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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 **(HONORABLE GORDON THOMPSON)**

11 UNITED STATES OF AMERICA,)	CASE NO. 06CR0304-GT
)	
12 Plaintiff,)	DATE: JULY 17, 2007
)	TIME: 9:00 a.m.
13 v.)	
14)	OBJECTIONS TO DISTRICT COURT'S
)	PROPOSED UPWARD DEPARTURE AND
15 BENJAMIN GARCIA-RENTERIA,)	SENTENCING MEMORANDUM
)	
16 Defendant.)	
)	
17 _____)	

18 **I.**

19 **PRELIMINARY STATEMENT**
20

21 This case is before the Court for resentencing after remand by the Ninth Circuit. Pending
22 before the Court is the defendant's motion seeking specific performance of the plea agreement as
23 the government attorney committed a breach of that agreement which requires resentencing in
24 front of a different judge who did not witness the breach. In the event that the Court grants that
25 motion on July 17, 2007, the remainder of this filing need not be considered.

26 While Mr. Garcia-Renteria believes his motion should be granted, he files this objection
27 out of an abundance of caution, because on June 8, 2007, when the parties appeared for a status
28 conference, the Court indicated that it intended to impose the identical 60-month statutory

1 maximum sentence it imposed at the first sentencing hearing. The Court did indicate, upon
2 defense request, the grounds for imposing an upward departures of 47-months from the otherwise
3 applicable guideline range: U.S.S.G. §§§§ 5K2.0, 5K2.9 and 5K2.21 (the one ground already
4 accounted for in the parties' plea agreement). An upward departure of 47-months from the
5 presumptively reasonable guideline range based upon all the instances of uncharged and unproven
6 prior allegations of alien smuggling violates the Sixth Amendment, constitutes an incorrect
7 application of the guidelines and is unreasonable.

8 **II.**

9 **FACTUAL BACKGROUND**

10 This factual background sets forth facts pertinent to both the objections to the proposed
11 upward departures and the facts which militate in favor of a sentence far more lenient than the 60-
12 month term contemplated by the Court.

13 In this case, Mr. Garcia-Renteria plead guilty to a one-count information charging him with
14 8 U.S.C. §1324(a)(1)(A)(iv) and (v)(II), inducing and encouraging undocumented aliens to enter
15 the United States and aiding and abetting, and he waived substantial rights in exchange for the
16 government's promise to recommend a 13-month sentence. According to the plea agreement and
17 the sentencing guidelines applicable to his sentencing guideline range was 10-16 months and the
18 government and defense joint sentencing recommendation was 13 months. CR 13 at 11 (plea
19 agreement). As part of the plea negotiations, he gave up valuable rights and saved the
20 government and this Court's resources: he waived his right to be indicted by the grand jury, CR
21 13, he stipulated to the release of the material witnesses who had been detained to testify for the
22 prosecution, CR 9, he waived the right to litigate motions and trial as well as the rights to appeal
23 or collaterally to attack the plea, conviction or sentence. CR 13. He also agreed to entry of an
24 order removing him from the United States, CR 13 at 4; he agreed not to seek any downward
25 departures from the applicable sentencing guidelines; and he also agreed that an upward
26 adjustment of four levels be applied in order to account for uncharged criminal conduct,

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1 specifically, the prior apprehensions where he was driving a car containing undocumented aliens.
2 CR 10-11.¹

3 A number of those apprehensions included instances where Mr. Garcia-Renteria was
4 driving instead of having to pay the money it would cost for him to obtain entry into the United
5 States. There was a point in time when Mr. Garcia-Renteria was employed in the United States.
6 See PSR at 2. The true benefits that Mr. Garcia-Renteria was to receive in exchange for all his
7 concessions was to avoid a mandatory minimum sentence of 60 months and obtain a 13-month
8 sentencing recommendation. CR 13 at 4-5.

9 The PSR reported that Mr. Garcia-Renteria had a number of prior apprehensions by law
10 enforcement but it also indicated that Mr. Garcia-Renteria is himself an undocumented alien, PSR
11 at 6, and a number of the prior apprehensions involved his agreeing to drive a car with other
12 undocumented aliens who usually rode as passengers in exchange for a reduced fee to get himself
13 into the country. PSR at 2-3. Other than the recitations in the PSR, no further substantiation of the
14 16 prior apprehensions has been provided. While Mr. Garcia-Renteria has agreed that his prior
15 law enforcement contacts merit a four-level increase, he never agreed that all 16 involve his
16 efforts to smuggle aliens into the United States, he never agreed that all 16 involve false
17 documents and he never agreed that he obtained or provided the false documents.

18 The PSR revealed that Mr. Garcia-Renteria had no criminal history points and was in a
19 criminal history category I. PSR at 5. The PSR described a serious leg injury suffered by Mr.
20 Garcia-Renteria which required him to use crutches to get around. PSR at 7.² According to the
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22
23 1 The plea agreement specifically contained this joint recommendation for a four-
24 level upward adjustment "to reflect conduct underlying a potential charge not pursued in this
25 case Specifically, defendant was apprehended . . . numerous other times attempting to
smuggle illegal aliens for which defendant was not prosecuted." CR 13 at 10-11; PSR at 9.

26 2 There was a lengthy discussion of the leg injury and Mr. Garcia-Renteria's need for
27 medical treatment and surgery at the guilty plea hearing. Plea Transcript at 17-19.
28 Mr. Garcia-Renteria's counsel requested the Court's assistance in obtaining proper medical
treatment for Mr. Garcia-Renteria at the Metropolitan Correctional Center. Plea Transcript
at 18.

1 PSR, Mr. Garcia-Renteria had only been able to go to school through the sixth grade in Mexico
2 and had to leave school to support his family. PSR at 8. It also reported that he had some years of
3 gainful employment in the United States from 1995-2001. PSR at 8. Mr. Garcia-Renteria also
4 has five children who live in Mexico with his wife and he provides financial support to his family.
5 PSR at 7.

6 At the sentencing hearing, the Probation Officer -- after recommending certain upward
7 adjustments which this Court correctly found inapplicable, recommended a sentence of 21
8 months. Sentencing Transcript ("Sent. Tr.") at 18.

9 As far as undersigned counsel is aware, the parties still jointly recommend 13-months and
10 Probation still recommends 21-months -- while the undersigned believes the case should be
11 reassigned to a different judge due to government breach, if this claim is rejected, the Court
12 should sentence Mr. Garcia-Renteria in accordance with this plea agreement and should not depart
13 upwards -- certainly not by 47-months -- an almost 400% increase in the applicable guideline
14 range.

15 III.

16 OBJECTIONS

17 A. Reliance Upon The 16 Alleged Apprehensions From The PSR Violates The Sixth 18 Amendment.

19 In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court recognized the
20 importance of the Sixth Amendment guarantee to only sentence defendants based upon the jury's
21 factual findings or a defendant's sworn factual admissions at a guilty plea, *id.* at 244, yet it
22 retained the validity of the Sentencing Guidelines system by making it advisory. *Id.* at 258-265.
23 *Booker* also determined that on appeal, sentences were to be reviewed for "reasonableness." *Id.*
24 In *Booker*, the Court did not spell out the contours of "reasonableness" review. *See id.* at 260-61;
25 *see also id.* at 311 (Scalia, J., dissenting in part). Subsequently, the Supreme Court decided
26 *Cunningham v. California*, ___ U.S. ___, 127 S.Ct. 856 (2007) and *Rita v. United States*, ___
27 U.S. ___, 2007 WL 1772146 (June 21, 2007), both of which must be considered before this Court
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1 seeks to sentence Mr. Garcia-Renteria based upon judicial findings of facts which were not
2 admitted by Mr. Garcia-Renteria at his guilty plea.

3 In *Cunningham*, the Supreme Court invalidated California's determinate sentencing scheme
4 because it failed to comply with the Sixth Amendment right requiring that any fact that exposes a
5 defendant to a greater potential sentence must be found by a jury, not a judge, and established
6 beyond a reasonable doubt, not merely a preponderance of the evidence. 127 S.Ct. at 863-64.
7 *Cunningham* reiterated the principles set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)
8 and *Blakely v. Washington*, 542 U.S. 296 (2004), reaffirming that the statutory maximum sentence
9 was that authorized by the jury's verdict or the defendant's admissions at the guilty plea. 127 S.Ct
10 at 868.

11 In *Rita*, the Court decided that in a case where there were no judicial findings which
12 enhanced the defendant's within-Guidelines' sentence that appellate courts could apply a
13 presumption of reasonableness to a "sentence that reflects a proper application of the Sentencing
14 Guidelines." 2007 WL 1772146 at *6. In keeping with its decision in *Booker*, the Court applied
15 an appellate standard which required substantive reasonableness review of sentencing decisions.
16 *Id.*; see also *id.* at *17 (Stevens, J. concurring) (*Booker* "plainly contemplated that reasonableness
17 review would have a substantive component.").

18 In applying a substantive standard of appellate review, appellate courts will review
19 sentences which are unreasonable because they are either too high or too low. *See id.* at *22
20 (Scalia, J., concurring and concurring in the judgment); see also *Cunningham*, 127 U.S. at 880
21 n.11 (Alito, J. dissenting) (reasonableness review is not an empty exercise).³ In order to review a
22 sentence as too high, thus, unreasonable, courts must determine what the maximum reasonable
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24 3 Justice Scalia's notes that by reviewing sentences substantively as "unreasonable,"
25 the Court reintroduced the Sixth Amendment issue into the sentencing scheme. *Id.* at 22
26 ("the Sixth Amendment problem with reasonableness review is created only by the lack of
27 district court discretion to impose *high* sentences, since eliminating discretion to impose *low*
28 sentences is the equivalent of judicially creating mandatory minimums, which are not a
concern of the Sixth Amendment. . . . But since reasonableness review should not function
as a one-way ratchet, . . . we must forswear the notion that sentences can be too low in light
of the need to abandon the concept that sentences can be too high.").

1 sentence is. *See id.* The Court's Sixth Amendment jurisprudence mandates that the maximum
2 reasonable sentence be the sentence authorized only by facts found by the jury or admitted by the
3 defendant at a guilty plea. *Id.* ("[F]or every given crime there is some maximum sentence that
4 will be upheld as reasonable based only on the facts found by the jury or admitted by the
5 defendant. *Every* sentence higher than that is legally authorized only by some judge-found fact, in
6 violation of the Sixth Amendment."); *see also Cunningham*, 127 S. Ct. at 880 (Alito, J. dissenting)
7 ("For each statutory offense, there must be a sentence that represents the least onerous sentence
8 that can be regarded as reasonable in light of the bare statutory elements found by the jury.").
9 Justice Scalia also noted that *Rita's* majority opinion itself recognized that "reasonableness"
10 review would necessarily encompass review for Sixth Amendment challenges to sentences that
11 are imposed (as proposed here) based upon judge's factual findings. *See id.* at 23 (Scalia, J.
12 concurring and concurring in the judgment) ("The one comfort to be found in the Court's opinion .
13 . . is that it does not rule out as-applied Sixth Amendment challenges to sentences that would not
14 have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea."); *see*
15 *also id.* at 17 (Stevens, J. concurring) (recognizing that substantive reasonableness review may
16 lead to review of sentences for Sixth Amendment violations though *Rita* did not present such a
17 case).

18 Justice Scalia's lament is that in undertaking the substantive reasonableness review, the
19 task of determining the constitutionally-permissible statutory maximum sentence will fall upon
20 appeals courts rather than district courts. *Id.* at *22 (Scalia, J. concurring and concurring in the
21 judgment) ("The only difference between this system and the pre-*Booker* mandatory Guidelines is
22 that the maximum sentence based on the jury verdict or guilty plea was specified under the latter
23 but must be established by appellate courts, in case-by-case fashion, under the former").
24 However, he suggests that conscientious district court judges should determine the
25 constitutionally-permissible "reasonable" maximum sentence in the first instance as did the
26 district court in *United States v. Griffin*, No. 05-10175-WGY, ___ F. Supp.2d ___, 2007 WL
27 1620526, *13-*14 (D.Mass. June 6, 2007); *Rita*, 2007 WL 1772146 at *26 (Scalia, J. concurring
28 and concurring in the judgment) ("At least one conscientious District Judge has decided to

1 shoulder the burden of ascertaining what the maximum reasonable sentence is in each case based
2 only on the verdict and appellate precedent, correctly concluding that this is the *only* way to
3 eliminate Sixth Amendment problems after *Cunningham* if *Booker* mandates substantive
4 reasonableness review.").

5 The approach taken in *Griffin* is to determine the statutory maximum reasonable sentence
6 as established by the jury's factual findings. 2007 WL 1620526, *13-*14. In cases of guilty
7 pleas, the statutory maximum would be established by the defendant's admissions at the guilty
8 plea hearing. In this case, this means that the statutory maximum reasonable sentence is based
9 upon the admissions made at Mr. Garcia-Renteria's guilty plea: admissions to the transportation of
10 one alien which results in a base offense level of 12. At most, an additional four-levels can be
11 added for the admissions to prior apprehensions. Mr. Garcia-Renteria made no other sworn
12 admissions; he was not asked about specific prior apprehensions nor did he make any admissions
13 that all sixteen incidents identified by this Court occurred or occurred in the manner described in
14 the PSR. *See* CR 13. This agreement was drafted by the government and any ambiguities must
15 be construed in Mr. Garcia-Renteria's favor and against the drafter. *United States v. Franco-*
16 *Lopez*, 312 F. 3d 984, 989 (9th Cir. 2002) (The government as drafter of the agreement, is
17 responsible "for any lack of clarity") (quoting *United States v. Anderson*, 970 F.2d 602, 607 (9th
18 Cir.1992), *as amended* 990 F.2d 1163 (9th Cir. 1993)).

19 The Court, consistent with *Apprendi*, *Blakely*, *Cunningham*, and *Rita*, cannot sentence
20 Mr. Garcia-Renteria based upon recitations in the PSR as that constitutes the constitutionally-
21 infirm practice of judicial fact-finding to increase the sentence above the reasonable maximum
22 sentence determined by Mr. Garcia-Renteria's sworn admissions. Such fact-finding leads
23 ineluctably to a Sixth Amendment violation at the level of review for reasonableness.

24 If this Court were to reject both Justice Scalia and District Judge Young's (from *Griffin*)
25 constitutionally-mandated approach, Mr. Garcia-Renteria still objects to the Court's reliance solely
26 upon the PSR and he demands an evidentiary hearing regarding each and every one of the 16 prior
27 apprehensions that the Court would be relying upon to enhance his sentence. *See United States v.*
28 *Littlesun*, 444 F.3d 1196, 1199 (9th Cir. 2006) (sentencing courts can rely upon hearsay but it

1 must bear minimal indicia of reliability). Here, the brief and untested recitations contained in the
2 PSR, many of which involve events occurring years ago, do not bear the required -- or any --
3 indicia of reliability.

4 Even if the Court rejects the Sixth Amendment claims, the clear and convincing burden of
5 proof in imposing the 16-level upward departure applies. *See United States v. Bonilla-*
6 *Montenegro*, 331 F.3d 1047, 1049 (9th Cir. 2003) (applies to upward adjustment of 16-levels
7 because such has a disproportionate effect upon the sentence). Application of this heightened
8 burden of proof survives *Booker* in this instance where the sentencing increase is disproportionate.
9 *United States v. Gonzalez*, ___ F.3d ___, 2007 WL 1892863 (9th Cir. July 3, 2007) (clear and
10 convincing evidence standard applies to 9-level increase); *see also United States v. Staten*, 466
11 F.3d 708, 718 (9th Cir. 2006) (suggesting that due process requires the clear and convincing
12 burden where sentence increase is disproportionate).

13 In addition, because the proposed upward departure of 47-months, an almost 400%
14 increase from the 13-month within Guidelines' sentence, is so extreme, the Court must provide an
15 overwhelming justification for its imposition -- the overriding reasons should be proportionate to
16 the degree of the upward departure. *See, e.g., United States v. Smith*, 445 F.3d 1, 4 (1st Cir.
17 2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006); *United States v. Armendariz*,
18 451 F.3d 352, 358 (5th Cir. 2006); *United States v. Davis*, 458 F.3d 491, 496 (6th Cir. 2006);
19 *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States v. Dalton*, 404 F.3d 1029,
20 1033 (8th Cir. 2005); *United States v. Bishop*, 469 F.3d 896, 907 (10th Cir. 2006); *United States v.*
21 *Crisp*, 454 F.3d 1285, 1291-92 (11th Cir. 2006).⁴

22 **B. Reliance upon Section 5K2.0 is Misplaced: The Upward Adjustment For Uncharged**
23 **Conduct is Adequately Accounted For Under Section 5K2.21.**

24 Even after *United States v. Booker*, 543 U.S. 220 (2005), district courts are still obligated to
25 follow and correctly apply the Sentencing Guidelines. The upward departure of 16 levels, one
26 level for each uncharged apprehension to reach a sentence of the statutory maximum is not found
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28 ⁴ The Supreme Court will consider that issue next term in *United States v. Gall*, No.
06-7949.

1 anywhere in the Guidelines itself and is unprecedented. It also fails to take into account the
2 differences in these 16 reported apprehensions -- as noted previously, a number of them involve
3 Mr. Garcia-Renteria agreeing to drive in lieu of paying smuggling fees, not all of them involve the
4 use of false documents and he doesn't and did not admit that every one of these apprehensions
5 occurred or occurred in the manner described by the brief recitation in the PSR. If the Court
6 wishes to impose a sentencing increase based upon each individual apprehension, Mr. Garcia-
7 Renteria demands an evidentiary hearing where the witnesses can present the relevant facts and he
8 can cross-examine them in order to ensure that the sentence imposed is based upon reliable
9 information.

10 Mr. Garcia-Renteria recognizes that his prior conduct warrants an increase -- indeed, he
11 agreed to a four-level increase because that properly accounts for and is sufficient but not greater
12 than necessary to serve sentencing purposes. *See* 18 U.S.C. § 3553(a). Imposing a sentence of the
13 statutory maximum -- that reserved for career offenders and others labeled as hardened criminals -
14 - is unreasonable for an individual with no criminal history. While the Court may believe that
15 Mr. Garcia-Renteria escaped punishment on too many prior occasions, the truth is that punishment
16 is supposed to serve a deterrent purpose -- had he been punished earlier, perhaps he would not be
17 here today.

18 C. **Reliance upon U.S.S.G. §5K2.9 Is Misplaced: It Provides An Increase Only If The**
19 **Offense Of Conviction Was Committed In Order To Facilitate Another Crime, Not**
The Other Way Around As Is The Case Here With The Use Of False Documents.

20 The Court indicated that part of its reasons for imposing the extraordinary increase of 47-
21 months from the Guidelines sentence recommended by the plea agreement was a proposed upward
22 departure under U.S.S.G. § 5K2.9. This section is a policy statement noting that an upward
23 departure may be imposed when "the defendant committed the offense in order to facilitate or
24 conceal the commission of another offense" *Id.* Here, the Court seeks to impose an upward
25 departure because in the discussion of the prior apprehensions, the PSR notes that there were
26 instances where the undocumented aliens used false documents in order to attempt entry. It is
27 apparent that the use of the false documents, if this even occurred, which Mr. Garcia-Renteria
28 does not admit, was designed to facilitate the actual offense of alien smuggling or the unlawful

1 entry into the United States. The alien smuggling did not facilitate the crime of using false
2 documents. Thus, this upward departure is wholly inapplicable and inappropriate here. Indeed,
3 examination of the relevant Guidelines punishments reveals that the alien smuggling offense is the
4 more serious crime not the use of false documents. Even in the instant offense, the offense of
5 conviction which is the transportation of aliens, the alien transportation was not committed to
6 facilitate the false documents offense which would have to be the case for this upward departure to
7 apply.

8 In addition, there is no indication that Mr .Garcia-Renteria was involved with procuring the
9 false documents, thus, he should not be held responsible for these offenses.

10 **D. Reliance Upon U.S.S.G. §5K2.0, Without Further Specification, Is Improper.**

11 Finally, the Court indicated that it would rely upon U.S.S.G. § 5K2.0 in imposing an
12 upward departure. Section 5K2.0 provides for upward or downward departures on grounds not
13 otherwise identified or not properly accounted for in the Guidelines. Here, the prior
14 apprehensions are specifically identified and accounted for as a ground for upward departure
15 under U.S.S.G. § 5K2.21. Thus, reliance upon the general departure authority of section 5K2.0 is
16 impermissible. If the Court is relying upon section 5K2.0 for other reasons, such as grounds that
17 are not properly accounted for, the Court must state and identify what those grounds are and to
18 what degree they have not been properly accounted for. *See* U.S.S.G. § 5K2.0. Mr. Garcia-
19 Renteria seeks more complete notice as is required under *United States v. Evans-Martinez*, 448
20 F.3d 1163 (9th Cir. 2006).

21 While the Court has never specified what those grounds were, at the original sentencing
22 hearing, as part of its decision to impose the statutory maximum term upon Mr. Garcia-Renteria,
23 the Court referenced a number of considerations, several of which should not have been
24 considered. For example, the Court relied upon nonexistent facts : it referenced two dry runs
25 (there is no mention of these anywhere in any sentencing papers, including the PSR); it incorrectly
26 recited certain facts, such as that Mr. Garcia-Renteria had been unemployed, which was inaccurate
27 according to the PSR at 8 (Garcia works at a swap meet in Tijuana) at least until he suffered a leg
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1 injury, PSR at 7 and it referenced the use of false documents when there was no evidence that
2 Mr. Garcia-Renteria was responsible for that conduct.

3 **E. Sentencing Mr. Garcia-Renteria, A Man In Criminal History Category I To The**
4 **Statutory Maximum of 60 Months, When the Applicable Guideline Range Is 10-16**
5 **Months, Is Unreasonable.**

6 Although the United States Sentencing Guidelines are now advisory, *Booker*, 543 U.S. at
7 245-46, the remedial majority in *Booker* held that district courts must still consider the guideline
8 range, 18 U.S.C. § 3553(a)(4)-(5), in addition to other directives set forth in § 3553(a). *See id.* at
9 259-60. And even after *Booker*, the Sentencing Guidelines' must be applied properly. *United*
10 *States v. Menyweather*, 431 F.3d 692, 696-97 (9th Cir. 2005).

11 In *Rita*, the Supreme Court stated that "it is fair to assume that the Guidelines, insofar as
12 practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.
13 An individual judge who imposes a sentence within the range recommended by the Guidelines
14 thus makes a decision that is fully consistent with the Commission's judgment in general"
15 ___ U.S. ___, 2007 WL 1772146 at *8 (2007). *Rita* also now resolved the question of whether, on
16 appeal, appellate courts will presume a guideline sentence to be reasonable. *See id.* Indeed,
17 appeals courts will presume guidelines' sentences not sentences which are 400% above the
18 applicable guidelines range, to be reasonable.

19 Imposing the statutory maximum sentence upon Mr. Garcia-Renteria is not only an
20 improper application of the Sentencing Guidelines but it is also an improper application of the
21 factors set forth in § 3553(a). Section 3553(a) states that a sentencing court "shall impose a
22 sentence sufficient, *but not greater than necessary*, to comply with the purpose" set forth in
23 § 3553(a)(2). 18 U.S.C. § 3553(a)(1) (emphasis added). Section 3553(a) goes on to state the
24 factors that the courts "shall consider," as follows:

- 25 (1) the nature and circumstances of the offence and the history and characteristics of
26 the defendant
27 (2) need for the sentence imposed -
28 (A) to reflect the seriousness of the offense, to promote respect for the law,
and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or
vocational training, medical care, or other correctional treatment in
the most effective manner;

- 1 (3) the kinds of sentences available;
- 2 (4) the kinds of sentence and the sentencing range established for--
 - 3 (A) the applicable category of offense committed by the applicable category
4 of defendant as set forth in the guidelines [...]
- 5 (5) any pertinent policy statement [. . .]
- 6 (6) the need to avoid unwarranted sentence disparities among defendants with
7 similar records who have been found guilty of similar conduct; and
- 8 (7) the need to provide restitution to any victims of the offense.

9 18 U.S.C. § 3553(a)(1)-(2). As noted in Justice Scalia's dissenting opinion in *Booker*, § 3553
10 “provides no order of priority among all [its] factors.” *Booker*, 543 U.S. at 304-05. Indeed, “[i]n
11 the post-*Booker* world, district courts must consider the factors provided in 18 U.S.C. § 3553(a) in
12 fashioning the appropriate sentence for the individual defendant.” *United States v. Ameline*, 409
13 F.3d at 1073, 1092 (9th Cir. 2005) (en banc) (Wardlaw, J., concurring in part, dissenting in part).
14 In considering the Section 3553(a) factors, the sentencing court should give no more or less
15 weight to any of the factors. *See Booker*, 543 U.S. at 304-05 (Scalia, dissenting). *See also United*
16 *States v. Jaber*, 362 F.Supp. 2d 365, 371 (D. Mass. 2005); *United States v. Ranum*, 353 F.Supp. 2d
17 984, 985-87 (E.D. Wis. 2005). Here, from this Court's announced intention, it will rely
18 exclusively upon the PSR's recitation of Mr. Garcia-Renteria's prior apprehensions by law
19 enforcement to the exclusion of all the other factors under § 3553(a).

20 By reviving the primary sentencing mandate of section 3553(a), *Booker* now requires
21 courts to impose only the minimally sufficient sentence to achieve the statutory purposes of
22 punishment—justice, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a) (“The
23 court shall impose a sentence sufficient, but not greater than necessary, to comply with the
24 purposes set forth in 18 U.S.C. § 3553(a)(2)”). *Booker* set forth a limit on the length and type of
25 sentence that may be imposed. Imposing the statutory maximum of 60-months is far greater than
26 necessary to provide just punishment, deterrence, incapacitation and rehabilitation. Indeed,
27 Mr. Garcia-Renteria has never suffered any conviction, thus, was never afforded the incentive he
28 now has to avoid criminal contacts in the future.

29 In applying all of the section 3553(a) factors, the Court should recognize that there are
30 other mitigating circumstances, specifically, Mr. Garcia-Renteria's health, his family
31 circumstances, his employment history which was documented and his lack of education and

1 opportunities in Mexico. Mr. Garcia-Renteria has suffered a serious leg injury for which he has
2 not received needed care in prison - that injury has left him permanently disabled. He has been a
3 good family man and he has tried to best of his limited abilities and perhaps not through the best
4 means at all times, to provide for his family. He has little education and vocational skills and
5 because he is an alien, he will not receive educational or vocational training programs in prison as
6 U.S. citizens have access to. In addition, imposing the statutory maximum upon Mr. Garcia-
7 Renteria results in disparate treatment -- other similarly-situated individuals receive the same
8 offers from the government and they receive the benefit of their bargained for pleas. *See* 18 U.S.C.
9 §3553(a)(6) (one of statutory purposes is to avoid sentencing disparity).

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Respectfully submitted,

Dated: July 10, 2007

s/ Shereen J. Charlick
SHEREEN J. CHARLICK
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Garcia-Renteria

1 CERTIFICATE OF SERVICE

2
3 Counsel for Defendant certifies that the foregoing document is true and accurate to the best
4 of her information and belief, and that a copy of the foregoing document has been served this day
5 upon:

6 **Christopher P. Tenorio**
7 Christopher.Tenorio@usdoj.gov

8
9 **Manual Notice List**

10 The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who
11 therefore require manual noticing). You may wish to use your mouse to select and copy this list into your
word processing program in order to create notices or labels for these recipients.

12 (No manual recipients)

13
14 Dated: July 10, 2007

/s/ Shereen J. Charlick
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