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 7
 8 UNITED STATES DISTRICT COURT
 9 DISTRICT OF ARIZONA

10 UNITED STATES OF AMERICA,

No. CR08-01238-TUC-CKJ-HCE

11 Plaintiff,

DEFENDANT’S SENTENCING
 MEMORANDUM

12 vs.

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 15 NELSON ADONAI LOPEZ-MENDOZA,

16 Defendant.

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 19 Defendant, by and through his counsel undersigned, submits the following
 20 Sentencing Memorandum for purposes of his sentencing on July 17, 2009. Defendant
 21 agrees with the analysis of the United States Probation Department that Defendant’s
 22 criminal history supports only a four-level enhancement.
 23

24 MEMORANDUM OF POINTS AND AUTHORITIES

25 Legal Argument

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 27 The United States Probation Department has concluded that

1 Defendant's prior conviction for Aggravated Assault on a Peace Officer, in violation of
2 A.R.S. §13-1204(A), does not qualify as a crime of violence under either 8 U.S.C.
3 §1101(a)(43) or under U.S.S.G. §2L1.2, comment (n.1)(B)(iii). (See PSR p. 4, fn. 1).
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5 Accordingly, the Probation Department has assigned only a four-level enhancement
6 based on this prior conviction. (PSR p. 4, ¶13). Defendant agrees that the Probation
7
8 Department has assessed the appropriate offense level.

9 The government claims that Defendant should be assessed a 16-level
10 enhancement based on the subject prior conviction and argues that this conviction
11 qualifies as a crime of violence under a modified categorical approach. (See p. 5 of
12 government's Objections to the Presentence Report, hereinafter "Objections"). This
13 assertion is incorrect as discussed below.
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16 Federal courts apply the categorical approach established by the Supreme
17 Court in Taylor v. United States, 495 U.S. 575 (1990), in order to make an initial
18 determination of whether a prior conviction qualifies as a predicate offense, for
19 purposes of applying the 16-level enhancement under §2L1.2(b)(1)(A). United States v.
20 Navidad-Marcos, 367 F.3d 905, 908 (9th Cir. 2004). This analysis requires the sentencing
21 court to look only to "the fact of conviction and the statutory definition of the prior
22 offense" in evaluating the proposed enhancement. United States v. Corona-Sanchez,
23 291 F.3d 1201, 1203 (9th Cir. 2002).
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2 The Ninth Circuit Court of Appeals has previously held that A.R.S. §13-
3 1204(A), the statute under which Defendant Lopez-Mendoza was convicted, is
4 overbroad and does not categorically qualify as a crime of violence for purposes of this
5 enhancement. See United States vs. Esparza-Herrera, 557 F.3d 1019, 1025 (9th Cir.
6 2009). “Under the categorical approach, aggravated assault requires a mens rea of at
7 least recklessness under circumstances manifesting extreme indifference to the value of
8 human life.” Id., at 1025 (court concluded that the defendant’s statute of conviction,
9 A.R.S. §13-1204(A)(11), encompassed ordinary recklessness, and therefore his
10 conviction was not a conviction for generic aggravated assault or a crime of violence.)
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15 When a defendant’s state statute of conviction does not define a
16 categorical crime of violence, federal courts apply a "modified categorical
17 approach." See Penuliar v. Gonzales, 435 F.3d 961, 966 (9th Cir. 2006). This involves
18 a limited examination of documents in the record of conviction in order to determine if
19 there is sufficient evidence to conclude that the defendant was convicted of the elements
20 of the generically defined crime. United States v. Wenner, 351 F.3d 969 (9th Cir. 2003).
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22 The sentencing court may appropriately review the “charging document, written plea
23 agreement, transcript of plea colloquy and explicit factual finding by the trial judge or to
24 which the defendant assented” in order to determine whether the enhancement should
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1 apply. Almazan-Becerra, 456 F.3d 949, 952 (9th Cir. 2006) (quoting Shepard v. United
2 States, 544 U.S. 13, 16, 125 S.Ct. 1254 (2005). The review of documents beyond the
3 statute and charging document is narrowly restricted in order to achieve the objective of
4 the statute and in order to avoid any evidentiary disputes. Almazan-Becerra, 456 F.3d at
5 952.
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8 A sentencing enhancement of 16 levels for a qualifying offense is a significant
9 penalty. See Sandoval-Venegas, 292 F.3d 1101, 1106 (9th Cir. 2002). Under these
10 circumstances, the court must determine if the record establishes unequivocally that the
11 defendant was convicted of the generically defined crime. Corona-Sanchez, at 1211.
12 (emphasis added). “If judicially noticeable facts would allow the defendant to be
13 convicted of an offense other than that defined as a qualifying offense, the offense
14 cannot be used to enhance a defendant’s sentence.” Corona-Sanchez, 291 F.3d at 1203-
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19 In this case, the Government is incorrect in its assertion that the judicially
20 noticeable documents that are available establish unequivocally that the prior offense
21 was a crime of violence. The record before the Court requires the Court to infer and
22 “read between the lines” in order to conclude that Defendant committed a “crime of
23 violence.” See Sandoval-Venegas, 292 F.3d 1101, 1106 (9th Cir. 2002) (“Because the
24 consequences of a sentence enhancement for a qualifying conviction are significant, we
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Copy of the foregoing delivered by ECF
this 14th day of July 2009 to:

Hon. Cindy K. Jorgenson
United States District Court Judge
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