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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF ARIZONA

8
9 United States of America,

10 Plaintiff,

11 v.

12 Arturo Alarcon-Garcia,

13 Defendant.

CR 06-00903-001-PHX-ROS

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR
DOWNWARD DEPARTURE**

14 The United States of America, by and through undersigned counsel, hereby responds to
15 defendant's motion for downward departure based on his alleged cultural assimilation in the
16 United States. The government asks that the Court deny defendant's motion, for the reasons set
17 forth in the following Memorandum of Points and Authorities.

18 MEMORANDUM OF POINTS AND AUTHORITIES

19 Defendant asks this Court for a downward departure based on his alleged cultural
20 assimilation in the United States. The defendant submits that this Court should grant a
21 downward departure based on his claim of cultural assimilation, which purportedly sets his case
22 outside the heartland of cases. The government submits that his background and circumstances
23 are not so extraordinary as to warrant a downward departure.

24 In *United States v. Booker*, 125 S.Ct. 738 (2005), the Supreme Court held that the federal
25 sentencing guidelines violated the Sixth Amendment. As a remedy, the Court excised that part
26 of the Sentencing Reform Act that made the guidelines mandatory, but district courts should still
27 consider the guidelines as advisory. Prior to *Booker*, the Ninth Circuit Court of Appeals held
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1 that district courts could consider evidence of cultural assimilation for sentencing purposes,
2 pursuant to U.S.S.G. § 5K2.0 and § 1B1.4 to. *See United States v. Lipman*, 133 F.3d 726 (9th
3 Cir. 1997). Under U.S.S.G. § 5K2.0, a departure is appropriate when “there exists an
4 aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into
5 consideration by the Sentencing Commission in formulating the guidelines.” 18 U.S.C. §
6 3553(b). In determining whether a departure is warranted under § 5K2.0, a sentencing court
7 “may consider, without limitation, any information concerning the background, character, and
8 conduct of the defendant, unless otherwise prohibited by law.” U.S.S.G § 1B1.4. The
9 defendant, however, bears the burden to prove by a preponderance of the evidence that the
10 circumstances of his or her case warrant a downward departure. *Lipman*, 133 F.3d at 730.

11 Before departing from the Guidelines, the sentencing court must decide whether the
12 considered factor, given the facts and circumstances of the case, “is sufficient to take the case
13 out of the [relevant] Guideline’s heartland. The court must bear in mind the Commission’s
14 expectation that departures based on grounds not mentioned in the Guidelines will be ‘highly
15 infrequent.’” *Lipman*, 133 F.3d at 730. The factor of cultural assimilation is akin to the factor
16 of “family and community ties” reflected in U.S.S.G. § 5H1.6. Therefore, “to the extent that
17 cultural assimilation denotes family and community ties,” a district court has authority to depart
18 on that basis only in *extraordinary circumstances*. *Lipman*, 133 F.3d at 730. Whether a
19 defendant’s family and community ties are sufficiently “unusual” or “extraordinary” to warrant
20 departure in a particular case is a factual determination that lies within the discretion of the
21 district court. *Lipman*, 133 F.3d at 730. Cultural assimilation may be relevant to sentencing if
22 a district court finds that a defendant’s unusual cultural ties to the United States--rather than
23 ordinary economic incentives--provided the motivation for the defendant’s illegal return or
24 continued presence in the United States. It may also be relevant to the character of a defendant
25 in so far as his culpability might be lessened if his motives were familial or cultural rather than
26 economic. *Lipman*, 133 F.3d at 731.

1 A comparison to the facts in *Lipman* is instructive. Lipman lost his permanent residence
2 status and was deported to Jamaica because he had been convicted of numerous felonies,
3 including possession of a weapon, attempted possession of marijuana, unlawful imprisonment,
4 two counts of sexual abuse, and attempted robbery. *Lipman*, 133 F.3d at 728. Lipman reentered
5 the United States approximately two years later through Miami, Florida. *Id.* Ten days after his
6 reentry, Lipman was arrested in Los Angeles, California, for possession and transportation for
7 sale of approximately 39 pounds of marijuana. *Id.* Lipman was subsequently charged and
8 convicted for illegal reentry into the United States. At his sentencing, Lipman urged the court
9 for a downward departure based on cultural assimilation. *Lipman*, 133 F.3d at 728. Lipman had
10 been brought to the United States by his mother at the age of 12 and, until his deportation, had
11 legally resided here for an uninterrupted period of 23 years. *Lipman*, 133 F.3d at 729. Lipman
12 attended New York public schools through high school. *Id.* He married a U.S. citizen, with
13 whom he raised five U.S. citizen children. *Id.* Lipman also fathered two other American-born
14 children. *Id.* In short, Lipman’s entire family, including his mother, three siblings, five children
15 and wife, resided in the United States as American citizens. *Id.* Despite Lipman’s familial ties
16 to the United States, the district court concluded that Lipman’s circumstances did *not* justify a
17 downward departure. *Id.* at 731 (“Lipman’s family ties were not so unusual as to justify a
18 downward departure in light of the nature and number of offenses that caused Lipman to lose
19 his residency status in the first place.”) The Court of Appeals affirmed. *Id.* at 729.

20 Compared to the defendant in *Lipman*, this defendant has a much weaker claim that he
21 has culturally assimilated into the United States. Defendant claims to have been brought here
22 at the age of 7. However, at the age of 16, defendant was arrested and convicted of aggravated
23 assault. He was sentenced to 3.5 years’ imprisonment. He was deported to Mexico on March
24 24, 2005. He subsequently returned to the United States; however, he was rearrested on August
25 11, 2005 for a new criminal offense and has been incarcerated since that time. Accordingly, a
26 majority of the defendant’s time in the United States has been while incarcerated. Defendant
27 only lived in the United States as a free person for approximately 9 years during his youth. He
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1 has been in prison, deported to Mexico, or living within the United States under an order of
2 deportation since he was 16 years old.

3 Further, the defendant does not claim he has had any legal status to live in the United
4 States, he did not attend high school in the United States, and he does not have a wife or children
5 in the United States. While the defendant states that the reason he came back was to support his
6 mom and siblings, the defendant was almost immediately rearrested and incarcerated upon his
7 illegal re-entry to the United States for more criminal activity.

8 Given all of the circumstances in this case, the United States does not believe that
9 defendant's ties are so unusual as to justify a downward departure on the basis of cultural
10 assimilation and it asks that the Court deny defendant's motion. Further, the government
11 requests the high end of the guideline range. Defendant has a previous conviction, whereby he
12 was given a significant sentence, and he was previously removed from the United States.
13 However, he did not learn from that conviction, sentence, or removal. Instead, he returned to
14 the United States less than a year after his removal, and less than a year after his release from
15 incarceration, he committed another violent offense.

16 Respectfully submitted this 22nd day of August 2007.

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18 DANIEL G. KNAUSS
19 United States Attorney
20 District of Arizona

21 s/ Sarah L Hartnett
22 SARAH L HARTNETT
23 Special Assistant U.S. Attorney

24 Certificate of Service

25 I hereby certify that on August 22, 2007, I electronically transmitted the attached document to the Clerk's Office using the
26 CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

27 Anthony B. Bingham
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