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7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA

9 UNITED STATES OF AMERICA,  
10 Plaintiff.

11 v.

12 ARNULFO REYES-BARAJAS,  
13 a/k/a INDIO REYES,  
14 Defendant.

Case No. 3:07-CR-00071-BES-RAM

UNITED STATES'  
SENTENCING MEMORANDUM

15  
16 The undersigned confirms this response is timely filed.

17 COMES NOW, the United States of America, by and through its attorneys, Steven W.  
18 Myhre, United States Attorney for the District of Nevada, and James E. Keller, Assistant United States  
19 Attorney, and submits its sentencing memorandum in the above-captioned action.

20 INTRODUCTION

21 Suspended from school for fighting, on probation for carrying a concealed weapon, and, while on  
22 probation, shooting and injuring a person in a public parking lot, the defendant was deported after his  
23 conviction for Assault with a Deadly Weapon and service of state prison time. Thereafter, without the  
24 express consent of the Attorney General or his designated successor, as required under 8 U.S.C. § 1326(a),  
25 defendant illegally returned to the United States. While appealing to our sympathy, defendant's claim to  
26 re-enter the United States to save his marriage is not a legally cognizable justification under the federal  
27 statute enacted by Congress. Notably, upon his marriage's failure, defendant remained illegally in the  
28 country.

1 While illegally in the United States without proper permission in January 2001, he wed a United States  
2 citizen, and more than a year later, on April 11, 2006, submitted an *ex post facto* application for permission  
3 to re-enter the country. Defendant claims in his letter that he met a friend of his wife's family, Ms. Soliz,  
4 in the San Bernadino Immigration office – even though a search has not revealed any such person  
5 employed by that office – who advised him that he could remain in the United States. For defendant to  
6 attribute his circumstances on this unconfirmed person and highly-improbable statement,<sup>1</sup> when it was the  
7 defendant who committed the crime, does not qualify as acceptance of responsibility under United States  
8 Sentencing Guidelines § 3E1.1. Further, when defendant's wife inquired as to the status of defendant's  
9 I-212 application in May 2007, she was not candid when she alleged that her husband was in Mexico. Her  
10 statement is belied by a number of the letters submitted on behalf of the defendant, evidencing defendant's  
11 presence in the United States over the past seven or eight years as a tattoo artist in Reno. And defendant  
12 himself attached a letter to his I-212 application in April 2006 claiming he is self employed tattoo artist in  
13 Leon, Mexico, where "he has been successful" and "will continue to tattoo," when the defendant at the time  
14 was residing and working in Reno. By claiming dubious representations purportedly made by a friend  
15 of the defendant's wife's family, not being candid in his I-212 application years after he illegally re-entered  
16 the country, and blaming others for circumstances for which his own criminal conduct is responsible, the  
17 defendant has failed to promote respect for the law and accept responsibility.

18 The record must be clear: the defendant has yet to be punished for his continuing offense of illegal  
19 re-entry by an alien who has a prior aggravated felony conviction. In what appears to be an unprecedented  
20 step, Probation recommends that the Court disregard the defendant's applicable Sentencing Guidelines  
21 range of 41-51 months and sentence the defendant to time served. A proposed departure of this magnitude  
22 – more than 90% of the applicable Guidelines range – is at odds with the Court's obligation to consult the  
23 Sentencing Guidelines when determining an appropriate sentence under 18 U.S.C. § 3553(a)(4). By  
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26 <sup>1</sup> Such an employee, save an Immigration Judge, would not have the authority to make any  
27 such promise to an illegal alien. Defendant's allegation, if confirmed, would place that family friend's  
28 employment with Immigration in substantial jeopardy. To make such a claim for his benefit, a claim that  
is not supported by any documentary evidence, nor by any uninterested witness, further reflects the  
defendant's resistance to accepting responsibility for his actions.

1 ignoring *de facto* the applicable Guidelines range in its time served sentencing recommendation, Probation  
2 renders the necessary step of consulting the Guidelines meaningless. This contravenes 18 U.S.C. §  
3 3553(a)(4), which requires the Court to consider the applicable category of offense committed by the  
4 applicable category of defendant as set forth in the guidelines. It also undermines Congress' authority to  
5 enact 8 U.S.C. §1326 by erasing defendant's unlawful acts with a sentence of time served.

6 The Court is required to balance of the factors enumerated in § 3553(a). Section 3553(a) does not  
7 call for a unbalanced application of one factor over others. By recommending the lowest sentence possible  
8 under the circumstances, Probation failed to weigh: (1) the need to promote respect for the law, (2) to  
9 consider the applicable category of offense and category of defendant as set forth in the guidelines with  
10 its recommendation, and (3) to afford adequate deterrence to criminal conduct. After a complete analysis  
11 and weighing of the § 3553(a) factors to the circumstances of this case, a sentence in the low-end of the  
12 applicable Guidelines range is reasonable and appropriate.

#### 13 ANALYSIS

#### 14 A. **The Doctrine of Separation of Powers and Applicable Federal Statutes, 8 U.S.C. § 1326(b) and** 15 **18 U.S.C. § 3553(a), Mandate a Reasonable and Appropriate Sentence for an Alien Convicted** **of an Aggravated Felony Who Illegally Re-entered the United States At Least Once**

16 Neither the executive branch, nor the judicial branch, determined that the defendant's re-entry  
17 without permission to be felonious under 8 U.S.C. § 1326. Congress did. Congress duly enacted a federal  
18 statute requiring express consent prior to re-embarkation, which the defendant breached when he re-entered  
19 the country without permission. Given his prior aggravated felony, defendant is facing a maximum term  
20 of twenty years imprisonment according to the statute. 8 U.S.C. § 1326(b).

21 An unprecedented departure of 90% of the applicable Guidelines range for a violation of a  
22 statute that carries a maximum term of imprisonment of 20 years arguably treads upon, and  
23 undermines, Congress's right to determine, through its enactment of federal statutes, what defines  
24 United States' immigration law. Clearly, express consent from the Attorney General, or his designated  
25 successor, the Secretary of Homeland Security, is required prior to an illegal alien's re-embarkation  
26 under 8 U.S.C. § 1326. However, by recommending time served for an illegal alien who indisputably  
27 failed to obtain the express consent of the Attorney General, or his designated successor, the Secretary  
28 of Homeland Security, prior to re-embarkation casts doubt as to the importance of this statutory