

1 BARRY J. PORTMAN  
Federal Public Defender  
2 JOHN PAUL REICHMUTH  
Assistant Federal Public Defender  
3 555 12<sup>th</sup> St. –Suite 650  
Oakland, CA 94607-3627  
4 Telephone: (510) 637-3500  
5 Counsel for Defendant  
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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10

11 UNITED STATES OF AMERICA, ) No. CR-03-40010-SBA  
12 )  
Plaintiff, ) DEFENDANT )S  
13 vs. ) MEMORANDUM OF LAW REGARDING  
14 ) *BLAKELY V. WASHINGTON*;  
15 ) SENTENCING MEMORANDUM; AND  
16 ) MOTION FOR DOWNWARD  
Defendant. ) DEPARTURE

17 **I. INTRODUCTION**

18 Mr. has entered an open plea of guilt to the charge of illegal  
19 reentry, in violation of 8 U.S.C. § 1326. The Probation Office has calculated an adjusted  
20 offense level of 21 and a Criminal History Category VI. The Probation Office has recommended  
21 that this 24-year-old man, with one felony conviction, who arrived in the United States during  
22 his infancy, be given a sentence of 7 years and two months incarceration (86 months) for being  
23 found in the only country he has ever known.

24 The fact is that countless defendants in Mr. 's position have been  
25 sentenced to 30 months incarceration, notwithstanding Guideline ranges of 77-96 months, but  
26 Mr. does not presently have the opportunity to be sentenced without the

1 guidelines. *See United States v. Green*, 2004 WL 1381101 at \* 5-6 (D. Mass. June 18, 2004)  
2 (observing that, because of numerous practices on the part of the Executive Branch, it is the  
3 Department of Justice, not the Judiciary, that ultimately determines the sentence under the  
4 Sentencing Guidelines).

5 Mr. \_\_\_\_\_ argues that Sentencing Guidelines are facially  
6 unconstitutional and, in the alternative, that they are unconstitutional as applied to him. If the  
7 court holds that it can constitutionally apply the Guidelines in this case, Mr.

8 \_\_\_\_\_ argues that his Criminal History has been erroneously calculated as a VI instead of V, in that  
9 PSR ¶25 should not reflect a revocation under Ninth Circuit Law. Also assuming the  
10 constitutionality of the Guidelines, Mr. \_\_\_\_\_ respectfully requests that the  
11 court grant a downward departure in this case. Mr. \_\_\_\_\_ is deeply culturally  
12 assimilated in this country, and he firmly believed that he had legal recourse to adjust his status  
13 in this country when he returned, having been unjustly denied the opportunity to be heard on the  
14 issue immediately prior to his deportation.

15 In a recent decision, *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004), the  
16 Supreme Court held unconstitutional any system of guidelines that permits or mandates a  
17 sentencing judge to increase a defendant's sentence upon the finding of a fact not found by the  
18 jury beyond a reasonable doubt. The *Blakely* decision renders infirm a significant portion of the  
19 federal guideline system under which Probation calculated defendant's sentence. Accordingly,  
20 defendant moves this Court to strike down as unconstitutional the guidelines and sentence Mr.

21 \_\_\_\_\_ to 30 months imprisonment. Not only has *Blakely* left the guidelines  
22 unsalvageable in their entirety on sixth amendment grounds, regardless of the type of case before  
23 the court, but it has also brought Guideline enhancements out from under the fundamental  
24 assumptions that supported the Court's decision in *Mistretta v. United States*, 488 U.S. 361, 369  
25 (1989) upholding the Guidelines against separation of powers challenges. If the court upholds  
26 the guidelines against a facial challenge, there are still numerous facts which have not been

1 admitted by the defendant or presented to a jury which raise the statutory maximum in this case.  
2 These are an alleged non-jury juvenile adjudication, PSR ¶ 25; an allegation that Mr.  
3 had been released from prison less than two years prior to this offense, ¶32; an  
4 allegation that Mr. had been under a criminal justice sentence at the  
5 time that he committed the instant offense, ¶32; and allegations that Mr.  
6 was given certain sentences in the past for prior convictions. ¶¶ 25-30. Based only on Mr.  
7 's plea and the fact of his prior convictions (+1 criminal history point each),  
8 Mr. is at an adjusted offense level of 21 and a Criminal History  
9 Category of III, establishing a range of 46-57 months. It is from that level that further departures  
10 are requested.

11  
12 **II. STATEMENT OF FACTS AND PROCEEDINGS**

13 Mr. was brought to this country from Mexico at the age of four  
14 months. PSR ¶ 39. Growing up, Mr. witnessed his father act as a  
15 domestic abuser, a philanderer, and an alcoholic. *Id.* He grew up in East Palo Alto and  
16 Redwood City, California. At a young age in Redwood City, Mr.  
17 became involved with a gang. He was shot multiple times at the age of 12 or 13, and he suffered  
18 serious physical and psychological after-effects, including the inability to move for months and  
19 the experience of flashbacks. PSR ¶ 40. By his own statements and the corroboration of his  
20 brother Jose, Mr. is no longer involved with gang activity. PSR ¶¶ 40,  
21 43.

22 Now 24 years of age, Mr. has a criminal history, most of it  
23 related to his tumultuous relationship with Irma Ramirez. Mr.  
24 committed these offenses against Ms. Ramirez as a young intoxicated man, and he received  
25 significant sentences for them. Ms. Ramirez has since stated that she believes that Mr.  
26 has matured and that she loves him; she very much objected to his deportation. *See*

1 Declaration of Irma Ramirez, attached as Exhibit A. Unlike many § 1326 defendants, even  
2 those receiving 30-month “Fast Track,” plea agreements, Mr. \_\_\_\_\_ has only  
3 one felony conviction. PSR ¶ 30. In fact, on March 20, 2002, even after this felony was known  
4 to the United States Attorney’s Office, prosecution of Mr. \_\_\_\_\_ was declined.  
5 United States Department of Justice, Memorandum for File, March 20, 2002, attached as Exhibit  
6 B.

7 Mr. \_\_\_\_\_ is young, employable, loved and supported by his family,  
8 and culturally an American. His brother Jose describes him as a “good sweet person.” PSR ¶  
9 43. He differs in no material respects from the scores of defendants who have been given 30-  
10 month sentences in this District, except that he has less connection to Mexico than perhaps any  
11 of them, and the consequences of deportation for him will be many times more severe.

12 Mr. \_\_\_\_\_ is a fully assimilated citizen of the San Francisco Bay Area.  
13 He has spent his entire life here. All of his family resides in the immediate area. Two of his  
14 brothers and his mother are U.S. citizens. Another brother is a Lawful Permanent Resident.  
15 PSR ¶ 38.<sup>1</sup> The application for Cancellation of Removal, attached as exhibit C and also filed  
16 separately herewith on March 2, 2004 as attachment 1 to the Amended Declaration of  
17 \_\_\_\_\_, which Mr. \_\_\_\_\_ attempted to file with the I.N.S. immediately  
18 prior to his most recent deportation, includes substantial documentation of Mr.

19 \_\_\_\_\_’s ties to this country. The application includes notarized declarations from Irma Ramirez  
20 and Leticia \_\_\_\_\_, Mr. \_\_\_\_\_’s girlfriend and mother,  
21 respectively. Irma Ramirez, who was once involved in a tumultuous relationship with Mr.  
22 \_\_\_\_\_, stated in December, 2001 that Mr. \_\_\_\_\_ had changed when  
23 she last saw him. She felt that he had matured. She begged the INS not to deport Mr.

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25 <sup>1</sup>Another of Mr. \_\_\_\_\_’s young brothers was killed in a car accident  
26 almost three months ago. Graciously, the United States Marshals Service escorted Mr.  
\_\_\_\_\_ to a private viewing of his brother at the funeral home.



1 money having each item notarized, and he had been given a docket number by the INS. The  
2 official would not accept the paperwork, and he continued to tell that  
3 “the bus [was] leaving.”

4 Mr. was told that he needed to sign a Form I-871, Notice of  
5 Intent/Decision to Reinstate Prior Order. He refused to sign the document. He asked if he could  
6 see a judge, and he specifically requested an opportunity to call and speak with the attorney  
7 whose telephone number he had.

8 Upon his refusal to sign the Form I-871, he was placed in a single-cell alone.

9 After about a 5 ½ hour wait, a woman came to the cell and told him that it was time to  
10 go. She would not permit him to call an attorney, but she allowed him to call his mother to tell  
11 her that he was being deported. She dialed the number. He told his mother that he was not being  
12 allowed to file papers or speak with an attorney. The woman then presented him with the I-871  
13 form again. She told him to sign it because the bus was leaving and he could not stay behind.

14 Mr. felt he had no choice but to sign the Form she gave him. After he  
15 signed it, he was deported.

16 Mr. kept all of the forms that he had wanted to file and he  
17 mailed them back to the U.S. after he was deported. He felt that he had been denied the right to  
18 contest his deportation and to consult with an attorney for the purpose of understanding what his  
19 rights were. He returned here in part to try to accomplish what was denied to him in March  
20 2002, consultation with counsel and the filing of his paperwork for adjustment of status. He  
21 knew that his mother and brother were United States citizens, so he believed that he would have  
22 a right to contest the deportation. *Id.* Significantly, Mr. went through  
23 the trouble of mailing the original paperwork that he attempted to file in March, 2002 to his  
24 mother in the States. PSR ¶ 10. Tellingly, Mr. informed the Probation  
25 Officer that he hopes to obtain a permit so that he can visit the United States after he is deported.  
26 This is a virtual impossibility under current law, but the belief held by Mr.

1 quite sets his case apart from the large numbers of immigrants who enter unlawfully time and  
2 time again with no hope of adjustment of status and no motive other than the financial.

3 Consonant with other cases of this type, Mr. \_\_\_\_\_'s counsel and the  
4 government were involved in negotiations that appeared that they would result in a fast-track  
5 plea in this case, but those discussions were ended when the case was transferred to a new  
6 prosecutor. Later in the case, around the time of the death of Mr. \_\_\_\_\_'s  
7 brother, Mr. \_\_\_\_\_ was offered a 48-month plea agreement. However, the  
8 government and defense counsel believed that Mr. \_\_\_\_\_ was in a Criminal  
9 History Category IV, facing a range of 57-71 months. This belief was reasonable. The "Rap  
10 Sheet" attached as Exhibit A to the Government's Opposition to Defendant's Motion To Dismiss  
11 Indictment, contains only three convictions resulting in sentences. Government counsel  
12 summarized those convictions in her Opposition. *Id.* at 2-3. Applying U.S.S.G. § 4A1.1 to those  
13 convictions and adding three Criminal History Points for committing the offense while under  
14 supervision and within two years of release from prison produced a Criminal History Category  
15 IV. Because the difference between the range and the plea offer was possibly only nine months,  
16 Mr. \_\_\_\_\_ rejected the offer and chose to pursue his motion to dismiss and  
17 motions for downward departures. The Presentence Report then revealed that Mr.  
18 \_\_\_\_\_ and both counsel were all laboring under a serious mistake of fact during their plea  
19 negotiations.<sup>2</sup>

20  
21 **III. ARGUMENT**

22 **A. *BLAKELY* RENDERS CONSTITUTIONALLY INFIRM ALL GUIDELINE**  
23 **UPWARD ADJUSTMENTS AND DEPARTURES PREDICATED ON**  
24 **FACTS THAT WERE NOT CHARGED IN THE INDICTMENT AND**  
25 **FOUND BY THE JURY BEYOND A REASONABLE DOUBT**

26 \_\_\_\_\_  
<sup>2</sup>The undersigned, by his signature below, declares under penalty of perjury that the plea negotiations as stated herein are true and correct to the best of his information and belief.

1           The underlying facts of *Blakely v. Washington* are critical for understanding the  
2 application of that decision to the federal sentencing guideline scheme. Ralph Blakely, charged  
3 by the state of Washington with first-degree kidnaping, reached a plea agreement with the  
4 prosecutor whereby Blakely pleaded guilty to second-degree kidnaping involving domestic  
5 violence and use of a firearm in exchange for the prosecutor’s dismissal of the first-degree  
6 kidnaping charge. Washington state has a guideline sentencing scheme that provides two kinds  
7 of statutory sentence maxima for each offense. First, because second-degree kidnaping is a class  
8 B felony, Blakely cannot be sentenced to more than 10 years imprisonment. Second, under the  
9 scheme engendered by a Washington state sentencing reform act, there is a standard or  
10 presumptive sentencing range of 49 to 53 months.

11           The first statutory maximum, 10 years, sets an absolute limit beyond which the  
12 sentencing judge cannot go. The second statutory maximum, 53 months (i.e., the high end of the  
13 presumptive sentencing range) is not an absolute limit; rather, the sentencing judge can adjust  
14 the sentence upward if the judge finds one or more of the statutorily-enumerated aggravating  
15 factors (or an analogous factor) to be present in the case. Such an upward adjustment or  
16 “exceptional sentence” is legal, however, only if the judge explicitly finds an aggravating factor  
17 apart from the elements found by the jury during the guilt phase of the case.

18           In Blakely’s case, the Washington state judge, rejecting the prosecutor’s recommendation  
19 of 53 months, found that Blakely had acted with deliberate cruelty, one of the statutorily-  
20 enumerated aggravating factors. On that basis, the judge adjusted Blakely’s sentence upward by  
21 37 months for a final sentence of 90 months. Blakely appealed, citing *Apprendi* for the  
22 proposition that 37 months could not be tacked on to his presumptive sentence maximum unless  
23 the fact supporting the additional increment of punishment was found by a jury beyond a  
24 reasonable doubt.

25           The Supreme Court agreed with Blakely, concluding that the upward adjustments of the  
26 Washington state scheme violate the constitutional rule of *Apprendi v. New Jersey*, 530 U.S. 466,

1 490 (2000): “Other than the fact of a prior conviction, any fact that increases the penalty for a  
2 crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond  
3 a reasonable doubt.” (Cited by *Blakely*, 2004 WL 1402697 at \* 4). The *Blakely* Court noted that  
4 the Court’s precedents clarified what the term “statutory maximum” means for *Apprendi*  
5 purposes: “the maximum sentence a judge may impose *solely on the basis of the facts reflected*  
6 *in the jury verdict or admitted by the defendant.*” *Blakely*, 2004 WL 1402697 at \* 4 (italics in  
7 original).

8 Applying this definition of “statutory maximum,” the *Blakely* Court made it very clear  
9 that in guideline systems such as the Washington state scheme that contain two types of statutory  
10 maxima (e.g., in *Blakely*’s case, there was a 10-year maximum because the offense of conviction  
11 was a Class B felony and a 53 month maximum because that was the high end of the  
12 presumptive sentence range for the offense of conviction), the *Apprendi* rule applies to the lower  
13 statutory maximum:

14 In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge  
15 may impose after finding additional facts, but the maximum he may impose *without* any  
16 additional findings.

16 *Id.* Because the Washington state sentencing judge could not impose a sentence above 53  
17 months unless he explicitly found one or more additional facts, the *Apprendi* rule applies to the  
18 53-month maximum.

19 This reasoning applies equally to the federal guideline scheme. Each federal offense  
20 carries a statutory maximum set by Congress and typically contained in the statute creating the  
21 criminal offense. But the guideline system sets up a lower or subsidiary statutory maximum  
22 calculated by ascertaining the base offense level assigned to the offense of conviction and  
23 referencing that offense level to the defendant’s criminal history. The result is a sentencing  
24 range. The judge cannot increase the defendant’s sentence above the high end of that range  
25 unless he or she finds one or more additional facts. Under the guideline system, the judge is  
26 directed to apply various sentencing increases if he or she finds beyond a preponderance various

1 respective aggravating facts. These upward adjustment provisions are every bit as infirm as the  
2 provision in the Washington state scheme that permitted the judge to increase Blakely’s sentence  
3 from 53 to 90 months. As such, these upward adjustment provisions are unconstitutional.

4 Any attempt by the government to salvage these enhancement provisions by  
5 distinguishing the federal guideline scheme from the Washington state scheme will be  
6 unavailing. In the Washington state scheme, the guideline enhancement provisions are  
7 promulgated directly by the legislature whereas in the federal scheme the legislature, Congress,  
8 delegated the authority to promulgate such guideline provisions to an independent agency within  
9 the Judicial Branch. The majority opinion in *Blakely* makes no mention of this distinction; its  
10 silence is telling. Justice O’Connor, writing in dissent, agrees: “The fact that the Federal  
11 Sentencing Guidelines are promulgated by an administrative agency nominally located in the  
12 Judicial Branch is irrelevant to the majority’s reasoning.” *Blakely*, 2004 WL 1402697 at \* 16  
13 (O’Connor, J., dissenting).<sup>3</sup> Justice O’Connor continues, “The structure of the Federal  
14 Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds  
15 for distinction.” *Id.* Her analysis of the guideline enhancement provisions in Chapters 2 and 3  
16 of the Guidelines “suggests [such provisions] will meet the same fate [as the Washington state  
17 enhancement provisions].” *Id.*

18 Accordingly, *Blakely* compels this Court to rule that the enhancement provisions of the  
19 Guidelines are unconstitutional.

20 **B. THE ONLY CONSTITUTIONAL REMEDY IS TO IMPOSE A NON-**  
21 **GUIDELINE SENTENCE**

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22  
23 <sup>3</sup> Justice O’Connor took little comfort in the majority opinion’s nominal limitation  
24 of its holding to the effect that “[t]he Federal Guidelines are not before us, and we express no  
25 opinion on them . . . .” *Blakely* 2004 WL 1402697 at \* 16 (O’Connor, J., dissenting) (citing  
26 *Blakely*, 2004 WL 1402697 at \* 9 n.9). To demonstrate how little the majority’s limiting  
language meant, Justice O’Connor cited language in *Apprendi* claiming that the decision does  
not overrule *Walton*, an earlier affirmation of Arizona’s death penalty statute, and then noted that  
two years later in *Ring* the rule of *Apprendi* was applied to overrule *Walton* and strike down  
Arizona’s statute. *Id.* (O’Connor, J., dissenting).

1 As demonstrated above, the inexorable implication of the Supreme Court’s holding in  
2 *Blakely* is that a federal defendant’s sentence cannot be increased under a guideline provision  
3 triggered by a judicial finding (by a preponderance of evidence) of an aggravating factor unless  
4 the aggravating fact is a prior conviction or has been admitted by the defendant. Thus, *Blakely*  
5 renders the following categories of guideline provisions unconstitutional under the current  
6 scheme:

- 7 (1) alternative enhanced base offense levels;
- 8 (2) aggravating specific offense characteristics;
- 9 (3) cross-references;
- 10 (4) Chapter 3 aggravating factors;
- 11 (5) upward departures; and
- 12 F. Criminal History adjustments other than the “fact of a prior  
13 conviction.”

14  
15 **1. Adjudication of Whether a Guideline Enhancement Provision**  
16 **Applies, Consistent with *Apprendi* and *Blakely*, is Necessarily the**  
17 **Adjudication of Guilt or Innocence of a New Compound Criminal**  
18 **Offense**

19 *Blakely* requires that any guideline adjustment that increases a defendant’s sentence  
20 comply with the rule of *Apprendi*. That rule, a consequence of the Sixth Amendment’s  
21 guarantee of a jury trial to the criminally accused, requires that any fact potentially triggering an  
22 increased sentence be charged in an indictment and proved to a jury beyond a reasonable doubt.

23 It is apparent from *Apprendi* and its precedents that for constitutional purposes, a fact or  
24 factor is either an element of an offense (with the constitutional guarantees that it is charged in  
25 an indictment and proved to a jury beyond a reasonable doubt) or it is merely a sentencing factor,  
26 something the court can elect to take into account in sentencing with the bounds of its discretion  
(i.e., within the base guideline sentencing range for the offense of which the defendant was  
convicted). For example, in *Castillo v. United States*, 530 U.S. 120 (2000), the Court sets out the

1 issue in the opening paragraph of the decision: “In this case we once again decide whether words  
2 in a federal criminal statute create offense elements (determined by a jury) or sentencing factors  
3 (determined by a judge).” In *Jones v. United States*, 526 U.S. 227, 232 (1999), the Court stated:  
4 “Much turns on the determination that a fact is an element of an offense rather than a sentencing  
5 consideration, given that elements must be charged in an indictment, submitted to a jury and  
6 proven by the Government beyond a reasonable doubt.” Thus, the Court never contemplated or  
7 left open the possibility that there could be a tripartite classification of (i) elements (charged in  
8 the indictment and proved to a jury beyond a reasonable doubt), (ii) sentencing factors (not  
9 charged in the indictment and only considered by a judge during the sentencing phase) and (iii) a  
10 third category of *Apprendi* sentencing factors (proved to a jury beyond a reasonable doubt but  
11 possibly not charged in the indictment because not considered elements).

12 Justice Thomas’ incisive concurrence in *Apprendi* explains why this third category is  
13 legally untenable. The reason is that the *Apprendi* rule, according to Justice Thomas, is rooted in  
14 the fundamental question of what is and is not a crime: “This case turns on the seemingly simple  
15 question of what constitutes a ‘crime.’” *Apprendi*, 530 U.S. at 499 (Thomas, J., concurring). In  
16 other words, the *Apprendi* rule is fundamentally a question of what is and is not an element.

17 Justice Thomas further explains:

18 Sentencing enhancements may be new creatures, but the question that they create for  
19 courts is not. Courts have long had to consider which facts are elements in order to  
20 determine the sufficiency of an accusation (usually in an indictment). The answer that  
21 courts have provided regarding the accusation tells us what an element is, and it is then a  
22 simple matter to apply that answer to whatever constitutional right may be at issue in a  
23 case – here *Winship* and the right to a trial by jury.

24 . . . .  
25 This authority establishes that a “crime” includes every fact that is by law a basis for  
26 imposing or increasing punishment (in contrast with a fact that mitigates punishment).  
Thus, if the legislature defines some core crime and then provides for increasing the  
punishment of that crime upon a finding of some aggravating fact – of whatever sort,  
including the fact of a prior conviction – the core crime and the aggravating fact together  
constitute an aggravated crime, just as much as grand larceny is an aggravated form of  
petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if  
the legislature, rather than creating grades of crimes, has provided for setting the  
punishment of a crime based on some fact – such as a fact that is proportional to the  
value of stolen goods – that fact is also an element. No multi-factor parsing of statutes,  
of the sort that we have attempted since *McMillan*, is necessary. One need only look to

1 the kind, degree or range of punishment to which the prosecution is by law entitled for a  
2 given set of facts. Each fact necessary for that entitlement is an element.

3 *Id.* at 500-501 (Thomas, J., concurring). Thus, there can be no hybrid category of *Apprendi*-  
4 strength sentencing facts that somehow are not elements of aggravated crimes.

5 *Blakely* confirms this clear dichotomy between elements and sentencing factors. At the  
6 very start of the majority opinion’s legal discussion, Justice Scalia writes that the *Apprendi* rule  
7 “reflects two longstanding tenets of common-law criminal jurisprudence . . . .” *Blakely*, 2004  
8 WL 1402697 at \*4. The second tenet is: “[A]n accusation which lacks any particular fact which  
9 the law makes essential to the punishment is . . . no accusation within the requirements of the  
10 common law, and it is no accusation in reason.” *Id.* (quoting 1 J. Bishop, *Criminal Procedure* §  
11 87, p. 55 (2d ed. 1872)). The majority opinion’s according of prominence to this common-law  
12 tenet indicates unequivocally that any fact falling under the *Apprendi* rule is a fact that must be  
13 charged in the indictment as part of the crime or offense charged against the defendant. Thus,  
14 *Blakely*, *Apprendi* and their precedents leave no conceptual space for a fact or factor that must  
15 be proved to a jury beyond a reasonable doubt and yet is somehow distinguishable from an  
16 element of a criminal offense.

17 Accordingly, if a court attempts to remedy *Apprendi* error with regard to guideline  
18 enhancement provisions and the procedural framework by which they are applied (i.e., proved to  
19 a judge beyond a preponderance), and does so by requiring that the predicate facts for such  
20 provisions be charged in an indictment and proved to a jury beyond a reasonable doubt, than this  
21 construction of the sentencing guidelines and their enabling act transforms the predicate facts  
22 into elements of aggravated crimes.

## 23 **2. Congress Did Not Delegate to the Sentencing Commission the** 24 **Authority to Enact New Criminal Offenses**

25 The Sentencing Reform Act of 1984, by its plain language and its legislative intent,  
26 creates an agency within the Judicial Branch, the United States Sentencing Commission, and

1 delegates to the Commission very specific powers with regard to federal sentencing law and only  
2 with regard to federal sentencing law. *See* 28 U.S.C. § 994 (proving in pertinent part that “[t]he  
3 purposes of the United States Sentencing Commission are to . . . establish sentencing policies  
4 and practices for the Federal criminal justice system . . . and develop means of measuring the  
5 degree to which the sentencing, penal, and correctional practices are effective in meeting the  
6 purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.”). At no  
7 time has Congress delegated the Commission any authority or powers outside the area of federal  
8 sentencing. *See also* *Mistretta v. United States*, 488 U.S. 361, 369 (1989) (“The Responsibilities  
9 of the Commission”).

10 Specifically, Congress has not delegated its authority to legislatively enact new federal  
11 offenses. That such authority resides with Congress is beyond dispute. Since the Crimes Act of  
12 1790, an act that created the first serious federal offenses apart from those found in the  
13 Constitution, Congress has had exclusive authority over the creation of federal felony offenses.  
14 As the Supreme Court stated in *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality  
15 opinion):

16 Our national government is one of delegated powers alone. Under our federal system the  
17 administration of criminal justice rests with the States except as Congress, acting within  
the scope of those delegated powers, has created offenses against the United States.

18 Thus, whether or not Congress in principle can delegate to an agency its power to enact federal  
19 crimes (or at least serious federal crimes), the simple fact here is that Congress has not delegated  
20 such power to the United States Sentencing Commission.

21 Therefore, because neither the Sentencing Reform Act of 1984 nor any other  
22 congressional legislation delegated to the Sentencing Commission the power to enact or  
23 promulgate federal criminal offenses, and because construing guideline enhancement provisions  
24 to comply with the procedural protections of *Apprendi* and *Blakely* transforms the triggering  
25 aggravating facts for such provisions into elements of new aggravated crimes, such a  
26 construction of the federal guidelines is unconstitutional.

1                   **3.     Given the Fundamental Incompatibility of the Federal Sentencing**  
2                   **Guidelines With the Rule of *Blakely*, They Are Pervasively**  
3                   **Unconstitutional and Should Not Be Applied to Any Case, Regardless**  
4                   **of The Guideline Section At Issue.**

5                   The logical conclusion of the preceding discussion is that there are numerous Guideline  
6                   Sections, enabling statutes, and Rules of Criminal Procedure which now conflict with *Blakely*.  
7                   Both the substance and the procedure of federal sentencing must be completely revised in order  
8                   to comply with *Blakely*. The procedure must be revised, because presently there is neither  
9                   authority nor a blueprint for the adjudication of sentencing factors before a jury beyond a  
10                  reasonable doubt. The substance must be revised because the majority of it has been  
11                  promulgated by an independent commission within the judiciary which had neither the statutory  
12                  nor the constitutional authority to set maximum punishments or enact criminal law with neither  
13                  Congressional votes nor Presidential approval.

14                  Given the sweeping effect of *Blakely* on the Guidelines, the question of remedy remains.  
15                  In *United States v. Croxford* Judge Paul Cassell of the District of Utah, held that the *Blakely*  
16                  decision applies to the Federal Sentencing Guidelines. *Memorandum Opinion and Order*  
17                  *Finding Application of the Federal Sentencing Guidelines Unconstitutional, United States v.*  
18                  *Croxford*, No. 2:02-CR-00302 PGC at 13 (D.Ut. June 29, 2004). In that case, the court had  
19                  evidence of two enhancements, obstruction of justice and uncharged relevant conduct, that had  
20                  not been admitted by the defendant or proven to a jury beyond a reasonable doubt. The court  
21                  held that application of the enhancements would violate *Blakely*. *Croxford*, No. 2:02-CR-00302  
22                  PGC at 13-15. In response to the pervasive unconstitutionality of the Guidelines, the court  
23                  proposed three possible remedies: 1) to convene sentencing juries and present them with  
24                  instructions and verdict forms as to the unproven adjustments; 2) to apply the Guidelines without  
25                  enhancements; or 3) to declare the Guidelines unconstitutional as applied and sentence the  
26                  defendant on an indeterminate basis.

                  The Court dismissed the first option because it is not only practically impossible to  
                  present to juries all of the considerations contained in a Sentencing Manual, but it is also not

1 authorized by statute and would “require courts to redraft the sentencing statutes and  
2 implementing Guidelines.” *Id.* at 21. Judge Cassell is correct that there is no authority for such  
3 a procedure or for a massive judicial rewriting of the sentencing rules and statutes. Furthermore,  
4 there is an additional reason to reject this option: Congress never delegated to the Sentencing  
5 Commission the authority to make new criminal laws that define the elements of new crimes and  
6 set out the penalties for committing such crimes. Yet to judicially amend the Guidelines so that  
7 the upward adjustment provisions of the Guidelines apply only upon provision of the *Apprendi*  
8 right to a jury trial would be to construe such provisions as enacting new criminal offenses.  
9 Because Congress never delegated to the Commission the power to enact new criminal laws,  
10 even were such a delegation in principle permissible under our constitutional framework, the  
11 upward adjustment guideline provisions cannot be rendered constitutional by reading into them  
12 *Apprendi* rights.

13 The judge in *Croxford* dismissed the second option, that of refusing to impose only  
14 enhancements, because it would be fundamentally unfair to the government and because it  
15 “would distort the Guidelines” which are intended as a “holistic system, calibrated to produce a  
16 fair sentence by a series of both downward *and* upward adjustments.” *Id.* at 23-24 (emphasis in  
17 original). This reasoning is also sound. The second proposal, merely imposing the Guidelines  
18 without any adjustments, can not be said to comport with the intent of Congress.

19 In concluding, *Croxford* defaulted to the third option, unconstitutionality as applied. It  
20 is as to this third option, unconstitutionality as applied, that Mr.  
21 respectfully disagrees with the holding in *Croxford*. What the court did not consider as an option  
22 is whether the Guidelines should be ruled facially unconstitutional in every case. The  
23 incongruous result of applying only certain guideline sections to a defendant or of applying the  
24 guidelines to some, but not other defendants, is an unfair prospect neither intended by the  
25 sentencing commission nor permissible under the guise of severability. Mr.

26 submits that given the number of cases in which unconstitutionality will be found as applied,

1 facial unconstitutionality is the only remedy that comports with both the constitution and the  
2 principle of uniformity embodied in the guidelines.

3 Respectfully, a holding of facial unconstitutionality is a more reasoned result than the  
4 *Croxford* solution. This is so for several reasons: First, given the impact of *Blakely* on Criminal  
5 History Score, *see infra*, it is unlikely that many cases will be unaffected by *Blakely*;

6 Second, the *Croxford* model, unlike a bright line holding, presents a very unclear test for  
7 when the court can or should resort to indeterminate sentencing: this is so because it is only  
8 through a court's determination that a sentencing enhancement might apply that the court then  
9 determines that the Guideline is unconstitutional and proceeds to follow indeterminate  
10 sentencing. By what standard of proof must a court determine that an enhancement does apply,  
11 before determining that the sentence would therefore be unconstitutional? Must there only be  
12 some evidence of the enhancement, or must the government show that it would have a strong  
13 chance of proving the enhancement to a jury beyond a reasonable doubt, in order to show that  
14 the enhancement applies and the Guideline is therefore unconstitutional? Should the court find  
15 the Guidelines unconstitutional as applied and impose an indeterminate sentence if there is any  
16 possible *Blakely* enhancement in the case? If, for example, Mr. \_\_\_\_\_ can  
17 show that his sentence is somehow affected by *Blakely*, is Mr. \_\_\_\_\_ entitled  
18 to indeterminate sentencing? In sum, this approach is likely to produce a mosaic of results, some  
19 guideline and some indeterminate, based on an unclear standard of case-by-case  
20 unconstitutionality.

21 Third, and most importantly, given the very significant proportion of cases that will not  
22 permit application of the guidelines under *Blakely*, even assuming no effect on criminal history  
23 score, it can not be said that the remainder of cases are intended by Congress or the Sentencing  
24 Commission to be sentenced under the guidelines.

25 In a case such as this one, where a very large number of applications of a statute have  
26 been or will be found unconstitutional, even a defendant facing a constitutional application of the

1 statute may invoke its facial unconstitutionality. The United States Supreme Court, in *United*  
2 *States v. Raines*, 362 U.S. 17 (1960), held that a facial constitutional attack on a statute may not  
3 be made by a person against whom operation of the statute is not unconstitutional. However, the  
4 court noted exceptions to the rule, among them, as here, “the rules' rationale may disappear  
5 where the statute in question has already been declared unconstitutional in the vast majority of  
6 its intended applications, and *it can fairly be said that it was not intended to stand as valid, on*  
7 *the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to*  
8 *cover. Id.* at 23 (emphasis added) (citing *Butts v. Merchants & Miners Transportation Co.*, 230  
9 U.S. 126 (1913)). Our Circuit has recently noted the *Raines* exceptions: “Principles of  
10 prudential standing are not ‘ordained by the Constitution, but constitute rather ‘rule(s) of  
11 practice,’ albeit weighty ones; hence some exceptions to them where there are weighty  
12 countervailing policies have been and are recognized.” *Pershing Park Villas Homeowners Ass'n*  
13 *v. United Pacific Ins. Co.*, 219 F.3d 895, 899 (9<sup>th</sup> Cir. 2000) (citing *United States v. Raines*, 362  
14 U.S. 17, 22 (1960)).

15 Furthermore, the requirement that the statute “has already been declared unconstitutional  
16 in the vast majority of its intended applications” need not be taken too literally. As to this  
17 exception, the United States Court of Appeals for the First Circuit noted that “[w]e read these  
18 exceptions as not depending upon the historic fortuity that a statute has already been subjected to  
19 such holdings but as depending upon the probability of such holdings invited by the wording of  
20 the statute.” *Goguen v. Smith*, 471 F.2d 88, 92 (1<sup>st</sup> Cir. 1972). This court can hold, not only that  
21 there is a probability of numerous holdings of unconstitutionality of application of guidelines,  
22 but cases like *Croxford* have already declared, implicit in their holdings, that a vast number of  
23 cases will be affected by *Blakely* unconstitutionality. *Croxford*, furthermore, did not address the  
24 sleeping dragon of *Mistretta*, the strong prospect argued herein that all enhancements enacted by  
25 the United States Sentencing Commission are invalid.

26 The origin of the exception applicable in this case was the case of *Butts v. Merchants' &*

1 *Miners' Transp Co.*, 230 U.S. 126 (1913). In that case, Congress had intended to apply a civil  
2 rights law to all areas within the power of Congress to reach. However, the statute was held  
3 unconstitutional as applied to the states. The Court was thereafter faced with the question  
4 whether the statute, now null as to the states, would apply to the District of Columbia, the  
5 Territories, and the High Seas. Clearly, the statute was not unconstitutional as applied in these  
6 three areas; the question was whether, as here, a statute which is unconstitutional in a large  
7 number of applications should continue to be enforced in the remaining applications.

8 The real question is whether the sections in question, being in part--by far the greater  
9 part--in excess of the power of Congress, are invalid in their entirety. Their words, as also  
10 those of the preamble, show that Congress proceeded upon the assumption that it could  
11 legislate, and was legislating, in respect of all persons and all places 'within the  
12 jurisdiction of the United States.' It recognized no occasion for any exception and made  
13 none. Its manifest purpose was to enact a law which would have a uniform operation  
14 wherever the jurisdiction of the United States extended. But the assumption was  
15 erroneous, and for that reason the purpose failed. Only by reason of the general words  
16 indicative of the intended uniformity can it be said that there was a purpose to embrace  
17 American vessels upon the high seas, the District of Columbia, and the territories. But  
18 how can the manifest purpose to establish a uniform law for the entire jurisdiction of the  
19 United States be converted into a purpose to create a law for only a small fraction of that  
20 jurisdiction? How can the use of general terms denoting an intention to enact a law which  
21 should be applicable alike in all places within that jurisdiction be said to indicate a  
22 purpose to make a law which should be applicable to a minor part of that jurisdiction and  
23 inapplicable to the major part? Besides, it is not to be forgotten that the intended law is  
24 both penal and criminal.

17 *Butts v. Merchants' & Miners' Transp Co.*, 230 U.S. 126, 133 (1913).

18 The logic of the exception invoked here is remarkably applicable to the *Blakely* situation.  
19 To apply the Guidelines to some defendants and not others is to ensure that "the manifest  
20 purpose to establish a uniform law for the entire jurisdiction of the United States be converted  
21 into a purpose to create a law for only a small fraction of that jurisdiction." The heart of the  
22 Guideline system was to establish a uniform law for the entire jurisdiction. Through binding  
23 determinate sentencing, limited range sizes, limited departure grounds, limited appellate review,  
24 and limited powers of the Parole Commission to release inmates, the Sentencing Reform Act of  
25 1984, 18 U.S.C. § 3551 *et seq.*, has sought uniformity as its central purpose. The idea that many  
26 or most defendants will not be sentenced under a single Guidelines Manual undermines the

1 approach to the point of nullification. It is decidedly not the intention of the Act that a small  
2 number of Guidelines remain in force, while other defendants face indeterminate sentencing.  
3 Thus, the Guidelines should be declared facially unconstitutional in this case.

4  
5 **4. In The Alternative to A Non-Guideline Sentence The Court Should**  
6 **Reduce The Offense Level by 16 Points Because the Prior Crime of**  
7 **Violence Enhancement Constitutes an Element Unconstitutionally**  
8 **Enacted By The Sentencing Commission.**

9 The fact of a prior conviction has been held to be an exception to the rule that all facts  
10 which raise the maximum sentence must be submitted to the jury and proven beyond a  
11 reasonable doubt. The prior convictions exception was announced in *Almendarez-Torres v.*  
12 *United States*, 523 U.S. 224, 243-44 (1998) and cited in *Apprendi*. It states bluntly, “other than  
13 the fact of a prior conviction, any fact that increases the penalty for a crime beyond the  
14 prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable  
15 doubt.” 530 U.S. at 490. If ever there were a Supreme Court case on life-support, it would be  
16 *Almendarez-Torres v. United States*, 523 U.S. 224, 243-44 (1998). In that case the Court held  
17 that the aggravated felony prior enhancement prescribed in 8 U.S.C. § 1326(b) was not an  
18 element but a sentencing factor, so it did not have to be pled in the indictment or proved to a jury  
19 beyond a reasonable doubt. *Blakely*’s holding deeply undermines *Almendarez-Torres* and  
20 practically guarantees its demise. Already, the Court in *Apprendi* cast serious doubt on the  
21 continued viability of *Almendarez-Torres*:

22 Even though it is arguable the *Almendarez-Torres* was incorrectly decided, and that a  
23 logical application of our reasoning today should apply if the recidivist issue were  
24 contested, *Apprendi* does not contest the decision's validity and we need not revisit it for  
25 purposes of our decision today to treat the case as a narrow exception to the general rule  
26 we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the  
otherwise uniform course of decision during the entire history of our jurisprudence.

27 *Apprendi*, 530 U.S. at 489-90, 120 S.Ct. 2348 (emphasis added); *see also id.* at 487, 120 S.Ct.  
28 2348 (“*Almendarez-Torres* represents at best an exceptional departure from the historic practice

1 that we have described.")

2 Several of the basic premises of *Almendarez-Torres* were again repudiated by the  
3 *Blakeley* Court. The *Almendarez-Torres* Court focused on numerous factors to determine  
4 whether the fact of a prior aggravated felony was an element or a sentencing factor. Only one of  
5 them was whether the fact increases the maximum penalty. *Almendarez-Torres*, 523 U.S. 242-  
6 243. *Blakely* set forth a bright-line rule establishing the latter factor as the determinative one.  
7 *Almendarez-Torres* is no longer good law.

8 The defendant concedes that *Blakely* does not expressly overrule *Almendarez-Torres*. As  
9 the Ninth Circuit noted after *Apprendi*,

10 [U]nless and until the Supreme Court expressly overrules it, *Almendarez-Torres* controls  
11 here. Under *Almendarez-Torres*, the government was not required to include Pacheco-  
12 Zepeda's prior aggravated felony convictions in the indictment, submit them to a jury, or  
13 prove them beyond a reasonable doubt, and the district court properly considered such  
convictions in sentencing.

14 *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414-15 (9<sup>th</sup> Cir. 2001); *but see id.* at 414 n.4

15 (conceding that Justice Thomas, a member of the majority in *Almendarez-Torres* stated in  
16 *Apprendi* that *Almendarez-Torres* was wrongly decided). Thus, the defendant requests the court  
17 to hold that “the fact of a prior conviction” falls under the rule of *Blakely*. If that is the case, it is  
18 an element of a criminal offense and the Sentencing Commission lacked the authority to enact it.  
19 The argument is made here to preserve a constitutional challenge to the 16-point enhancement  
20 under U.S.S.G. § 2L1.2(b)(1)(A).

21  
22 Even if the court must hold that *Almendarez-Torres* still has force, it is clear that the  
23 Sentencing Commission’s Criminal History Score does not escape the holding of *Blakely*.

24 **C. Even If the Holding of *Almendarez-Torres* Survives *Blakely* and this Court  
25 Holds That the Guidelines Are Facially Constitutional, the *Blakely* Opinion  
26 Heavily Impacts the Criminal History Calculation Because it Is Based on  
Numerous Facts Other than the Fact of a Prior Conviction.**

1           Because its holding has been completely denied its jurisprudential underpinnings,  
2 *Almendarez-Torres* should be given the narrowest possible interpretation. It can not be  
3 interpreted to encompass “recidivism” or “recidivist facts” in general, nor “criminal history.” To  
4 now extend the *Almendarez-Torres* exception beyond “the fact of a prior conviction” as it has  
5 been succinctly set forth in *Apprendi* and *Blakely* would deeply offend the spirit and the holdings  
6 of those cases.

7           Our Circuit has already held that the holding of *Almendarez-Torres* should not be  
8 extended. In *United States v. Tighe*, 266 F.3d 1187 (9<sup>th</sup> Cir. 2001), the United States Court of  
9 Appeals for the Ninth Circuit held that a juvenile prior conviction for which no jury right had  
10 been afforded could not be used to increase the statutory maximum punishment from ten to  
11 fifteen years under the Armed Career Criminal Act, 18 U.S.C. § 924(e). In reaching its decision,  
12 the court determined that prior convictions lacking procedural protections such as the right to  
13 jury trial do not fall within the prior conviction exception to *United States v. Apprendi*. *Tighe*,  
14 266 F.3d at 1194-95. The *Tighe* Court noted that the prior convictions exception is a narrow  
15 one, and the court warned against any extension of the exception:  
16

17           To the extent the government's argument can be construed as a request to extend  
18 *Apprendi* 's "prior conviction" exception to include prior nonjury juvenile adjudications  
19 on the basis of *Almendarez-Torres* ' logic, we decline to do so. The *Apprendi* Court's  
20 serious reservations about the reasoning of *Almendarez-Torres* counsel against any  
21 extension of that opinion's holding . . . .

22           In sum, we conclude *Apprendi* 's narrow "prior conviction" exception is limited to prior  
23 convictions resulting from proceedings that afforded the procedural necessities of a jury  
24 trial and proof beyond a reasonable doubt. Thus, the "prior conviction" exception does  
25 not include nonjury juvenile adjudications.

26 *Tighe*, 266 F.3d at 1194-95 (footnotes omitted).

          The clear import of this holding is threefold: 1) *Almendarez-Torres* does not apply to the  
general categories of recidivist facts or criminal history; 2) *Almendarez-Torres* is limited to the  
bare fact of a prior conviction, and then only when that conviction resulted from proceedings

1 affording jury trial and proof beyond a reasonable doubt; and 3) *Almendarez-Torres* is not to be  
2 extended. Once these premises are established, one can easily see how much of the Criminal  
3 History Score falls under *Blakely*'s holding: the score depends on numerous facts other than  
4 convictions themselves, and these facts raise the maximum punishment faced by the defendant.  
5 It is of no consequence that these facts are styled as criminal history score instead of offense  
6 level. One of the bedrock premises of the *Blakely* decision is that the maximum sentence is a  
7 matter of practical effect, not nomenclature. The date of the defendant's most recent release  
8 from incarceration, the length of his sentences, his juvenile convictions, and whether he was  
9 under supervision at the time of the instant offense are all facts which increase the maximum  
10 punishment, but these facts have not been proven in a proceeding that "afforded the procedural  
11 necessities of a jury trial and proof beyond a reasonable doubt." *Tighe*, 266 F.3d at 1194-95.  
12 These facts may not increase the maximum penalty under *Blakely*.  
13

14 **1. Given the Holding of *Blakely*, the Non-Jury Juvenile Adjudication Listed in**  
15 **Paragraph 25 Raises the Maximum Punishment for the Offense in Violation**  
16 **of Due Process.**

17 In *United States v. Tighe*, 266 F.3d 1187 (9<sup>th</sup> Cir. 2001), the United States Court of Appeals  
18 for the Ninth Circuit held under *Apprendi* that a juvenile prior conviction for which no jury right  
19 had been afforded could not be used to increase the statutory maximum punishment from ten to  
20 fifteen years under the Armed Career Criminal Act, 18 U.S.C. § 924(e), unless the enhancement  
21 was proved to a jury beyond a reasonable doubt. The holding of *Tighe*, which previously only  
22 applied to a statutory non-guideline maximum, now inescapably applies to Criminal History  
23 Points which raise the actual sentencing range that the defendant is facing. The *Blakely* Court  
24 extended the term "statutory maximum" for *Apprendi* purposes: "the maximum sentence a judge  
25 may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the*  
26

1 *defendant.*” *Blakely*, 2004 WL 1402697 at \* 4 (italics in original). In this case, the statutory  
2 maximum is the applicable guideline range, accounting for all facts admitted by the defendant or  
3 exempt from the requirements of *Apprendi*. Mr. \_\_\_\_\_ has 14 criminal history  
4 points. P.S.R. ¶ 34. Two of his criminal history points stem from a non-jury juvenile  
5 adjudication. PSR ¶ 25. In California, “there is no right to jury trial in juvenile court  
6 proceedings.” *In re Travis W.*, 107 Cal.App.4th 368, 378, 132 Cal.Rptr.2d 135, 143 (Cal. Ct.  
7 App. 2003). Those two points increase the Criminal History Category from V to VI, raising the  
8 maximum penalty faced by Mr. \_\_\_\_\_. No jury has ever determined that Mr.  
9 \_\_\_\_\_ committed the juvenile offense in ¶ 25, and no opportunity to have that  
10 determined by a jury was ever afforded Mr. \_\_\_\_\_. There is no sound  
11 basis on which to distinguish *Tighe*. Non-jury juvenile adjudications which raise the Sentencing  
12 Guideline range are clearly *Blakely* facts in the Ninth Circuit. The application of Criminal  
13 History points under PSR ¶ 25 would be unconstitutional in this case.

14  
15 **2. Given the Holding of *Blakely*, the Criminal History Adjustments For**  
16 **Committing an Offense While Serving a Criminal Justice Sentence and**  
17 **Within Two Years Following Release From Imprisonment Listed in**  
18 **Paragraph 33 Raise the Maximum Punishment for the Offense in Violation**  
19 **of Due Process.**

20 In the Presentence Report, Mr. \_\_\_\_\_ was assessed 3 criminal history  
21 points under U.S.S.G. §§ 4A1.1(d)(e), for committing the instant offense while under a criminal  
22 justice sentence (2 points) and for committing the instant offense within 2 years of release from  
23 prison (1 point). These two upward adjustments make the difference of one criminal history  
24 category in the instant case. These facts thus increase the total punishment that the defendant  
25 would face considering only those facts that he has admitted and those that are exceptions to  
26 *Apprendi*. “*Apprendi*’s narrow “prior conviction” exception is limited to prior convictions

1 resulting from proceedings that afforded the procedural necessities of a jury trial and proof  
2 beyond a reasonable doubt.” *Tighe*, 266 F.3d 1194-95. No jury has ever concluded that Mr.  
3 was released from a sentence less than two years prior to his instant offense.  
4 Nor has Mr. ever had the right to a jury determination of that fact. No  
5 jury has ever decided that Mr. was serving a criminal justice sentence at  
6 the time of the instant offense. As the *Apprendi* Court explained, "there is a vast difference  
7 between accepting the validity of a prior judgment of conviction entered in a proceeding in  
8 which the defendant had the right to a jury trial and the right to require the prosecutor to prove  
9 guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser  
10 standard of proof." *Id.* at 2366. The facts contained in PSR ¶ 33 are not limited to “the validity  
11 of a prior judgment.” They are facts in addition to the conviction, and they therefore fall outside  
12 of the “fact of a prior conviction” exception.  
13

14 **3. Given the Holding of *Blakely*, the Criminal History Adjustments For Lengths**  
15 **of Terms Imposed Listed in Paragraphs 25-30 of The PSR Raise the**  
16 **Maximum Punishment for the Offense in Violation of *Blakely*.**

17 Mr. was assessed more than one point for each “fact of a prior  
18 conviction.” The additional points were based on facts other than the fact of the prior  
19 conviction, namely the length of the prior sentences. Under *Blakely*, these facts can not  
20 constitutionally be imposed. Limited to the facts of the prior convictions alone, PSR ¶¶ 25-30,  
21 only 5 criminal history points may be imposed, for a Criminal History Category of III.

22 **IV. ARGUMENT INDEPENDENT OF THE *BLAKELY* DECISION**

23 The challenge of *Blakely*’s new holding should not detract from the most important issue at  
24 hand, the sentence that Mr. should justly be given. If the court holds  
25 that the Sentencing Guidelines may still be applied to some defendants, Mr.

26 advances two significant arguments. First, Mr. should be placed in

1 Criminal History Category V, instead of VI, because he did not receive a revocation as stated in  
2 ¶25 of the PSR. Second, Mr. \_\_\_\_\_ respectfully requests that the court depart  
3 downward significantly in this case. Mr. \_\_\_\_\_'s case is unique because of his  
4 cultural assimilation and his belief, fueled by government conduct, that his lawful attempt to  
5 prevent his deportation was thwarted by the Immigration and Naturalization Service. Given  
6 these unique issues, the proposed sentencing range of 77-96 months, or 70-87 months if the  
7 Criminal History Category is corrected, is beyond what is necessary to effect the purposes of  
8 incarceration.

9  
10 **A. The Juvenile Prior Listed in ¶25 Is Inapplicable to The Criminal History**  
11 **Score Because No Revocation Occurred in That Case and it is Therefore**  
12 **Time-Barred.**

13 Besides the holding of *United States v. Tighe*, there is an additional reason that the 2-point  
14 criminal history enhancement set forth in ¶ 25 can not apply. As the Probation Officer notes, the  
15 imposition of the two points stems from U.S.S.G. §§ 4A1.2(d)(2)(A) and 4A1.2(k)(2)(B). The  
16 latter of these addresses probation and parole revocations. Revocations add to the total length of  
17 time of incarceration as well as alter the time limits applicable to the sentence, because the term  
18 of confinement extends to the most recent date of release from a revocation sentence. The case  
19 described in ¶ 25 lists two probation revocations. Without either of them, the case would not  
20 count for any criminal history points, because the PSR notes that the Glenwood commitment, an  
21 alleged term of confinement, was terminated on October 10, 1996. PSR ¶ 25. The instant  
22 offense was committed on or about July 2, 2002. *See* Indictment, *United States v.*

23 . Thus, Mr. \_\_\_\_\_ was then allegedly released from confinement  
24 more than five years prior to the commission of the instant offense, and the sentence is time-  
25 barred under § 4A1.2(d)(2)(A), unless a revocation sentence brought the confinement term to  
26

1 within 5 years, as the Probation Report alleges in this case. A close review of the findings and  
2 orders of the court made on April 22, 1997 and December 23, 1997, the dates of the alleged  
3 revocations, reveal that no order revoking probation was made in either of these cases, even  
4 though periods of therapeutic detention were ordered. Dispositional Findings and Orders, In the  
5 Matter of \_\_\_\_\_, No. 57830, Superior Court of California, San Mateo County,  
6 In Session as a Juvenile Court, April 22, 1997, attached as Exhibit F (hereinafter “April Order”);  
7 Dispositional Findings and Orders, In the Matter of \_\_\_\_\_, No. 57830,  
8 Superior Court of California, San Mateo County, In Session as a Juvenile Court, December 23,  
9 1997, attached as Exhibit G (hereinafter “December Order”). Both of these orders continue the  
10 wardship of Mr. \_\_\_\_\_. Neither Order commits Mr.  
11 \_\_\_\_\_ to the California Youth Authority or returns him to Glenwood Camp. Neither order makes  
12 reference to revocation of probation. On April 22, 1997, Mr. \_\_\_\_\_ was  
13 ordered, “Under the direction of the Probation Officer,” to serve 28 consecutive days  
14 “therapeutic detention in Juvenile Hall/San Mateo County Juvenile Rehabilitation Facilities.”  
15 April Order. On December 23, 1997, he was ordered to serve 60 consecutive days therapeutic  
16 detention to be served in county jail. December Order. That order also specified that “The  
17 minor is released from all orders and judgments of the juvenile court upon conclusion of  
18 therapeutic detention.” *Id.* To summarize, neither order can be distinguished from a  
19 modification of supervision; both orders commit the defendant to “therapeutic detention” only;  
20 both orders state that the therapeutic detention is to be served, “at the direction of the probation  
21 officer”; neither order nullifies any of the term of supervision that preceded it.  
22  
23

24 The United States Court of Appeals for the Ninth Circuit, in *United States v. Ramirez*, 347  
25 F.3d 792 (9<sup>th</sup> Cir. 2003) addressed the meaning of the term “revocation” as it is used in  
26 §4A1.2(k). In that case, the defendant challenged criminal history points received as a result of a

1 prior thirty day temporary detention and a prior two week temporary detention imposed by the  
2 California Youth Offender Parole Board (YOPB). In the first case, the defendant had merely  
3 signed a form waiving a fact-finding hearing, admitting the violation, and accepting a proposed  
4 CAP, Corrective Action Plan, recommending that he serve 30 days in the Los Angeles County  
5 Jail. *Id.* at 796. In the second case, the YOPB detained him and made a probable cause finding  
6 as to the alleged violation and issued a report recommending that he be continued on parole. The  
7 defendant had signed a form waiving rights to a parole hearing, an attorney, and witnesses, and  
8 admitting the alleged violation. *Id.* at 797. The Board found that he had violated his parole. It  
9 ordered that he spend two weeks in temporary detention, and it noted that the defendant would  
10 be better served by parole supervision.  
11

12 The Court found that neither of these orders amounted to prior sentences or revocations.  
13 First, and not pertinent here, the court dismissed the argument that the orders of the Parole Board  
14 constituted actual separate prior cases, as alleged by the government. The court then considered  
15 the issue presented in the instant case, whether the cases were constructive revocations of  
16 supervision. In a lengthy discussion, the court determined that they were not. In so doing, the  
17 court held that, in order for a court to find that a revocation occurred, the government must show  
18 that the constitutional requirements for revocation were met in the proceedings. *Id.* at 800.  
19 These requirements are that “there be (1) a formal finding that a probationer or parolee has a  
20 committed a violation and (2) a determination that the violation was serious enough to warrant  
21 reimposing the probationer’s or parolee’s original sentence.” *Id.* at 800 (citing *Morrissey v.*  
22 *Brewer*, 408 U.S. 471 479-80 (1972)). And, short of a showing by the government that “an  
23 actual revocation” occurred, it is presumed that no revocation occurred. *Ramirez*, at 800-801.  
24 The court also noted that, “[w]here the terms of probation are modified, including imposition of  
25 temporary periods of confinement, but the probationer remains under the supervision of the  
26

1 probation entity, revocation has not occurred.” The court concluded: “the term ‘revocation’ as  
2 used in § 4A1.2(k)(1), requires that before probation or parole supervision can continue after a  
3 revocation, the sentencing authority must sentence the defendant anew.” *Id.* at 802.

4 Analogous to the “therapeutic detention” at the direction of the Probation Officer imposed  
5 in this case, the court noted that there is a wide array of intermediate sanctions utilized by states  
6 as an alternative to revocation, including temporary detention. Finally, the court instructed  
7 judges to defer to the reasoned determinations of parole and probation authorities to determine  
8 whether a violation was sufficiently grave to warrant revocation. *Id.* at 805. In the instant case,  
9 it is quite clear that a revocation did not occur. The sanction imposed was a “therapeutic  
10 detention” at the direction of the Probation Officer. Mr. \_\_\_\_\_ was not  
11 ordered back to Glenwood camp, his original confinement sentence. The proceedings were not  
12 styled as a revocation by the court. It is also clear that supervision could have continued after  
13 sentencing in both cases without sentencing anew. In the latter case, the court ordered that  
14 supervision would terminate at the end of the period of confinement, but that was akin to early  
15 termination, not revocation: the term of confinement was at the Direction of the Probation  
16 Officer and thus supervision continued even during the period of confinement.

17  
18 In sum, no actual or constructive revocation occurred in ¶25, and Mr.  
19 \_\_\_\_\_’s Criminal History Category should be reduced to V.  
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22 **B. Mr. \_\_\_\_\_ Respectfully Requests a Downward Departure  
23 Based on His Cultural Assimilation.**

24 Mr. \_\_\_\_\_ faces deportation from the country that has been his home for  
25 more than 20 years. The United States is the land of his youth, upbringing, education,  
26 employment, and community. It is where he has made his home. The difference between

1 Mexico and the United States are obviously stark, but the biggest difference between them is that  
2 one of them contains Mr. \_\_\_\_\_'s family. These circumstances take this case  
3 outside the heartland.

4 In *United States v. Lipman*, 133 F.3d 726, 732 (9th Cir. 1998), the Ninth Circuit held that  
5 such circumstances can be the basis of a downward departure, whether in the form of  
6 extraordinary family or community ties pursuant to USSG 5H1.6, or in the form of cultural  
7 assimilation to the United States as a mitigating factor not adequately taken into account in the  
8 Guidelines pursuant to USSG § 5K2.0 and § 1B1.4. The Ninth Circuit held that

9 [C]ultural assimilation may be relevant to sentencing under U.S.S.G. § 2L1.2 if a district  
10 court finds that a defendant's unusual cultural ties to the United States -- rather than  
11 ordinary economic incentives -- provided the motivation for the defendant's illegal reentry  
12 or continued presence in the United States. Cultural assimilation may also be relevant to the  
13 character of a defendant sentenced under U.S.S.G. § 2L1.2 insofar as his culpability might  
14 be lessened if his motives were familial or cultural rather than economic.

15 *Lipman*, 133 F.3d at 731. The court noted that this is a fact-based enquiry. *Id.*

16 The principles of *Lipman* have been reaffirmed by the United States Court of Appeals as  
17 recently as April of 2004: "Under *Lipman*, cultural assimilation remains a proper basis for  
18 granting a downward departure in 8 U.S.C. § 1326 cases for persons brought to the United States  
19 as children, who had adapted to American culture in a strong way and who, after deportation,  
20 returned to the United States for cultural rather than economic reasons." *United States v.*  
*Rivas-Gonzalez*, 365 F.3d 806, 811 (9th Cir. April 22, 2004).

21 The facts of this case show that Mr. \_\_\_\_\_'s motives for returning were  
22 purely familial and cultural. The Application for Cancellation of Removal, which is before this  
23 court and which has been submitted to the Probation Office, illustrates a level of cultural  
24 attachment well beyond that of the heartland illegal reentry case. Mr.  
25 \_\_\_\_\_ has no connection to the Republic of Mexico. He has desperately sought legalization of his  
26

1 status, and he continues to hope that he can receive some type of permission to be in this  
2 country, a dream not likely to be realized. His offense has nothing to do with economic  
3 opportunity. Under these circumstances, his family and community ties, his acculturation to the  
4 United States, and his familial motivation take Mr. out of the heartland  
5 of 8 U.S.C. § 1326 cases. A downward departure on that ground is therefore requested.<sup>4</sup>  
6

7 **C. The Government Denied Mr. an Opportunity To**  
8 **Submit His Application For Cancellation Of Removal, an Action That Fueled**  
9 **His Erroneous Belief That He Had Recourse To Lawful Residence in the**  
10 **United States; This Fact Removes The Case From The Heartland and Merits**  
11 **a Downward Departure.**

12 Mr. has submitted a detailed declaration together with  
13 documentation, recounting his experience immediately prior to his most recent deportation. The  
14 account need not be repeated here. The government has contested this account, but Mr.  
15 stands by it, and it has not been resolved by the court. As stated previously in his  
16 Motion to Dismiss the Indictment, the account of Mr. is detailed and  
17 quite disturbing. Corroboration of his account comes from the fact that the Application for  
18 Cancellation, photocopies of the original of which has been submitted to this court, is dated  
19 January 1, 2002. The incident in which Mr. attempted to submit the  
20 application occurred in March of 2002. It makes no sense that Mr. and  
21 his family would go to great pains preparing an application for cancellation of removal in late  
22 2001 and early 2002 without filing the original. Mr. was in the throes  
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24 <sup>4</sup>It is requested that the court impose a sentence of 48 months incarceration or less. At  
25 the time that Mr. rejected a plea offer of 48 months incarceration, he  
26 was unaware that the *Blakely* decision might radically alter the prospects of his sentencing. He,  
along with both counsel, also labored under the mistaken impression that his sentencing range  
would be 57-71 months incarceration.

1 of deportation; why did he not file this application that had been so painstakingly prepared? If  
2 he had filed it, it is certain that the government would have produced a file-stamped copy. Mr.  
3 tried to file the original in March, 2002, but he was denied that  
4 opportunity. He kept the original, and brought it back to the United States with him. This is the  
5 truth of the matter, and it makes sense.

6 The court has the authority to depart downward based on government conduct which does  
7 not rise to the level of a due process violation. *United States v. Lopez*, 106 F.3d 309 (9th  
8 Cir.1997) (affirming departure based on the prejudice that the defendant suffered as a result of  
9 the government's conduct in entering plea negotiations in the absence of the defendant's  
10 attorney); *United States v. Garza-Juarez*, 992 F.2d 896 (9th Cir.1993) (affirming departure based  
11 on coercive police and prosecutorial actions even though such misconduct was not sufficient to  
12 warrant dismissal of indictment or judgment notwithstanding the verdict).

14 This case warrants some relief. Eighty-six months, the sentence recommended by the  
15 Probation Office, is not a just sentence. The punishment of deportation alone is many times  
16 more significant for Mr. than it is for others charged with this offense,  
17 and the actions of the I.N.S. had their predictable effect. Both of these circumstances are  
18 mitigating factors which differ in kind and degree from the factors taken into account by the  
19 Sentencing Commission. Mr. is a young man with a single felony  
20 conviction. He has served his time for his past offenses. A sentence of 2-and-one-half to four  
21 years in prison for being found in his hometown could never be called too lenient.

## 23 **V. CONCLUSION**

24 Based on the foregoing, Mr. respectfully requests that the Court: 1)  
25 to hold the United States Sentencing Guidelines facially unconstitutional and sentence him to 30  
26 months incarceration like dozens of defendants with cases of equal or more serious severity; 2)

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to, in the alternative, find the Guidelines unconstitutional as applied and strike all enhancements not admitted by Mr. \_\_\_\_\_ ; and/or 3) to correct the Criminal History Score and grant a significant downward departure.

Dated:

Respectfully submitted,

BARRY J. PORTMAN  
Federal Public Defender  
Northern District of California

JOHN PAUL REICHMUTH  
Assistant Federal Public Defender