntarily pleaded guilty to the federal charges and
13 waived all appellate rights and the right to collaterally attack the conviction. The
14 defendant’s groundless attempt to withdraw his federal guilty plea “degrade[s] the otherwise
15 serious act of pleading guilty into something akin to a move in a game of chess.” *Hyde*, 520
16 U.S. at 677. Accordingly, the motion to withdraw should be denied.

17 2. The Timing of the Request

18 “[T]he time between the plea and the plea withdrawal motion is a factor to consider
19 in ruling on that motion,” particularly where (as here) the defendant fails to provide any
20 good reason for the delay. *United States v. Nostratis*, 321 F.3d 1206, 1211 (noting cases in
21 which withdrawal motions made one month, 77 days, three months, and seven months after
22 the change of plea were denied). The timing of the defendant’s attempt to withdraw his
23 guilty plea is highly probative of motive, and close scrutiny of the chronology is important
24 in deciding whether retraction is fair and just. *Doyle*, 981 F.2d at 595. While an immediate
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party must have been able to “direct the course of litigation” such that he or she “had a fair and complete opportunity to litigate the issue” involved in the first litigation.).

1 change of heart may well lend considerable force to a plea withdrawal request, a long
2 interval between the plea and the request weakens any claim that the plea was entered in
3 confusion or false circumstances. *Id.* “Put another way, excessive delay saps strength from
4 any proffered reason for withdrawal.” *Id.* Such a delay “suggests that the withdrawal was
5 intended to serve a different purpose than that avowed” by the defendant. *Nostratis*, 321
6 F.3d at 1211.

7 The timing of the defendant’s request here is suspect given that it occurred only days
8 before sentencing and almost a year since his guilty plea. The federal cases have been
9 pending for almost four years. The defendant litigated the motion to suppress in state court
10 over a year ago, and was sentenced on the state charges in July 2007. This belated and
11 baseless motion to withdraw the defendant’s guilty plea should be denied.

12 3. Legal Innocence

13 The absence of a claim of innocence weighs in favor of allowing a plea to stand.
14 Doyle, 981 F.2d at 596. Here, the defendant is not claiming that he is actually innocent of
15 the crimes to which pleaded guilty. He admitted at the change of plea hearing that he was
16 in possession of two kilograms of cocaine and that he was going to ultimately transport it
17 to Virginia. He also admitted that he knowingly and intentionally possessed child
18 pornography. The absence of a claim of innocence also weighs against granting the motion
19 to withdraw.

20 4. Voluntariness

21 In assessing the merits of a motion to withdraw, an inquiring court must determine
22 whether, in light of the defendant’s proffered reason and any newly disclosed facts, the plea
23 may still be deemed voluntary and intelligent.” *Doyle*, 981 F.2d at 596. As discussed
24 above, the Magistrate Judge conducted the change of plea in accordance with the
25 requirements of Rule 11. The defendant never indicated that he was dissatisfied with his
26 attorney or that he did not understand the rights that Judge Estrada had explained to him or
the consequences of pleading guilty. Moreover, the defendant voluntarily admitted to the

1 factual basis of the charged crimes at the change of plea hearing, and acknowledged that he
2 realized that he was giving up his right to appeal the conviction and sentence. The absence
3 of a claim that defendant's guilty plea was not knowing or voluntary weighs against
4 granting the motion to withdraw.

5 5. Prejudice to the Government

6 Even if the defendant's proffered reason for withdrawing his plea were credible, the
7 motion should be denied because of the prejudice that would result to the government if the
8 defendant were permitted to withdraw his plea. As mentioned above, the federal cases are
9 almost four years old. The government has lost contact with at least one witness who would
10 likely have to testify at both trials. Even if this witnesses is located, his recollection of the
11 events surrounding the defendant's arrest will be far less clear than it was four years ago.
12 Moreover, there are two cooperating defendants who have been awaiting sentencing for
13 over two years while the defendant's case has been pending. Therefore, the prejudice that
14 would result to the government if the guilty plea was withdrawn also warrants denial of the
15 motion to withdraw.

16 CONCLUSION

17 For the above reasons, the United States respectfully requests that this Court deny
18 the defendant's motion to withdraw his guilty plea.

19 RESPECTFULLY submitted this 18th day of April, 2008.

20 DIANE J. HUMETEWA
21 United States Attorney
22 District of Arizona

23 *s/ Eric J. Markovich*
ERIC J MARKOVICH
Assistant U.S. Attorney

24 Copy of the foregoing served electronically
25 or otherwise this 18th day of April 2008 to

26 Charles Kendall, Esq.