

C. Renée Manes  
Assistant Federal Public Defender  
Federal Public Defender's Office  
101 SW Main Street, Suite 1700  
Portland, OR 97204-3228  
Telephone: (503) 326-2123  
Facsimile: (503) 326-5524  
renée\_manes@fd.org  
Attorney for Defendant

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**ARMANDO GUTIERREZ-VARGAS,**

Defendant.

No. CR 03-577 BR

**MOTION TO DISMISS  
INDICTMENT AS LACKING ANY  
PREDICATE FELONY**

**MEMORANDUM OF LAW IN  
SUPPORT**

**Hearing To Be Scheduled By The Court**

Defendant Armando Gutierrez-Vargas, through his attorney Assistant Federal Public Defender C. Renée Manes, hereby moves to dismiss the Indictment charging him with a violation of 18 U.S.C. § 922(g), "felon in possession of a firearm," on the basis that the allegations in the Indictment do not establish the existence a sufficient predicate conviction, under the applicable state law, to support the charge.

Mr. Gutierrez-Vargas also requests a hearing on this motion, to be set at the Court's convenience. Mr. Gutierrez-Vargas was arrested on November 22, 2004, he has been detained pending trial, and the present trial date is March 15, 2005.

This motion is supported by the Indictment, the Memorandum of Law which follows hereon, the documents submitted in support of this Motion, along with the file in this matter and any additional information which may be submitted by the parties at the time of the hearing in this matter.

Respectfully submitted thus 12<sup>th</sup> day of January, 2005.

/s/ C. Renée Manes  
C. Renée Manes  
Assistant Federal Public Defender

**MEMORANDUM OF LAW IN SUPPORT  
OF THE MOTION TO DISMISS THE INDICTMENT**

**I. INTRODUCTION AND BRIEF STATEMENT OF FACTS REGARDING THE CHARGED PREDICATED CONVICTION.**

The Indictment charges Mr. Gutierrez-Vargas with a violation of 18 U.S.C. § 922(g)(1), alleging that he possessed a firearm after being convicted of a crime “punishable for a term of imprisonment exceeding one year.” The Indictment further specifies the predicate conviction as:

1. On or about June 14, 2002, in Multnomah County Circuit Court, Case Number C02-04-32425 for Felony Attempt to Elude a Police Officer.

The discovery provided by the Government in support of this Indictment consists of records from the Circuit Court of the State of Oregon for Multnomah County, including an Indictment for a Violation of ORS 811.540, a Petition to Plead Guilty and a Judgment of Conviction and Sentence. [See Exhibits A-C respectively, submitted herewith.] The Judgment of Conviction and Sentence regarding this state court conviction documents that Mr. Gutierrez-Vargas was sentenced to 10 days in jail, 18 months probation, 80 hours of alternative community service, and some other minor conditions. [See Exhibit C, Judgment of Conviction and Sentence, at 2-3.]

Mr. Gutierrez-Vargas contends, and will establish in this memorandum, that this state court conviction cannot qualify as a predicate conviction under 18 U.S.C. § 922(g)(1), because he could not have been sentenced in excess of one year under the applicable Oregon law.<sup>1</sup>

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<sup>1</sup> By making these contentions, Mr. Gutierrez-Vargas does not intend to admit, nor does Mr. Gutierrez-Vargas admit, any other allegations presented in the Indictment. Mr. Gutierrez-Vargas specifically reserves the right to challenge any and all other

**II. OREGON LAW DETERMINES WHETHER THIS CONVICTION IS AN APPROPRIATE PREDICATE FELONY.**

To convict Mr. Gutierrez-Vargas of a violation of a violation of 18 U.S.C. § 922(g), the Government must allege and prove both that he possessed a firearm, and that he has previously been convicted of a crime “punishable by imprisonment for a term exceeding one year.” As the Ninth Circuit recently noted, “the determination of whether someone has in fact been convicted of a crime punishable by more than a year in prison is governed by the law of the jurisdiction in which the criminal proceeding took place[.]” *United States v. Marks*, 379 F.3d 1114, 1117 (9<sup>th</sup> Cir. 2004).

**III. UNDER OREGON LAW, MR. GUTIERREZ-VARGAS COULD NEVER HAVE BEEN SENTENCED TO A TERM OF IMPRISONMENT IN EXCESS OF ONE YEAR.**

**A. The Oregon Supreme Court Has Recently Confirmed That The Oregon Sentencing Guideline Grid Sets Forth The “Statutory Maximum Sentence” For Any Offense Under Oregon Law.**

In *Blakely v. Washington*, 542 U.S. \_\_, 124 S. Ct. 2531 (2004), the United States Supreme Court confirmed that when a state has a sentencing guideline system providing for imposition of sentences in light of certain established facts, the “statutory maximum” for that sentence is the maximum allowed by the sentencing guidelines:

Our precedents make clear, however, that the “statutory maximum” for *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.

*Blakely v. Washington*, 124 S. Ct. at 2537 [emphasis in original, further citations omitted].

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allegations in the Indictment, including the allegation that he possessed a gun.

In *State v. Dilts*, 337 Or. 645, \_\_ P.3d \_\_, 2004 WL 2903856 (Or., decided December 16, 2004), the Oregon Supreme Court revisited the Oregon Sentencing Guidelines following a remand by the United States Supreme Court in light of *Blakely*. See *Dilts v. Oregon*, 542 U.S. \_\_, 124 S. Ct. 2906 (2004). The Oregon Supreme Court confirmed that Oregon's Sentencing Guidelines are governed by *Blakely*, so that the "statutory maximum penalty" for any offense under Oregon law would be the penalty set out in those Guidelines:

. . . Oregon law provides that "the sentencing judge *shall* impose the presumptive sentence [set out in the sentencing guidelines] Gutierrez-Vargas Gutierrez-Vargas Gutierrez-Vargas *unless* the judge finds substantial and compelling reasons to impose a departure." OAR 213-008-0001 (emphasis added) [footnote omitted]; see also ORS 137.669 (sentencing guidelines "shall control the sentences for all crimes committed after the effective date of such guidelines Gutierrez-Vargas Gutierrez-Vargas Gutierrez-Vargas ")[]

*State v. Dilts*, 2004 WL 2903856 \*4 [emphasis in original, further citations omitted].

In reaching this decision, the Oregon Supreme Court rejected an argument by the state prosecutor that the "statutory maximum" was actually the time set forth in the criminal statute itself. *State v. Dilts*, 2004 WL 2903856 at 1\*, 3 and 5. And the Court recognized that limiting sentences to within the Oregon Sentencing Guidelines:

[I]llustrates the appropriate role of the judicial branch in criminal sentencing. "Determining the range of possible sentences for particular crimes historically has been a legislative, rather than a judicial, function." *State ex rel Huddleston v. Sawyer*, 324 Or. 597, 615, 932 P.2d 1145 (1997); see also *State v. Smith*, 128 Or. 515, 524, 273 P. 323 (1929) ("The power to declare what punishment may be assessed against those convicted of crime is not a judicial, but a legislative, power Gutierrez-Vargas Gutierrez-Vargas Gutierrez-Vargas."). Here, the legislature authorized the creation of the sentencing guidelines and later adopted the guidelines that the Oregon Criminal Justice Council promulgated. The guidelines describe the presumptive sentence range as the "appropriate

punishment" for a crime based on "the seriousness of the crime of conviction Gutierrez-Vargas Gutierrez-Vargas Gutierrez-Vargas and the offender's criminal history." OAR 213-002- 0001(3)(d). "A sentencing judge must impose a presumptive sentence Gutierrez-Vargas Gutierrez-Vargas Gutierrez-Vargas unless there are 'substantial and compelling' reasons in aggravation or mitigation Gutierrez-Vargas Gutierrez-Vargas Gutierrez-Vargas." *State v. Davis*, 315 Or. 484, 487, 847 P.2d 834 (1993).

*State v. Dilts*, 2004 WL 2903856 at \*5.

**B. The Oregon Sentencing Guidelines Grid Establishes A Presumptive Maximum Prison Term Of No More Than 90 Days, And Establishes That No One Convicted Of This Crime Could Ever Be Subjected To A Term Of Imprisonment In Excess Of A Year.**

The applicable Oregon law, which is the Oregon Sentencing Guidelines, establishes that no one convicted of the crime of "Failure to Elude" under Oregon Revised Statute § 811.540(1) could ever be sentenced to a term of imprisonment exceeding one year. Further, the most that any individual could be sentenced for such a crime – no matter how aggravated their conduct or conviction – is one year. [See Exhibit D, 2002 Oregon Sentencing Guidelines Grid.<sup>2</sup>]

A review of the "Crime Seriousness" category, as shown in the column on the furthest-left of the 2002 Oregon Sentencing Guidelines Grid, shows that the crime of "Attempt to Elude" is considered a category "2" crime. The Grid documents that no matter what criminal history category is established – from A (most criminal history points) through

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<sup>2</sup> Mr. Gutierrez-Vargas is providing the 2002 information because that is applicable to his underlying conviction. However, the law has not changed, and the maximum possible sentence remains the same under current Oregon law. [See 2004 Oregon Sentencing Guideline Grid, Exhibit E.]

I (least criminal history points), the presumptive sentencing guideline for a crime with a Crime Seriousness category of "2" is never more than 90 days. [*Id.*]

Notably, even if a court found additional facts that subjected a defendant to a longer period of incarceration under Oregon's "Upward Dispositional Departure," the defendant could receive only 6 months in prison for this crime.<sup>3</sup> [*Id.*] Indeed, even if a defendant was subjected to the most severe possible upward departure under Oregon law, a "Durational Departure Maximum," the sentence could still be no more than a single year. [*Id.*]

**IV. CONCLUSION: THE GOVERNMENT HAS FAILED TO ALLEGE A QUALIFYING PREDICATE FELONY, AND THE INDICTMENT MUST BE DISMISSED.**

The predicate felony alleged by the Government, a violation of O.R.S. § 811.540(1), could never have resulted in imposition of any sentence in excess of one year under Oregon law, no matter how aggravated the case. Accordingly, this conviction cannot establish a sufficient predicate felony to support a charge under 18 U.S.C. § 922(g). All of the counts presented in the Indictment are based on this sole predicate felony. As a result, the Indictment should be dismissed in its entirety, and Mr. Gutierrez-Vargas respectfully requests that this Court do so.

Respectfully submitted thus 12<sup>th</sup> day of January, 2005.

/s/ C. Renée Manes  
C. Renée Manes  
Assistant Federal Public Defender

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<sup>3</sup> Mr. Gutierrez-Vargas does not admit that this Court should consider the possible upward departure sentences when determining whether "Attempt to Elude" is an appropriate predicate felony, and in fact contends that the presumptive sentence would be the "statutory maximum" under both *Blakely* and *Dilts*.

C. Renée Manes  
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Federal Public Defender's Office  
101 SW Main Street, Suite 1700  
Portland, OR 97204-3228  
Telephone: (503) 326-2123  
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Defendant.

No. CR 03-577 BR

**REPLY TO MOTION TO DISMISS  
INDICTMENT AS LACKING A  
PREDICATE FELONY**

Hearing Scheduled: March 2, 2005

**I. INTRODUCTION.**

Mr. Gutierrez-Vargas has moved to dismiss the Indictment alleging a violation of 18 U.S.C. § 922(g)(1) because the predicate felony charged, a violation of Oregon Revised Statute § 811.540 for "attempt to elude" is not a crime that is "punishable for a term of imprisonment exceeding one year" as required for a conviction. The Government's opposition establishes that the most critical fact is not in dispute, specifically that under the Oregon Sentencing Guidelines, and particularly in light of *State v. Dilts*, 337 Or. 645, 651

n.6, 82 P.3d 593 (2004) (“*Dilts II*”), Mr. Gutierrez-Vargas could not have been sentenced to any period in excess of one year for a violation of O.R.S. § 811.540.

Instead, the Government argues that *Dilts II* changed the law, and that under prior law Mr. Gutierrez-Vargas could have been sentenced to a period in excess of one year, so that he is not entitled to benefit from the change set forth in *Dilts II*. The Government analyzes the situation as similar to *Lewis v. United States*, 445 U.S. 55 (1980), and *United States v. Padilla*, 387 F.3d 1087 (9<sup>th</sup> Cir. 2004).

The Government’s contention is inaccurate and should be rejected. Unlike the defendants in *Lewis* and *Padilla*, Mr. Gutierrez-Vargas is not contesting the validity of his prior conviction for “attempt to elude” nor is he seeking to be removed from any infirmity as a result of that conviction. Instead, Mr. Gutierrez-Vargas is simply seeking to apply the law as it has always existed, as recognized in *Dilts II*. As such, this situation is far more analogous to *Bailey v. United States*, 516 U.S. 137 (1995), and *Bousley v. United States*, 523 U.S. 614 (1998). Finally, even if this Court agrees that *Dilts II* represented some change in the law, Mr. Gutierrez-Vargas is entitled to the benefit of that change.

## II. ARGUMENT.

### A. ***Lewis* and *Padilla* Are Inapplicable Because Mr. Gutierrez-Vargas Is Neither Contesting Nor Challenging His Prior Conviction.**

The Government contends that a violation of O.R.S. § 811.540 is an appropriate predicate felony because it is statutorily defined as a Class C felony, and under O.R.S.

§ 161.605, Class C felonies may be subjected to term of imprisonment of 5 years.<sup>4</sup> [See Government's Response to Defendant's Motion to Dismiss the Indictment, at 3 (hereinafter "Government's Response").] The Government next argues that the holding in *Dilts II*, recognizing that the Oregon Sentencing Guidelines control all sentencing irrespective of any other statute, post-dates Mr. Gutierrez-Vargas' arrest and indictment, and, therefore, he cannot receive the benefit of that change in the law. [See Government's Response, at 3.] The Government analyzes the change to the situations presented by *Lewis v. United States* and *United States v. Padilla*. [See Government's Response at 3-5.]

The situations in *Lewis* and *Padilla* are completely distinct from that of Mr. Gutierrez-Vargas, because in each of those cases the prior felony was subject to some attack, but the defendant had failed to attack the conviction prior to being found guilty under 18 U.S.C. § 922(g)(1). In *Lewis*, the predicate felony could have been the subject

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<sup>4</sup> The Government does not cite to the holding, but the Ninth Circuit accepted this interpretation of Oregon law in the context of determining whether an Oregon conviction was an "aggravated felony" under section 2L1.1 of the United States Sentencing Guidelines. See *United States v. Rios-Beltran*, 361 F.3d 1204, 1205-1206 (9<sup>th</sup> Cir. 2004).

In *Rios-Beltran*, the panel agreed that it was the "statutory maximum" under O.R.S. § 161.605 that controlled the question, and not the "statutory maximum" set out in the Oregon Sentencing Guidelines. *Rios-Beltran*, 361 F.3d at 1207. To reach this conclusion, the court relied on the Oregon Supreme Court's interpretation of Oregon law as set forth in *State v. Dilts*, 336 Or. 158, 161, 82 P.3d 593, 594 (Or. 2003) (*Dilts I*). *Rios-Beltran*, 361 F.3d at 1207 & 1209. However, the decision in *Dilts I* has been completely vacated and reversed by the Oregon Supreme Court. *Dilts II*, 337 Or. at 651.

*Rios-Beltran* also predated the decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and of course the recent changes in the U.S.S.G. announced in *United States v. Booker*, 2005 WL 50108 (USSC, decided January 12, 2005). In light of the subsequent reversal of the legal authority on which *Rios-Beltran* rests, Mr. Gutierrez-Vargas submits that it is no longer good law and cannot control the outcome of this motion.

of a collateral attack because the defendant had not been represented by counsel, but the defendant had not actually made the collateral attack before being tried for a violation of 18 U.S.C. § 922(g)(1). 445 U.S. at 57-58. In *Padilla*, the conviction on the predicate felony was vacated, but that occurred six months *after* the defendant was found guilty of a violation of § 922(g)(1). 387 F.3d at 1090-1091.

Mr. Gutierrez-Vargas is in a situation completely distinguishable from the defendants in *Lewis* and *Padilla*. First, he is presenting his contentions long before any conviction. Second, Mr. Gutierrez-Vargas is not contesting the validity of his “attempt to elude” conviction, nor is he raising a collateral attack on his plea. Instead, he seeks to apply the law as it has always been based on the Oregon Supreme Court’s recognition of this fact in *Dilts II*. As such, his contentions are far more analogous to those raised in *Bailey v. United States* and *Bousley v. United States*.

**B. Mr. Gutierrez-Vargas Is Simply Seeking Recognition Of Oregon Law As It Has Always Been, Which Is Appropriate Under *Bailey* And *Bousley*.**

In *Bailey v. United States*, the Supreme Court addressed the enhancement for “use” of a firearm set out in 18 U.S.C. § 924(c)(1). Contrary to the holdings of numerous lower courts, the Supreme Court held that “use” required active employment. 516 U.S. at 150. When defendants who had previously been convicted sought to apply this new standard to challenge their convictions, the Government urged that this would be an inappropriate retroactive application of the law.. In *Bousley v. United States*, the Supreme Court rejected this contention, noting that *Bailey* did not change the law, it “merely explained what § 924(c) had meant ever since the statute was enacted.” 523 U.S. at 625.

This is analogous to Mr. Gutierrez-Vargas' situation. The holding in *Dilts II* simply recognized that, since the day they were enacted in 1989, the Oregon Sentencing Guidelines have had "the authority of statutory law." *Dilts II*, 337 Or. at 651 n.6 (further citations omitted). The Court recognized that the Guidelines control, and have always controlled, the "statutory maximum" penalty for crimes under Oregon law:

Oregon law provides that "the sentencing judge *shall* impose the presumptive sentence \* \* \* *unless* the judge finds substantial and compelling reasons to impose a departure." OAR 213- 008-0001 (emphasis added) [footnote omitted]; see *also* ORS 137.669 (sentencing guidelines "shall control the sentences for all crimes committed after the effective date of such guidelines \* \* \* "); ORS 137.671(1) ("The court may impose a sentence outside the presumptive sentence or sentence range made presumptive by ORS 137.669 for a specific offense if it finds there are substantial and compelling reasons justifying a deviation from the presumptive sentence."). If the trial court imposes a sentence that exceeds the presumptive sentence without making the required additional findings, then that sentence is erroneous.

*State v. Dilts*, 337 Or. at 651 [further citations omitted].

Under Oregon law as recognized in *Dilts II*, any statute such as O.R.S. § 161.605 is irrelevant, and the Oregon Sentencing Guidelines control the "statutory maximum" sentence for a violation of O.R.S. § 811.540. The 2002 Guidelines established that the "statutory maximum" time Mr. Gutierrez-Vargas could have received for this crime was 90 days in prison. [See Exhibit D, 2002 Oregon Sentencing Guidelines Grid (previously submitted)] Moreover, even under exceptionally aggravated circumstances, the Guidelines mandate that the most severe possible sentence that could ever be imposed for a violation of § 811.540 is the "Durational Departure Maximum" of one year – not five years, not more than a year, but one year. [*Id.*]

It does not matter whether Mr. Gutierrez-Vargas, or anyone else, believed that his conviction for a violation of O.R.S. § 811.540 precluded him from possessing a firearm under federal law – they were wrong, just as numerous lawyers and courts were wrong when they interpreted and applied 18 U.S.C. § 924(c)(1) prior to the decision in *Bailey*. As the Supreme Court recognized:

Thus in 1990 when petitioner was advised by the trial judge, by his own lawyer, and by the prosecutor that mere possession of a firearm would support a conviction under § 924(c), he received critically incorrect legal advice. The fact that all of his advisers acted in good-faith reliance on existing precedent does not mitigate the impact of that erroneous advice. Its consequences for petitioner were just as severe, and just as unfair, as if the court and counsel had knowingly conspired to deceive him in order to induce him to plead guilty to a crime that he did not commit. . . . Petitioner's conviction and punishment on the § 924(c) charge "are for an act that the law does not make criminal."

*Bousley v. United States*, 523 U.S. at 626 [citations omitted].

A violation of O.R.S. § 811.540 could never result in a sentence in excess of one year, and the possession of a firearm after conviction of that offense is simply not a crime under 18 U.S.C. § 922(g)(1).

**C. Even If *Dilts* Changed The Law, Mr. Gutierrez-Vargas Is Entitled To The Application Of That Law In This Action.**

Even if the Government is correct that *Dilts* changed the law, as opposed to recognizing and applying what the law has always been, Mr. Gutierrez-Vargas would still be entitled to the benefit of that change.

The Supreme Court has frequently analyzed when changes in the law apply to pending, and even completed, criminal cases. Any new rule – whether it is a substantive change in the law or simply a rule of criminal procedure – applies to cases that are not yet

final on direct review. *Schriro v. Summerlin*, 124 S. Ct. 2519, 2522-2523 (2004), citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) and *Teague v. Lane*, 489 U.S. 288, 311 (1989). Mr. Gutierrez-Vargas' situation is no where near finality – indeed, he does not even have a conviction. Thus, even if *Dilts* represents a change in the law, it still applies and controls the question of whether Mr. Gutierrez-Vargas can be convicted for a violation of 18 U.S.C. § 922(g)(1).

While the Government does not present an analysis on the issue, the Government may contend that *Lewis* and *Padilla* carve out an exception to the *Teague* rule. However, *Lewis* predated *Teague* by nine years, and did not consider those questions. *Padilla* also did not discuss *Teague*, which is understandable because the case did not address any change in the law, but instead dealt with a conviction that could have been the subject of a collateral attack.

Once again, Mr. Gutierrez-Vargas is in a situation far more analogous to *Bailey* and *Bousley*, where a change in the law impacts whether a defendant has actually committed some crime. In *Bousley*, the Supreme Court was quite clear that *Teague* did not bar application of such a change in the law:

*Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress. . . . Accordingly, it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid.

*Bousley v. United States*, 523 U.S. at 620-621 [citations omitted].

In sum, even if *Dilts* can be construed as changing the law – instead of simply interpreting the law as it has always been – Mr. Gutierrez-Vargas would still be entitled to the benefit of that change.

### III. CONCLUSION.

The predicate felony alleged by the Government, a violation of O.R.S. § 811.540(1), could never have resulted in imposition of any sentence in excess of one year under Oregon law, no matter how aggravated the case. Accordingly, this conviction cannot establish a sufficient predicate felony to support a charge under 18 U.S.C. § 922(g). All of the counts presented in the Indictment are based on this sole predicate felony. As a result, the Indictment should be dismissed in its entirety, and Mr. Gutierrez-Vargas respectfully requests that this Court do so.

Respectfully submitted thus 1<sup>st</sup> day of February, 2005.

/s/ C. Renée Manes  
C. Renée Manes  
Assistant Federal Public Defender

C. Renée Manes  
Assistant Federal Public Defender  
Federal Public Defender's Office  
101 SW Main Street, Suite 1700  
Portland, OR 97204-3228  
Telephone: (503) 326-2123  
Facsimile: (503) 326-5524  
renée\_manes@fd.org  
Attorney for Defendant

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**BRIEF STATEMENT OF  
SUPPLEMENTAL AUTHORITIES  
PRESENTED IN SUPPORT OF  
THE MOTION TO DISMISS  
INDICTMENT AS LACKING A  
PREDICATE FELONY**

Pursuant to the discussion at the hearing on March 2, 2005, Mr. Gutierrez-Vargas presents the following supplemental authorities in support of the motion to dismiss the Indictment alleging a violation of 18 U.S.C. § 922(g)(1).

As discussed below, while no district court appears to have issued any opinion on the issue, a similar question is now pending before United States District Court Judge Ann L. Aiken, in *United States v. Moreno-Hernandez*, No. CR-03-30012-AA. Further, the Tenth Circuit has addressed a similar claim, based on changes in Kansas law. An additional relevant Oregon citation is provided as well.

1. ***United States v. Moreno-Hernandez*, \_\_ F.3d \_\_, 2005 WL 387608 (9<sup>th</sup> Cir., Feb. 18, 2005)**

In *Moreno*, the Ninth Circuit recognized that the ruling in *United States v. Rios-Beltran*, 361 F.3d 1204, 1205-1206 (9<sup>th</sup> Cir. 2004), defining a “felony” under Oregon law, was likely no longer good law given the intervening decisions in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *State v. Dilts*, 337 Or. 645, 651 n.6, 82 P.3d 593 (2004) (“*Dilts II*”). However, instead of deciding the issue the Court remanded for an initial determination by a district court. The relevant language is as follows:

At oral argument and in supplemental briefing ordered by the court, Moreno-Hernandez advanced an argument purportedly based on *Blakely v. Washington*, --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). [footnote omitted]

Specifically, Moreno-Hernandez suggests that *Blakely*, as applied to Oregon's sentencing guidelines, limits the maximum possible sentence for his Oregon Assault IV conviction to the presumptive maximum sentence available under the Oregon guidelines at the time – thirty-six months of probation and a maximum of 180 days in jail. His contention is that the district court, in ascertaining the maximum possible state sentence to which Moreno-Hernandez was subject for his Assault IV conviction, should have looked not to the statutory maximum sentence for the offense, but to the maximum sentence available under the Oregon sentencing guidelines for Moreno-Hernandez, in particular. In effect, Moreno-Hernandez argues that because he could not have been sentenced for his Assault IV conviction to more than a maximum specified by the Oregon guidelines – which, he maintains, is less than one year – his conviction was not for a “felony.”

Unlike Moreno-Hernandez's enhancement argument considered in Part II, this contention was never presented to or considered by the district court. Instead, it was raised for the first time on appeal, at oral argument. Although presented at that time as if dependent upon *Blakely*, in fact, *Blakely* has not changed the maximum sentence available under Oregon law, although it did change the procedures that may be used to determine the imposition of a particular sentence. See *State v. Dilts*, 337 Or. 645, 103 P.3d 95 (2004) (*Dilts II*). [footnoted omitted] *United States v. Rios-Beltran*, 361 F.3d 1204 (9<sup>th</sup> Cir.2004), the case on which Moreno-Hernandez principally relied in his supplemental brief, does not discuss these procedural questions, either in explaining that the statutory maximum ordinarily governs the

question whether an offense is a felony, or in reserving, in footnote 4, the question whether a state guidelines' limitation on the maximum sentence is pertinent in deciding if an offense is a "felony" for federal Guidelines purposes. See *id.* at 1209 & n. 4.

Given these considerations, and given that we remand for resentencing anyway, see post at 1989, it would be imprudent to reach the *Rios-Beltran* issue without allowing the district court to consider it in the first instance. The parties will have a full opportunity, under *United States v. Matthews*, 278 F.3d 880, 884-90 (9<sup>th</sup> Cir.2002) (*en banc*), to brief and argue the effects, if any, of the relevant state and federal legal developments.

*United States v. Moreno-Hernandez*, 2005 WL 387608 at \*6. The case has now been remanded to the Judge Aiken for resolution of these, and other, sentencing issues.

*Rios-Beltran* and *Moreno-Hernandez* both addressed when a prior conviction may constitute an "aggravated felony" for purposes of U.S.S.G. § 2L1.2. That determination is governed by both state and federal law – *i.e.*, a conviction may be considered an "aggravated felony" if the underlying conduct would have been punished as an aggravated felony in either state or federal court. *Rios-Beltran*, 361 F.3d 1207. *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1338 (9<sup>th</sup> Cir. 2000), *United States v. Soberanes*, 318 F.3d 959 (9<sup>th</sup> Cir. 2003) (holding the *Ibarra-Galindo* framework application to § 2L1.2(b)(1)(C)).

In contrast, under 18 U.S.C. § 922(g), the question of whether a conviction is a crime "punishable by imprisonment for a term exceeding one year" is governed solely with reference to the "law of the jurisdiction in which the criminal proceeding took place[.]" *United States v. Marks*, 379 F.3d 1114, 1117 (9<sup>th</sup> Cir. 2004). Thus, the Government must prove that a violation of O.R.S. § 811.540 could be punished by a sentence in excess of a year under Oregon law alone.

**2. *United States v. Norris*, 319 F.3d 1278 (10<sup>th</sup> Cir. 1993)**

When *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was decided, the Kansas Supreme Court foresaw the necessary application of that rule to sentencing guideline statutes. The Court's decision in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (Kan. 2001), held several provisions of the then-existing Kansas sentencing scheme to be unconstitutional. In *Norris*, the defendant presented an argument very similar to that presented here, noting that under *Gould* he was no longer eligible for any sentence in excess of one year.

The Tenth Circuit rejected the argument, based solely on retroactivity analysis and the fact that the conviction pre-dated *Apprendi*. The Court specifically noted that if the conviction post-dated *Apprendi*, the argument would be valid. The relevant language is:

In the instant case, it makes no difference that had Mr. Norris' state convictions occurred after June 26, 2000, the underlying offenses would not have been punishable by more than one year under the decision in *Gould*. Likewise, it is of no consequence that at the time of his federal offense, departure sentences were no longer permitted under Kansas law. What does matter is that under the law of the jurisdiction where the proceedings were held, at the time of those proceedings, Mr. Norris had committed an offense punishable by more than one year. *Had Mr. Norris' state convictions become final after June 26, 2000, we would have before us a very different case.* However, because Mr. Norris' state convictions were final before the cut-off date designated in *Gould*, the decision in that case has no effect on either the validity of his convictions or their proper classification for purposes of § 922(g)(1). We therefore hold that the district court properly denied Mr. Norris' motion to dismiss.

*United States v. Norris*, 319 F.3d at 1283 [emphasis supplied].

In contrast, Mr. Gutierrez-Vargas' conviction in October 2002 post-dates *Apprendi* by more than two years. Further, the Oregon Supreme Court in *Dilts II* did not preclude any retroactive analysis of its ruling. Indeed, the Oregon Supreme Court acknowledged

that it was simply recognizing that affect of the Oregon Sentencing Guidelines since the day they were enacted in 1989. *Dilts II*, 337 Or. at 651 & n.6 [further citations omitted].<sup>5</sup>

**3. *State v. Haydon*, 116 Or. App. 347, 842 P.2d 410 (Or. App. 1992)**

In addition to *Dilts II*, the decision in *Haydon* is relevant to the question of whether an Oregon court could impose a sentence in excess of the longest sentence authorized by the Oregon Sentencing Guidelines, so long as the period of incarceration was not greater than the indeterminate sentences specified in O.R.S. § 161.605 (which is five years for a Class C felony). Both *Dilts II* and *Haydon* establish that an Oregon court could not do so, but are in fact limited to the imprisonment period specified in the Guidelines:

Oregon Laws 1987, chapter 619, section 2(1), directed that the guidelines were to provide for terms of imprisonment for felonies. Despite the fact that guidelines terms of incarceration were being developed, Ballot Measure 4 did not specify that the 'maximum sentence' was controlled by any existing statute. The legislature was not precluded from altering those maximums. It did so by providing for determinate sentences in the guidelines. ORS 161.605, on the other hand, provides maximum terms for indeterminate sentences, and those maximums no longer have general application. [citation omitted] The previous range of sentences is largely academic. [citation omitted.]

*State v. Haydon*, 116 Or. App. at 352, 842 P.2d 410 [footnote omitted]

Mr. Gutierrez-Vargas submits these additional authorities in support of his contention that his conviction for a violation of O.R.S. § 811.540 could not have been

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<sup>5</sup> Which is also in contrast to *Gould*. *United States v. Norris*, 319 F.3d at 1283 (“the Kansas Supreme Court in *Gould* did not simply interpret the relevant statutory provisions so as to make clear that departure sentences were not within the power of state trial judges.”).

punished by a period of imprisonment in excess of one year under the controlling Oregon law, which is the Oregon Sentencing Guidelines. Therefore, it is not a sufficient predicate felony to support a charge under 18 U.S.C. § 922(g)(1).

Respectfully submitted thus 4<sup>th</sup> day of March, 2005.

/s/ C. Renée Manes  
C. Renée Manes  
Assistant Federal Public Defender

C. Renée Manes  
Assistant Federal Public Defender  
Federal Public Defender's Office  
101 SW Main Street, Suite 1700  
Portland, OR 97204-3228  
Telephone: (503) 326-2123  
Facsimile: (503) 326-5524  
renée\_manes@fd.org  
Attorney for Defendant

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**ARMANDO GUTIERREZ-VARGAS,**

Defendant.

No. CR 03-577 BR

**REPLY TO MOTION TO DISMISS  
INDICTMENT AS LACKING A  
PREDICATE FELONY AND TO  
GOVERNMENT'S SUPPLEMENTAL  
RESPONSE**

Hearing Scheduled: March 2, 2005

**INTRODUCTION**

Mr. Gutierrez-Vargas presents the following surreply to the Government's Supplemental Response to Defendant's Motion to Dismiss. The Government has failed to establish that Mr. Gutierrez-Vargas' underlying conviction qualifies as an adequate predicate felony under 18 U.S.C. § 922(g). See *United States v. Lloyd*, 981 F.2d 1071, 1072-73 (9th Cir.1992) (*per curiam*) (government's burden to prove predicate felony

qualifies under § 922(g) when the defendant refused to stipulate), and this indictment must be dismissed.

## **ARGUMENT**

### **I. The Government’s Authorities Establish That The “Durational Departure Maximum” Is The Maximum Sentence That Could Be Imposed In This Matter, And It Is Only 1 Year.**

The Government presents three additional Oregon authorities, contending that they document a potential maximum sentence of up to 18 months for a violation of Oregon Revised Statute § 811.540. [Government’s Supplemental Response at 2.] In fact, the authorities confirm that the absolute maximum sentence Mr. Gutierrez-Vargas could be sentenced for this violation is the “durational departure maximum” – which in this case is just 1 year.

In *State v. Tracy*, 116 Ore. App. 329 (1991), the defendant was in sentencing grid block 7-H. *Id.* at 331. Under Oregon’s Sentencing Guideline Grid, her presumptive sentence was 90-180 days. [See Exhibit D, 2002 Oregon Sentencing Guidelines Grid, and Exhibit E, 2004 Oregon Sentencing Guideline Grid (both previously submitted).] However, that Grid also reflects a possible “upward dispositional departure sentence” of 18 months in prison, and a “durational departure maximum” of double that time, or 36 months in prison, for anyone in this grid block. *Id.* and *State v. Tracy*, 116 Or. App. at 331. That 36 months was the sentence received by the defendant. *State v. Tracy*, 116 Or. App. at 331-332. While the defendant contested the sentence based on the use of the terms “dispositional” versus “durational,” all the Oregon court did was apply the “durational

departure” maximum sentence authorized by the Sentencing Guidelines under Oregon Administrative Rules 213-008-00003. *Tracy*, 116 Or. App. at 331-32.

Applying these authorities to Mr. Gutierrez-Vargas establishes that at the highest possible level – the “durational departure” – for his crime of conviction was 1 year; just 1 year, never more than 1 year, just 1 year.

Mr. Gutierrez-Vargas’ was convicted of a violation of O.R.S. § 811.540, which is a “2” in Crime Seriousness under the Oregon Sentencing Guidelines. [See Exhibit D, 2002 Oregon Sentencing Guidelines Grid, and Exhibit E, 2004 Oregon Sentencing Guideline Grid (both previously submitted).] The Grid documents that no matter what criminal history category is established – from A (most criminal history points) through I (least criminal history points), the maximum presumptive sentencing guideline for a crime with a Crime Seriousness category of “2” is 90 days. [*Id.*] The Grids also document that the “upward dispositional departure” for a Grid 2 crime is 6 months, and the absolutely maximum “durational departure maximum,” is 1 year – just 1 year. [*Id.*]

In reality, the Government acknowledges that 1 year is the lengthiest sentence Mr. Gutierrez-Vargas could have ever received for this conviction, when urging the 18 month calculation. [Government’s Supplemental Response, at 2.] The Government’s calculation of 18 months is only obtained by asserting that if Mr. Gutierrez-Vargas had violated his term of post-prison supervision, he could have been sentenced to an additional 6 months under Oregon Administrative Rules 213-011-0001. This is simply an admission that without any violation, the maximum possible sentence is 12 months – just 1 year. However, the Government proffers no legal authority for the contention that the possible

punishments for violating a term of release are relevant when considering whether a conviction is “punishable by imprisonment for a term exceeding one year” under 18 U.S.C. § 922(g). The plain reading of the statute does not allow inclusion of such time, and such time would be punishment for other conduct, not the underlying conviction. This contention does not assist the Government in meeting its burden of proof.

**B. The Indeterminate Maximum Penalty Is Irrelevant Under Oregon’s Sentencing Guidelines.**

The Government continues to insist that the indeterminate sentencing scheme set out in O.R.S. § 161.605 should triumph over the Oregon Sentencing Guidelines when deciding the statutory maximum for a violation of any Oregon crime, including O.R.S. § 811.540. [Government’s Supplemental Response at 3.] The United States Supreme Court and the Oregon Supreme Court have already squarely rejected this contention:

In *Dilts I*,<sup>[6]</sup> this court affirmed defendant's sentence, holding that ORS 161.605 established the maximum penalty for the crime that defendant had committed and that defendant's sentence therefore was constitutional under *Apprendi*<sup>[7]</sup> because it had not exceeded that prescribed statutory maximum. Defendant petitioned for a writ of certiorari from the United States Supreme Court, and the Court vacated the judgment in *Dilts I* and remanded the case to us for further consideration in light of the Court's decision in *Blakely v. Washington*, 542 U.S. ----, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *Dilts v. Oregon*, 542 U.S. ----, 124 S. Ct. 2906, 159 L. Ed. 2d 809 (2004). . . .

The state agrees that this court's decision in *Dilts I* "cannot be reconciled with the constitutional requirements set forth in *Blakely*." Specifically, the state concedes that *Blakely* rejected the proposition, upon which this court based its holding in *Dilts I*, that the statutory maximum

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<sup>6</sup> *State v. Dilts*, 336 Or. 158, 82 P.3d 593 (2003).

<sup>7</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

sentence for *Apprendi* purposes is the statutory indeterminate maximum sentence, rather than the guidelines' presumptive sentence.

*State v. Dilts*, 337 Or. 645, 648-649, 82 P.3d 593 (2004) ("*Dilts II*").

When faced with the option of invalidating the mandatory provisions of the Oregon Sentencing Guidelines and affirming the indeterminate scheme, the Oregon Supreme Court rejected that option. Instead, the Oregon Supreme Court confirmed that the determinate Oregon Sentencing Guidelines that had been adopted by the legislature was the law governing sentencing in Oregon:

However, the fact that the sentencing guidelines may be applied unconstitutionally, as they were in this case, does not mean that we must reject the sentencing guidelines themselves as unconstitutional. On the contrary, the Court in *Blakely* specifically stated that determinate sentencing schemes, like Oregon's sentencing guidelines, are permissible if they are implemented "in a way that respects the Sixth Amendment." --- U.S. at ---, 124 S. Ct. at 2540; see also *id.* at 2540-41 (rejecting argument that *Blakely* undermines determinate sentencing and concluding that focus instead is on protecting jury trial right). Because we have not held that a part of the sentencing guidelines is unconstitutional, we can identify no unconstitutional part of the guidelines that might be appropriate to sever. Rather than add to or subtract from the words in the sentencing guidelines, as the state suggests, our holding simply requires Oregon courts to apply the guidelines "in a way that respects the Sixth Amendment." --- U.S. at ---, 124 S. Ct. at 2540.

Our holding in this regard illustrates the appropriate role of the judicial branch in criminal sentencing. "Determining the range of possible sentences for particular crimes historically has been a legislative, rather than a judicial, function." [citations omitted]. . . Here, the legislature authorized the creation of the sentencing guidelines and later adopted the guidelines that the Oregon Criminal Justice Council promulgated. . . . Our obligation is to apply the guidelines adopted by the legislature, consistently with constitutional requirements, and our decision here does that. We see no basis upon which to sever a part of the guidelines as the state suggests.

*Dilts II*, 337 Or. at 645-655.

In *Dilts II*, the Oregon Supreme Court rejected any contention that the indeterminate sentencing scheme of O.R.S. § 161.605 controls sentencing under Oregon law, and undeniably held that the determinate sentencing scheme adopted by the legislature and set forth in the Oregon Sentencing Guidelines establishes the statutory maximum sentence. As the Oregon Court of Appeals noted years ago, the adoption of the Oregon Sentencing Guidelines means that the indeterminate sentence maximums have no general application, and the range of sentences specified therein is “largely academic.” *State v. Haydon*, 116 Or. App. at 352, 842 P.2d 410 [citations omitted]

**C. The Government Has Failed To Prove That Mr. Gutierrez-Vargas’ Prior Conviction Is An Appropriate Predicate Felony Under 922(g).**

To proceed with this prosecution for a violation of 18 U.S.C. § 922(g), the Government bears the burden of proving that Mr. Gutierrez-Vargas’ prior conviction for a violation of O.R.S. § 811.540, is an appropriate predicate conviction because he faced possible imprisonment for a period in excess of one year under Oregon law. *United States v. Lloyd*, 981 F.2d at 1072-73 (government’s burden of proof); *United States v. Marks*, 379 F.3d 1114, 1117 (9<sup>th</sup> Cir. 2004) (Oregon law controls the determination of the possible length of sentence).<sup>8</sup>

Mr. Gutierrez-Vargas has documented that under Oregon law, both legislative and case law, the statutory maximum penalty for his crime of conviction is set by the Oregon

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<sup>8</sup> This is in contrast to the situations in *United States v. Moreno-Hernandez*, \_ F.3d \_, 2005 WL 387608 (9<sup>th</sup> Cir., Feb. 18, 2005) and *United States v. Rios-Beltran*, 361 F.3d 1204, 1205-1206 (9<sup>th</sup> Cir. 2004), governing sentencing, because both state and federal laws are relevant to that question.

Sentencing Guidelines, not by O.R.S. § 161.605. Mr. Gutierrez-Vargas has also documented that the greatest possible departure level, the maximum he ever could be imprisoned for a violation of O.R.S. § 811.540, under the Oregon Sentencing Guidelines is 1 year – **not** any period in excess of one year.

The Government has failed to come forward with any case mandating that O.R.S. § 161.605 controls over the Oregon Sentencing Guidelines, and has also failed to document that anyone ever convicted of O.R.S. § 811.540 was subjected to imprisonment for a period exceeding 1 year. Therefore, the Government has failed to meet its burden of proof on this issue.

### **CONCLUSION**

The Government has failed to meet its burden of proving that Mr. Gutierrez-Vargas' prior conviction qualifies as appropriate predicate felony under 18 U.S.C. § 922(g). The Indictment must be dismissed on this basis.

Respectfully submitted thus 11<sup>th</sup> day of March, 2005.

/s/ C. Renée Manes  
C. Renée Manes  
Assistant Federal Public Defender