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7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION

11  
12 UNITED STATES OF AMERICA, )  
13 Plaintiff, )  
14 v. )  
15 , )  
16 Defendant. )

NO. CR 03-1234  
NOTICE OF MOTION; MOTION  
TO DECLARE SENTENCING  
GUIDELINES  
UNCONSTITUTIONAL UNDER  
BLAKELY v. WASHINGTON;  
MEMORANDUM OF POINTS  
AND AUTHORITIES

Hearing Date:  
Hearing Time:

17  
18  
19 TO: UNITED STATES ATTORNEY DEBRA W. YANG, AND ASSISTANT  
20 UNITED STATES ATTORNEY BRIAN HERSHMAN:

21  
22 PLEASE TAKE NOTICE that on August 2, 2004, at 1:30 p.m., or as soon  
23 thereafter as counsel may be heard, in the courtroom of the Honorable Christina A.  
24 Snyder, United States District Judge, defendant, , will bring  
25 on for hearing the following motion:  
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MOTION

Defendant, \_\_\_\_\_, by and through Deputy Federal Public Defender Carlton F. Gunn, hereby moves this Honorable Court for an order declaring the Sentencing Guidelines unconstitutional in their entirety under the Supreme Court's decision in Blakely v. Washington, No. 02-1632, 2004 WL 1402697 (U.S. June 24, 2004). This motion is based on the attached memorandum of points and authorities, all files and records in this case, and such further argument as may be presented at the hearing on this motion.

Respectfully submitted,  
MARIA E. STRATTON  
Federal Public Defender

DATED: July \_\_, 2004

By \_\_\_\_\_  
Carlton F. Gunn  
Deputy Federal Public Defender

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4  
5 The federal Sentencing Guidelines are unconstitutional in their entirety and can  
6 no longer be applied after the Supreme Court's recent decision in Blakely v.  
7 Washington, No. 02-1632, 2004 WL 1402697 (U.S. June 24, 2004). While it was the  
8 Washington state sentencing guidelines which the Court held unconstitutional in  
9 Blakely, the Court's reasoning requires the same ruling as to the federal sentencing  
10 guidelines.

11  
12 This conclusion follows in four logical steps. First, Blakely v. Washington  
13 applies to all special offense characteristic increases, upward adjustments, and upward  
14 departures under the federal sentencing guidelines (other than those based on prior  
15 convictions) just as it applies to upward "exceptional sentences" under Blakely.  
16 Second, these provisions cannot be saved by committing them to a jury for findings  
17 beyond a reasonable doubt because the statute provides that the underlying facts are to  
18 be found by a judge and the courts cannot rewrite the statute to save it from an  
19 unconstitutional demise. Third, all Chapter Two guidelines which contain any  
20 special offense characteristics that increase the offense level must be invalidated in  
21 their entirety because the base offense levels and specific offense characteristics  
22 which decrease the offense level, while not unconstitutional in and of themselves,  
23 cannot be severed from unconstitutional specific offense characteristics within the  
24 same Chapter Two guidelines. Fourth, the few Chapter Two guidelines which do not  
25 include any specific offense characteristics that are directly invalidated by Blakely --  
26 of which the illegal reentry guideline, section 2L1.2, is one -- must be invalidated  
27 because these few internally valid guidelines cannot be severed from either the  
28 Chapter Three adjustments or the vast majority of Chapter Two guidelines which are

1 invalidated under the preceding three steps in the argument.

2  
3 In sum, all upward enhancements, then the Chapter Two guidelines which  
4 contain upward enhancements, and then the Guidelines as a whole fall like dominoes.  
5 After Blakely, the Court cannot apply the Sentencing Guidelines to Mr.

6 . The Court should consider the individual circumstances of Mr.  
7 's case and give him a sentence which is fair and just taking into account all  
8 of his circumstances.

9  
10 II.  
11 ARGUMENT

12  
13 A. BLAKELY APPLIES TO ALL SPECIFIC OFFENSE CHARACTERISTIC  
14 INCREASES, UPWARD ADJUSTMENTS, AND UPWARD DEPARTURES  
15 UNDER THE FEDERAL SENTENCING GUIDELINES.

16  
17 In Blakely, the Supreme Court considered the applicability of Apprendi v. New  
18 Jersey, 530 U.S. 466 (2000) to a state's sentencing guidelines, specifically, the  
19 Washington sentencing guidelines. See Blakely, at \*2-4. The Court held that  
20 Apprendi did apply. It began by restating the basic rule of Apprendi: "Other than the  
21 fact of a prior conviction, any fact that increases the penalty for a crime beyond the  
22 prescribed statutory maximum must be submitted to a jury and proven beyond a  
23 reasonable doubt." Id. at \*4 (quoting Apprendi, 530 U.S. at 490). It then held that the  
24 "statutory maximum" in a guidelines system is the maximum sentence in the  
25 sentencing range that controls in the absence of additional factual findings beyond the  
26 jury's verdict.

27 [T]he "statutory maximum" for Apprendi purposes is the  
28 maximum sentence a judge may impose solely on the basis of the

1           facts reflected in the jury verdict or admitted by the defendant. In  
2           other words, the relevant "statutory maximum" is not the  
3           maximum sentence a judge may impose after finding additional  
4           facts, but the maximum he may impose without any additional  
5           findings. When a judge inflicts punishment that the jury's verdict  
6           alone does not allow, the jury has not found all the facts "which the  
7           law makes essential to the punishment" and the judge exceeds his  
8           proper authority.

9   Blakely, at \*4 (emphasis in original) (citations omitted).

10  
11           The Washington sentencing scheme at issue in Blakely was simpler, but not  
12           fundamentally different, than the federal sentencing guidelines. Sentencing ranges  
13           under that scheme were based on a grid with sixteen offense "seriousness levels" and  
14           ten "offender score" categories based on defendants' criminal histories. See RCW  
15           9.94A.510. Certain criminal offenses are placed in certain "seriousness levels." See  
16           RCW 9.94A.515. See also Blakely, at \*2 (noting that RCW 9.94A.320 establishes  
17           "seriousness level" of V for second degree kidnaping). Combined with the "offender  
18           score," this creates a "standard range" for sentencing. Blakely, at \*2. This range sets  
19           a ceiling on the actual sentence unless and until the court makes certain findings  
20           which justify what is known as an "exceptional sentence." Id. The Supreme Court  
21           held that it was unconstitutional to impose such an "exceptional sentence" based on  
22           facts found by a judge because they were facts other than those implicitly found by the  
23           jury in its verdict or admitted in a guilty plea. See id. at \*5.

24  
25           The federal sentencing guidelines set a sentencing range based on an "offense  
26           level," which is equivalent to the Washington State "seriousness level," and a  
27           "criminal history category," which is equivalent to the Washington State "offender  
28           score." See U.S.S.G. Ch. 5, Pt. A. Compare RCW 9.94A.510. The Guidelines, which

1 have the "force of law," Stinson v. United States, 508 U.S. 36, 45 (1993), then assign  
2 criminal offenses to specific Chapter Two guidelines, see U.S.S.G. App. A, which  
3 have specific "base offense levels."<sup>1</sup> Those base offense levels may be increased only  
4 if certain additional facts are found, which facts are identified in "specific offense  
5 characteristics" and "cross references" in the Chapter Two guideline and  
6 "adjustments" in Chapter Three. There is then an additional power to depart upward,  
7 but, as under the Washington scheme, it exists only if a court finds certain specific  
8 encouraged departure grounds, see, e.g., U.S.S.G. §§ 5K2.1 et. seq., or some other  
9 factor that takes the case "outside the heartland" and/or makes it extraordinary, see  
10 United States v. Mondello, 927 F.2d 1463, 1470 (9th Cir. 1991) (recognizing power to  
11 depart based on factors that are not "ordinarily relevant" when factor present to an  
12 "extraordinary" extent); U.S.S.G. Ch. 1, Pt. A, § 4(d)(2002 ed.) (establishing  
13 "heartland" concept); U.S.S.G. § 5K2.0(a) (2003 ed.) (reflecting 2003 amendments  
14 incorporating "exceptional" standard).<sup>2</sup>

15  
16 While the Blakely majority left open the question of the federal guidelines'  
17 constitutionality, see Blakely, at \*6 n.9, there is no principled basis on which to  
18 distinguish them. The multitude of mandatory special offense characteristics, cross  
19 references, and adjustments which increase the base offense level and generally

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21 <sup>1</sup>For a few offenses, there is a choice of base offense levels, either because  
22 Appendix A gives a choice of two Chapter Two guidelines, see, e.g., U.S.S.G. App. A  
23 (entries for 18 U.S.C. §§ 470-77), or because the guideline has a choice of base  
offense levels depending on whether certain aggravating facts are found, see, e.g.,  
U.S.S.G. §§ 2D1.1(a), 2K1.1(a).

24 <sup>2</sup>Guidelines amendments adopted by the Sentencing Commission last year  
25 modified the language in section 5K2.0 to place the introductory commentary with the  
26 "heartland" language in a "historical note" and add the word "exceptional" to section  
27 5K2.0. That this was intended merely to refine rather than work a substantial change  
28 in the general departure standard is suggested by the background commentary to the  
amended guideline. That commentary states that "[t]he substantial revision of this  
policy statement in response to the PROTECT Act was intended to refine the  
standards applicable to departures while giving due regard for concepts, such as the  
'heartland', that have evolved in departure jurisprudence over time." U.S.S.G. § 5K2.0  
comment. (back'gd) (2003 ed.) (emphasis added).

1 depend on specific factual findings beyond the elements of the offense found in a  
2 verdict or admitted by a plea make Appendi, if anything, more applicable. As Justice  
3 O'Connor recognized in her dissent in Blakely:

4           If anything, the structural differences that do exist make the  
5 Federal Guidelines more vulnerable to attack. The provision  
6 struck down here provides for an increase in the upper bound of  
7 the presumptive sentencing range if the sentencing court finds,  
8 "considering the purpose of [the Act], that there are substantial and  
9 compelling reasons justifying an exceptional sentence." The Act  
10 elsewhere provides a nonexhaustive list of aggravating factors that  
11 satisfy the definition. The Court flatly rejects respondent's  
12 argument that such soft constraints, which still allow Washington  
13 judges to exercise a substantial amount of discretion, survive  
14 Appendi. This suggests the hard constraints found throughout  
15 chapters 2 and 3 of the Federal Sentencing Guidelines, which  
16 require an increase in the sentencing range upon specified factual  
17 findings, will meet the same fate.

18 Blakely, at \*16 (O'Connor, J., dissenting).

19  
20           Indeed, there is little for the defense to add to the argument in Justice  
21 O'Connor's dissent. The different structure -- with special offense characteristics,  
22 adjustments, and cross references in addition to departures -- does not save the federal  
23 guidelines for the reasons just stated. The fact that they are enacted by a body  
24 nominally within the judicial branch, but see Motion to Declare Feeney Amendment  
25 and Sentencing Guidelines Unconstitutional and Inapplicable, at 13-20 (arguing that  
26 Sentencing Commission can no longer be characterized as agency within judicial  
27 branch), does not matter because (1) the federal guidelines have the force of law and  
28 are subject to approval and modification by Congress, see Blakely, at \*16 (O'Connor,

1 J. dissenting) (citing Stinson v. United States, supra, and Mistretta v. United States,  
2 488 U.S. 361, 393-94 (1989)), and (2) the test for an "Apprendi fact" is whether a law  
3 makes it "increase[ ] the penalty for a crime beyond the prescribed statutory  
4 maximum," supra p. 4, not what body wrote the law that creates the increase.

5  
6 Finally, the fact that there can be departures from the federal guideline range --  
7 if the court makes a factual finding of a fact that takes the case "outside the heartland,"  
8 and/or makes it "extraordinary" or "exceptional," see supra p. 6 -- does not distinguish  
9 the federal guidelines. It was precisely such a departure, there called an "exceptional  
10 sentence," that was at issue in Blakely. As the majority opinion explained:

11 Nor does it matter that the judge must, after finding aggravating  
12 facts, make a judgment that they present a compelling ground for  
13 departure. He cannot make that judgment without some facts to  
14 support it beyond the bare elements of the offense. Whether the  
15 judicially determined facts require a sentence enhancement or  
16 merely allow it, the verdict alone does not authorize the sentence.

17 Blakely, at \*5 n.8 (emphasis in original). See also id. at \*16 (O'Connor, J., dissenting)  
18 (noting that majority "flatly rejects respondent's argument that such soft constraints,  
19 which still allow Washington judges to exercise a substantial amount of discretion,  
20 survive Apprendi").

21  
22 B. THE SPECIFIC OFFENSE CHARACTERISTICS, CROSS REFERENCES,  
23 ADJUSTMENTS, AND DEPARTURES WHICH INCREASE OFFENSE LEVELS  
24 UNDER THE GUIDELINES CANNOT BE SAVED BY COMMITTING THEM TO  
25 A JURY FOR FINDINGS BEYOND A REASONABLE DOUBT.

26  
27 The question then becomes what remedy there is for the effect of Blakely on the  
28 federal sentencing guidelines. See United States v. Croxford, No. 2:02-CR-

1 00302PGC, 2004 WL 1521560, at \*10 (D. Utah July 7, 2004) (Cassell, J.). One  
2 remedy that is not available is for courts to on their own empanel juries to determine  
3 the multitude of specific offense characteristics, cross references, adjustments, and  
4 departures which increase offense levels under the Guidelines.

5  
6 A comparable question was considered by the Ninth Circuit in United States v.  
7 Buckland, 289 F.3d 558 (9th Cir. 2002) (en banc), where the issue was Apprendi's  
8 effect on the drug quantity enhancement provisions in 21 U.S.C. § 841. The  
9 defendant pointed to the Ninth Circuit's prior decisions construing the statute as  
10 making drug quantity a sentencing fact to be decided by the court, not an element to  
11 be decided by a jury. See id. at 564. He then argued that it was for Congress, not the  
12 court, to rewrite the statute to provide for jury findings, because it is not the province  
13 of the courts to rewrite constitutionally invalid legislation. While courts may -- and,  
14 indeed, should -- construe statutes to avoid constitutional infirmities:

15 [T]his canon of construction does not give a court the prerogative  
16 to ignore the legislative will in order to avoid constitutional  
17 adjudication; "[a]lthough this Court will often strain to construe  
18 legislation so as to save it against constitutional attack, it must not  
19 and will not carry this to the point of perverting the purpose of the  
20 statute . . ." or judicially rewriting it.

21 CFTC v. Schor, 478 U.S. 833, 841 (1986) (quoting Aptheker v. Sec'y of State, 378  
22 U.S. 500, 505 (1964) (internal quotation marks and citations omitted)).

23  
24 A three-judge panel initially agreed with the defendant's argument in Buckland  
25 and flatly invalidated the drug quantity enhancements in 21 U.S.C. § 841. See United  
26 States v. Buckland, 259 F.3d 1157 (9th Cir. 2001), rev'd, 289 F.3d 558 (9th Cir. 2002)  
27 (en banc). The en banc court disagreed and reversed, but did not disagree with the  
28 basic principle that the judiciary cannot rewrite unconstitutional statutes for Congress.

1 To the contrary, the en banc court acknowledged that "this obligation [to construe  
2 statutes to avoid constitutional problems] does not give us the unfettered prerogative  
3 to rewrite a statute in order to save it." Buckland, 289 F.3d at 564. The en banc court  
4 reconstrued 21 U.S.C. § 841 to allow for jury findings only because there was no  
5 indication in the statute, in the legislative history, or anywhere else what Congress had  
6 intended.

7 The simple fact is that it has been the judiciary, not Congress,  
8 which allocated the responsibility for determining drug quantity  
9 under § 841 to the courts. However, the most important court in  
10 this process -- the Supreme Court -- has, up until now, remained  
11 silent. Congress and courts may have understood or accepted that,  
12 as a matter of procedure, drug quantity could be decided by a  
13 judge, not a jury. Such an understanding, however, does not  
14 represent the same kind of pellucid legislative purpose and intent  
15 found in the New Jersey statute struck down in Appendi.  
16 Moreover, Buckland fails to identify any persuasive legislative  
17 history that shows Congress clearly intended the procedure he now  
18 attacks as unconstitutional. Thus, because our reading of the  
19 statute is "fairly possible," we are obliged to so construe it.

20 Buckland, 289 F.3d at 567.

21  
22 The conclusion that was reached about 21 U.S.C. § 841 in Buckland cannot be  
23 reached about the Sentencing Guidelines and its implementing statute. It is clear from  
24 the statute, and its legislative history, that Congress intended for courts, not juries, to  
25 apply the Sentencing Guidelines.

26  
27 To begin with the statutory provisions, there is 18 U.S.C. § 3353. It says  
28 nothing about juries, but talks about what the court shall do. With respect to

1 departures, it states that there shall be no departure "unless the court finds that there  
2 exists an aggravating or mitigating circumstance of a kind, or to a degree, not  
3 adequately taken into consideration." 18 U.S.C. § 3553(b)(1) (emphasis added).  
4 More generally, it states that "[t]he court . . . shall consider," inter alia, the guidelines.  
5 18 U.S.C. § 3553(a) (emphasis added). Then, the statutory revisions regarding appeal  
6 refer to "the findings of fact of the district court" and "the opportunity of the district  
7 court to judge the credibility of the witnesses." 18 U.S.C. § 3742(e) (emphasis  
8 added). Finally, 18 U.S.C. § 3552 and Rule 32 of the Federal Rules of Criminal  
9 Procedure provide a detailed procedure for the preparation and disclosure of  
10 presentence reports, objections to presentence reports, and consideration of those  
11 objections by the court, with rulings and written findings thereon. See 18 U.S.C. §  
12 3552; Fed. R. Crim. Pro. 32. Nowhere is any role for a jury mentioned and it is  
13 difficult, if not impossible, to envision one. Accord Croxford, at \*11-12.

14  
15 The main congressional committee report's discussion of how the Sentencing  
16 Guidelines would work is even more clear.

17 The bill requires the judge, before imposing sentence,  
18 to consider the history and characteristics of the offender,  
19 the nature and circumstances of the offense, and the  
20 purposes of sentencing. He is then to determine which  
21 sentencing guidelines and policy statements apply to the  
22 case. Either he may decide that the guideline  
23 recommendation appropriately reflects the offense and  
24 offender characteristics and impose sentence according to  
25 the guideline recommendation or he may conclude that the  
26 guidelines fail to reflect adequately a pertinent aggravating  
27 or mitigating circumstance and impose sentence outside the  
28 guidelines. . . .

1 . . . Under a sentencing guidelines system, the judge is  
2 directed to impose sentence after a comprehensive examination of  
3 the characteristics of the particular offense and the particular  
4 offender. This examination is made on the basis of a presentence  
5 report that notes the presence or absence of each relevant offense  
6 and offender characteristics [sic]. This will assure that the  
7 probation officer and the sentencing judge will be able to make  
8 informed comparisons between the case at hand and others of a  
9 similar nature.

10 S. Rep. No. 84-225, at 52-53 (1983), reprinted in 1984 U.S.C.C.A.N. 3184, 3235-36  
11 (footnotes omitted). Congress thus clearly envisioned and intended that judges, not  
12 juries, find the sentencing guidelines facts.<sup>3</sup>

13  
14 Indeed, it is far from clear that Congress and/or the Sentencing Commission  
15 would have chosen to delegate all the Guidelines special offense characteristics, cross  
16 references, adjustments and upward departure facts to a jury, at least in their present  
17 form.<sup>4</sup> As posited by Justice Breyer in his dissent in Blakely, a jury would be faced  
18 with a new "offense" in which it would have to determine not only the traditional  
19 elements of robbery, but also "(1) the nature of the institution robbed, (2) the (a)

---

20  
21 <sup>3</sup>The Supreme Court has similarly recognized that it is the judge who will make  
22 the factual findings. In Koon v. United States, 518 U.S. 81 (1996), for example, the  
23 Court in explaining how departures should be considered indicated that "the district  
24 court must determine . . . whether the misconduct that occurred in the particular  
25 instance suffices to make the case atypical." Id. at 100 (emphasis added). And in  
United States v. Edwards, 523 U.S. 511 (1998), the Court recognized that "[t]he  
26 Sentencing Guidelines instruct the judge . . . to determine both the amount and the  
27 kind of 'controlled substances' for which a defendant should be held accountable." Id.  
28 At 513-14 (emphasis in original).

26 <sup>4</sup>This is another consideration which distinguishes Buckland. There was little  
27 reason to doubt that Congress would have delegated the question of drug quantities to  
28 juries if that were its only choice. Drug quantity is just one extra fact, usually  
addressed by the same witnesses who establishes the element that the substance is in  
fact a controlled substance, and is similar to other quantity facts commonly addressed  
and considered by juries. See, e. g., 18 U.S.C. § 641 (theft of government property  
statute including element of amount).

1 presence of, (b) brandishing of, (c) other use of, a firearm, (3) making of a death  
2 threat, (4) presence of (a) ordinary, (b) serious, (c) permanent or life threatening,  
3 bodily injury, (5) abduction, (6) physical restraint, (7) taking of a firearm, (8) taking  
4 of drugs, (9) value of property loss, etc." Blakely, at \*22 (Breyer, J., dissenting). Or  
5 as Judge Cassell of Utah characterized it in United States v. Croxford, supra:

6 [R]equir[ing] a jury to determine factors regarding the nature of the  
7 offense such as (1) the nature of the institution robbed; (2) the  
8 presence of, brandishing of, or other use of, a firearm; (3) the  
9 making [of] a death threat; (4) the presence of ordinary, serious, or  
10 permanent or life threatening bodily injury; (5) any abduction; (6)  
11 any physical restraint; (7) the taking of a firearm; (8) the taking of  
12 drugs; and (9) and [sic] the value of property taken; and further  
13 factors regarding the defendant's role in the offense such as (10)  
14 aggravating role; (11) mitigating role; (12) abuse of a position of  
15 trust; (13) use of a special skill; and (14) use of minor; and further  
16 factors regarding the victims such as (15) hate crime motivation;  
17 (16) vulnerable victim; (17) official victim; (18) terroristic  
18 motivation; and further factors concerning (19) obstruction of  
19 justice; and (20) acceptance of responsibility -- not to mention  
20 another dozen or so grounds for departing upward or downward  
21 from the general guidelines calculations.

22 Id. at \*20. As Justice Breyer put it at the end of his dissent: "How are juries to deal  
23 with highly complex or open-ended Sentencing Guidelines obviously written for  
24 application by an experienced trial judge?" Blakely, at \*29 (Breyer, J. dissenting).

25  
26 There are also other problems noted by Judge Cassell and Justice Breyer. One  
27 is the expense of jury trials, which would presumably become much more common  
28 and much more extensive. See United States v. Croxford, at \*20. Another is the

1 prejudice to defendants of including all sorts of aggravating facts in indictments and  
2 requiring the parties to argue inconsistent "sentencing defenses" at the same time they  
3 were arguing their substantive defenses. See Blakely, at \*22 (Breyer, J. dissenting).

4  
5 Perhaps Congress would choose this path, but that is far from certain. It is a  
6 difficult policy decision, and it is one which should be made by our elected  
7 representatives in group legislative deliberation. The decision should not be made by  
8 courts doing whatever is necessary to save a statutory scheme which was not initially  
9 written constitutionally. Cf. Blakely, at \*7 (noting response of legislature when  
10 Kansas sentencing guidelines were held unconstitutional under Apprendi); id. at \*22  
11 (Breyer, J. dissenting) (noting "[a] third option . . . which the Court seems to believe  
12 legislators will in fact take" (emphasis added)).

13  
14 C. CHAPTER TWO GUIDELINES WHICH CONTAIN SPECIAL OFFENSE  
15 CHARACTERISTICS OTHER THAN PRIOR CONVICTIONS THAT INCREASE  
16 THE OFFENSE LEVEL MUST BE INVALIDATED IN THEIR ENTIRETY,  
17 BECAUSE THE SUBSECTIONS THAT ARE NOT UNCONSTITUTIONAL  
18 UNDER BLAKELY AND APPRENDI -- NAMELY BASE OFFENSE LEVELS  
19 AND SPECIAL OFFENSE CHARACTERISTICS THAT REDUCE THE OFFENSE  
20 LEVEL -- CANNOT BE SEVERED FROM THE UNCONSTITUTIONAL  
21 SUBSECTIONS.

22  
23 The general rule regarding severability is: "Unless it is evident that the  
24 Legislature would not have enacted those provisions which are within its power,  
25 independently of that which is not, the invalid part may be dropped if what is left is  
26 fully operative as law." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)  
27 (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) and Champlin Refining Co. v.  
28 Corporation Comm'n of Oklahoma, 286 U.S. 210, 234 (1932)). This establishes two

1 requirements: (1) that the statute or regulation<sup>5</sup> is fully operative as law and (2) that it  
2 be evident that the valid provision would have been enacted without the other. Board  
3 of Natural Resources v. Brown, 992 F.2d 937, 948 (9th Cir. 1993).

4  
5 It is unclear that even the first requirement is met here. Individual guidelines  
6 are presumably intended to operate as whole, and they cannot do so if individual parts  
7 have been stricken. A Chapter Two guideline with most or all of its special offense  
8 characteristics stricken may be partially operative as law, but is it fully operative?

9  
10 The court need not decide the question here, however, because the second  
11 requirement of the test for severability is not satisfied. Severing constitutional  
12 subsections from unconstitutional ones is frowned upon when the provision as a  
13 whole "is designed to strike a balance between competing interests." Western States  
14 Medical Center v. Shalala, 238 F.3d 1090, 1096 (9th Cir. 2001), aff'd on other  
15 grounds sub nom. Thompson v. Western States Medical Center, 535 U.S. 234 (2002).  
16 See also United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1301 (9th Cir.  
17 1998) (valid provisions not severable from invalid provisions where statute "struck a  
18 finely-tuned balance between the interests of the states and the tribes"). And "a  
19 balance between competing interests" is precisely what the Sentencing Guidelines --  
20 especially individual Chapter Two guidelines within themselves -- attempt to  
21 accomplish. They take a starting point that is usually, though not always, for a less  
22 aggravated form of the offense, and then increase it, often significantly, with  
23 aggravating factors, and decrease it with mitigating factors that represent the  
24 "competing interests" in sentencing for that offense. To strike the aggravating factors  
25 without striking the mitigating factors and the starting point would throw off the  
26 "balance" completely. Accord United States v. Croxford, at \*12 (noting that

27  
28 <sup>5</sup>The doctrine of severability is applied to regulations just as it is applied to  
statutes. See, e. g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553 (2001); K Mart  
Corp. v. Cartier Inc., 486 U.S. 281, 293 (1988) (Kennedy, J.).

1 guidelines are a "holistic system, calibrated to produce a fair sentence by a series of  
2 both downward and upward adjustments" (emphasis in original)).

3  
4 Supporting this argument against severability is the lack of any severability  
5 clause in the Guidelines. "Although the absence of a severability clause does not raise  
6 a presumption of severability, it does suggest an intent to have all components 'operate  
7 together or not at all.'" Matter of Reyes, 910 F.2d 611, 613 (9th Cir. 1990). And such  
8 an intent is expressed explicitly in the Guidelines in another context -- in the "one  
9 book rule" in section 1B.11. That section provides that "[t]he Guidelines Manual in  
10 effect on a particular date shall be applied in its entirety." U.S.S.G. § 1B.11(b)(2).  
11 Though this provision is addressed to the effects of the Ex Post Facto Clause rather  
12 than the effects of Apprendi, it is an additional suggestion of the Sentencing  
13 Commission's intent regarding severability.

14  
15 In sum, standard principles of statutory construction require invalidation of  
16 Chapter Two guidelines in their entirety, not piecemeal.

17  
18 D. THE ILLEGAL REENTRY GUIDELINE IN SECTION 2L1.2 MUST BE  
19 INVALIDATED BECAUSE, REGARDLESS OF WHETHER ITS INTERNAL  
20 COMPONENTS RENDER IT INDEPENDENTLY UNCONSTITUTIONAL, IT IS  
21 NOT SEVERABLE FROM THE OTHER GUIDELINES WHICH ARE  
22 UNCONSTITUTIONAL.

23  
24 There are a few guidelines which do not have specific offense characteristics  
25 that directly violate Apprendi. Some of these are guidelines with no specific offense  
26 characteristics at all. See, e. g., U.S.S.G. §§ 2A1.1, 2A1.2, 2A1.3. Others -- most  
27 notably the career offender guideline in section 4B1.1 and the illegal reentry guideline  
28 in section 2L1.2 -- have specific offense characteristics that are based solely on prior

1 convictions. Section 2L1.2 in particular has one specific offense characteristic,  
2 requiring an increase of the base offense level by 4, 8, 12, or 16 that depends solely on  
3 whether the defendant has prior convictions of a certain type. See U.S.S.G. §  
4 2L1.2(b)(1). And the Apprendi rule does not apply to enhancements based on prior  
5 convictions, at least for now.<sup>6</sup>

6  
7 Still, the illegal reentry guideline must be thrown out regardless of whether its  
8 individual components violate Apprendi. That is because it -- and the few other  
9 guidelines which do not directly violate Apprendi -- are not severable from the other  
10 guidelines any more than the subsections within individual Chapter Two guidelines  
11 are severable from each other. This is so for two reasons.

12  
13 First, while there are no specific offense characteristics which must be stricken  
14 from section 2L1.2, there are Chapter Three adjustments that must be stricken. While  
15 some -- like the role in the offense guidelines in Part 3B -- may not apply in illegal  
16 reentry cases, others -- like the obstruction of justice guideline in section 3C1.1, the  
17 reckless endangerment guideline in section 3C1.2, and/or the multiple counts

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20 \_\_\_\_\_  
21 <sup>6</sup>Logically, prior convictions should not be treated any differently under the rule  
22 of Apprendi, see Apprendi, 530 U.S. at 520-21 (Thomas, J., concurring)  
23 (acknowledging his error in Almendarez-Torres v. United States, 523 U.S. 224  
24 (1998)), and so Blakely should apply to the illegal reentry guideline specific offense  
25 characteristics just as it does to all others. So far, however, the Supreme Court has  
26 refused to go this far and has retained an exception for enhancements based on prior  
27 convictions. See Blakely at \*4 (describing rule of Apprendi as "[o]ther than the fact  
28 of a prior conviction, any fact that increases the penalty for a crime beyond a  
prescribed statutory maximum must be submitted to a jury, and proved beyond a  
reasonable doubt" (quoting Apprendi, 530 U.S. at 490) (emphasis added)). To  
preserve the record, the defense here nonetheless argues that the analysis set forth in  
the preceding subsections should be applied to the specific offense characteristics in  
the illegal reentry guideline and hence that guideline as a whole. Cf. Apprendi, 530  
U.S. at 489-90 (recognizing that "it is arguable that Almendarez-Torres was  
incorrectly decided, (footnote omitted) and that a logical application of our reasoning  
today should apply if the recidivist issue were contested"). The defense recognizes  
that this Court is bound by and must follow Almendarez-Torres, however.

1 guidelines in Part 3D -- could.<sup>7</sup> These Chapter Three adjustments were enough for  
2 Judge Cassell to invalidate the underlying Chapter Two guideline at issue in the case  
3 before him. See United States v. Croxford, at \*7. That is because the Chapter Three  
4 adjustments are part of the "balance between competing interests," supra p. 15, and  
5 striking the adjustments that increase offense level without striking other provisions  
6 which decrease it throws the balance off kilter just like one-sided striking of special  
7 offense characteristics.

8  
9 More fundamentally, it seems doubtful that the Sentencing Commission and/or  
10 Congress would have intended a small number of defendants to be sentenced under  
11 whatever few Chapter Two guidelines survive Blakely while leaving other defendants  
12 completely outside the Guidelines sentencing system. That this precludes severability  
13 is suggested by two Ninth Circuit cases which held that provisions of the Sentencing  
14 Reform Act which were completely separate from the Guidelines statutory provisions  
15 were not severable when the Ninth Circuit held the Guidelines provisions  
16 unconstitutional before the Supreme Court's decision in Mistretta v. United States,  
17 488 U.S. 361 (1989). In the very same case that held the Guidelines provisions  
18 unconstitutional -- Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988),  
19 vacated on other grounds sub nom. United States v. Chavez-Sanchez, 488 U.S. 1036  
20 (1989) -- the court held that the provisions modifying good time credit rules were not  
21 severable from the Guidelines provisions. See id. at 1267-68. In another case decided  
22 the same day, the court held that the provisions replacing parole with supervised  
23 release were not severable. See United States v. Jackson, 857 F.2d 1285, 1286 (9th

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24  
25 <sup>7</sup>The multiple counts guidelines present a particularly problematic scenario, if  
26 one envisions an illegal reentry defendant who committed another offense that does  
27 not have a valid guideline, such as possession of a firearm by an illegal alien, see 18  
28 U.S.C. § 922(g)(5). The multiple counts rules direct the court to calculate the  
guidelines for both offenses and then combine them pursuant to a formula set out in  
section 3D1.4. This is impossible if there is no valid guideline for the other offense.  
In such a case, the guidelines truly would not be "fully operative as law," supra p. 14.

1 Cir. 1988). The reason the court gave was that there was no express severability  
2 clause in the Sentencing Reform Act, see Gubiensio-Ortiz, 857 F.2d at 1267, and that  
3 this was consistent with the intent evidenced by the broad sweep of the Act and its  
4 legislative history.

5 The Act introduced a comprehensive revision of post-custodial  
6 supervision, abolishing parole and substantially curtailing the  
7 availability of good time credits. In Gubiensio, we considered the  
8 severability of the provision relating to good time credits and  
9 concluded: "Congress having chosen a 'comprehensive' approach  
10 to making sentencing more determinate, we will not sever  
11 companion sections of the guidelines system that would introduce  
12 piecemeal reforms." We reach the same conclusion as to the  
13 supervised release provision. Severing the provision would leave  
14 in place two competing systems of post-custodial supervision --  
15 parole and probation under pre-SRA law and supervised release  
16 under the SRA.

17 Jackson, 857 F.2d at 1286 (citations omitted). See also Minnesota v. Mille Lac Band  
18 of Chippewa Indians, 526 U.S. 172, 191 (1999) (declining to sever valid and invalid  
19 portions of executive order because order "embodied a single, coherent policy").  
20

21 This reasoning is equally applicable in the present context. As with the  
22 Sentencing Reform Act, there is no severability clause in the Sentencing Guidelines;  
23 instead, there is the "one book rule" which is at least suggestive of a contrary intent.  
24 See supra p. 16. And it is apparent that both Congress and the Sentencing  
25 Commission intended a "comprehensive approach." Leaving a few defendants to be  
26 sentenced under the few surviving Chapter Two guidelines and without any Chapter  
27 Three upward adjustments would be the very sort of "piecemeal reform" and "two  
28 competing systems" that were held to be contrary to congressional intent in

1 Gubiensio-Ortiz and Jackson.

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III.

9

CONCLUSION

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The Sentencing Guidelines must be invalidated in their entirety. This Court should so hold and then use the individual circumstances of Mr.

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's case to decide what sentence to impose in his case.

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Respectfully submitted,

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DATED: July \_\_, 2004

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By \_\_\_\_\_  
CARLTON F. GUNN  
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