IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 04-516 JB
	)	
PEDRO QUIJADA,	)	
	)	
	)	
Defendant.	)	

MOTION TO CORRECT SENTENCE

COMES NOW, the United States of America, by and through DAVID C. IGLESIAS, United States Attorney for the District of New Mexico, and Nelson Spear, Assistant United States Attorney for said District, pursuant to Fed.R.Crim.P. Rule 35(c) moves the Court to correct the sentence orally pronounced in the above-numbered and styled cause, and as grounds in support of the Motion, Counsel states:

1. On July 1, 1998, Pedro Quijada (Quijada) was convicted in Malden District Court, Malden, Massachusetts of the felony offense of Assault and Battery. *United States Exhibit 1* - Quijada's 1998 conviction for Assault and Battery; *Pre-Sentence Report (PSR),* ¶ 23. For this crime, Quijada was sentenced to 1 year imprisonment and then 3 months of that sentence appear to have been suspended. *Id.*

2. On March 3, 1999, Quijada was removed from the United States to El Salvador. *Pre-Sentence Report (PSR),* ¶¶ 4, 23.

3. On June 5, 2003, Quijada, was arrested and charged by a criminal complaint in Bernalillo County, New Mexico for Re-entry of Deported Alien Previously Convicted of an Aggravated Felony contrary to 8 U.S.C. §§ 1326(a)(1) and (2); and 8 U.S.C. § 1326(b)(2).

(Doc. 1).

4. On November 3, 2003, the United States Probation Office (U.S.P.O.) disclosed a Form-13 Pre-Sentence Report (PSR) in this case. It stated that Quijada's total offense level was "21" and his Criminal History Category was "III." *PSR,* ¶¶ 9 - 24.

5. On March 19, 2004, the United States and Quijada entered into a plea agreement wherein Quijada agreed to pled guilty to an Information that alleged that Quijada was an alien that was found in Bernalillo County on or about June 5, 2003 contrary to law in that he had been deported, excluded and removed and departed the United States on or about March 3, 1999, while an order of exclusion, deportation and removal was outstanding and that he had not obtained the consent of the Attorney General nor his successor, the Secretary for Homeland Security, for re-application for admission into the United States. (Doc. 14 and Doc. 18). The Information further alleged that Quijada's actions were contrary to 8 U.S.C. §§ 1326(a)(1) and (2) and 8 U.S.C. § 1326(b)(2). *Id*. The plea included Quijada's agreement to have his sentence determined pursuant to the Sentencing Guidelines. (Doc. 18, ¶ 5).

6. On or about May 4, 2004, the U.S.P.O. filed its Pre-Sentence Report (PSR) in this case. It stated that Quijada's total offense level was "21" and his Criminal History Category was "III." *PSR,* ¶¶ 9 - 24.

7. On or about June 1, 2004, Quijada file a motion for downward departure and a memorandum in support of the motion for downward departure. (Doc. 25 and Doc. 26). Within the motion and memorandum, Quijada did not contest any of the factual findings in the PSR. *Id.*

8. At the Sentencing Hearing on July 19, 2004, Quijada did not contest any of the factual findings in the PSR.

9. At the Sentencing Hearing on July 19, 2004, the Court issued two rulings:

a. Over the objections of the United States, the Court first ruled that it would adopt the findings of the PSR with the exception of paragraph 11 which enhanced Quijada's offense level by 16 levels for the conviction of the crime of violence. The Court held that *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004) applies to the United States Sentencing Guidelines. Further, the Court stated that it had considered Quijada's waiver in paragraph 5 of the Plea Agreement (Doc. 18); however, because the Plea Agreement was signed prior to the *Blakely* decision, the waiver would not be adequate.

The Court concluded that in the present case, *Blakely* requires that any sentence enhancement above the 8-level minimum enhancement given to all aggravated felons under U.S.S.G. § 2L1.2 requires either a jury determination or an admission by the defendant to the level of increase sought by the United States. In Quijada's case, the Court ruled that a jury had not determined that a 16-level enhancement was warranted nor had Quijada admitted that he was subject to the 16-level increase. On these facts, the Court enhanced Quijada's base offense level of 8 by 8 levels for a resulting offense level of 16 since Quijada admitted that he had been convicted of an aggravated felony.

The United States, pursuant to paragraph 7a of the plea agreement, filed a motion in open Court that requested that the Court grant Quijada the third point for acceptance of departure under U.S.S.G. § 3E1.1(b). Thereafter, the Court considered that an offense level of 13 with a CHC of III would result in a Guideline sentence of 18-24 months. Thereafter, the Court announced that it intended to sentence Quijada to a term of 24 months imprisonment, three years of supervised release (which would be unsupervised) and a $100 special penalty assessment.

Prior to the Court's pronouncement of sentence, the United States requested the Court

to issue alternative sentences in the event that an appellate court issued a ruling on the application of *Blakely* to the Guidelines. The Court ruled, in the alternative, if it is later determined that *Blakely* invalidates the Guidelines, then the sentence would be 46 months three years of supervised release (which would be unsupervised) and a $100 special penalty assessment. The Court described this as a "Williams" sentence. The Court then ruled that if it is determined that *Blakely* does not apply at all to the Guidelines in this case, then it would adopt all of the findings of the PSR and the sentence for a total of offense level of "21" and a CHC of III would result in an offense level range of 46-57 months. Based upon the adoption of all of the findings of the PSR, the Court would impose a sentence of 46 months imprisonment, three years of supervised release (which would be unsupervised) and a $100 special penalty assessment.

b. The Court then ruled that Quijada's motion for downward departure was not warranted on the facts of the case. The Court further ruled that even if the facts of the case did warrant a downward departure, the Court would exercise its discretion not to depart because Quijada's circumstances were within the heartland of cases.

10. Concurrently, on July 19, 2004, the Tenth Circuit issued its holding in *United States v. Cooper*, 2004 WL 1598798 (10th Cir. 2004). The *Cooper* Court reaffirmed the holding that '[w]henever a prior conviction is relevant to sentencing, the government must establish the fact of that conviction by a preponderance of the evidence." *Id,* * 19 (citing *United States v. Simpson,* 94 F.3d 1373, 1381 (10th Cir.1996). The *Cooper* Court further stated that the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) does not apply to [Cooper] since "the facts that increase the penalty beyond the statutory maximum are facts of a prior conviction, for which *Apprendi* makes specific exception. See *Blakely v. Washington* (citation omitted); *United States v. Wilson,* 244 F.3d 1208, 1216 (10th Cir.2001)

("The new rule of *Apprendi* specifically carves out the recidivism issue, requiring that facts 'other than the fact of a prior conviction' be proven to a jury.")." *Id,* FN 3. Under the circumstances of this case, the *Cooper* Court's holding would permit Quijada's 16-level enhancement for his prior conviction of a felony crime of violence.

11. Counsel for the United States submits that subsequent to the Sentencing Hearing for Quijada, the Tenth Circuit has determined *Blakely* does not apply to the Sentencing Guidelines under the circumstances of this case. Further, that the sentence imposed on Quijada was a result of "arithmetical, technical or other clear error."

12. Fed.R.Crim.P. Rule 35(a) provides that "within 7 days after sentencing, the Court may correct a sentence that resulted from arithmetical, technical, or other clear error."Rule 45 permits an expansion of the time to exclude weekends. A hearing on the United States' motion will be timely if held on or before Wednesday, July 28.

13. Counsel for the United States has contacted Counsel for Quijada about this motion. Counsel for Quijada objects to this motion and he objects to any setting on or before Wednesday, July 28, 2004.

WHEREFORE, The United States respectfully requests that the Court set this matter for a hearing on or before Wednesday, July 28 on the United States' motion to correct the sentence imposed in the above-numbered and -styled cause.

Respectfully submitted,

DAVID C. IGLESIAS
United States Attorney

Electronically filed July 26, 2004

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14.

I HEREBY CERTIFY that a copy of
the foregoing was faxed/mailed to
defense counsel of record,
Floyd Lopez, Esq.,
this 26th day of July, 2004..

Electronically filed July 26, 2004

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