04-3771

and 04-3772

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant – Cross-Appellee,
v.

BIRJ DECKMEJIAN,
Defendant – Appellee – Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF AND OPPOSITION TO CROSS-APPEAL
FOR APPELLANT UNITED STATES OF AMERICA

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
JAMES M. GRIFFIN
Deputy Assistant Attorneys General

RALPH T. GIORDANO
REBECCA MEIKLEJOHN
DOUGLAS M. TWEEN
ELIZABETH PREWITT
Attorneys
U.S. DEPARTMENT OF JUSTICE
Antitrust Division
26 Federal Plaza, Room 3630
New York, NY 10278

JOHN J. POWERS, III
STEVEN J. MINTZ
Attorneys
U.S. DEPARTMENT OF JUSTICE
Antitrust Division
950 Pennsylvania Ave, NW
Room 3224
Washington, DC 20530
(202) 514-2414

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REPLY IN SUPPORT OF UNITED STATES' APPEAL

ARGUMENT

I. The District Court Erred by Granting the Downward Departure

A. Deckmejian's Circumstances Are Not So Extraordinary as to Justify a Downward Departure

Deckmejian's brief misleadingly attempts to portray the entire dispute over the downward departure as factual, so that every decision of the district court becomes subject to clearly erroneous review. But that is not the law. Whether the "departure is justified by the facts of the case" is an issue of law that this Court reviews *de novo*. *United States v. Kostakis*, 364 F.3d 45, 51 (2d Cir. 2004); *accord United States v. Huerta*, 371 F.3d 88, 94 (2d Cir. 2004); *United States v. Leiva-Deras*, 359 F.3d 183, 188 (2d Cir. 2004). Deckmejian's position erroneously reads out of existence 18 U.S.C. § 3742(e), as amended by the PROTECT Act to require *de novo* review of departures.

Moreover, in this case there is no material factual dispute about the nature of Deckmejian's medical conditions. The question for decision is not whether Deckmejian has a particular condition, or even how serious a particular condition is, because the medical witnesses largely agreed on those subjects. Nor is this a case about the credibility of witnesses, because the district court found both Dr. Berenson and Dr. Foley to be credible. A-118 ("Now, both of the doctors who

testified are fine professionals. . . . But I don't really have any lack of respect for either one, Dr. Berenson or Dr. Foley."); A-119-20 ("Dr. Foley has made a very sincere analysis . . . . He is familiar with the type of medical facilities in a federal prison to a degree that Dr. Berenson is not. So I certainly give weight to the testimony of Dr. Foley.").

Instead, the question posed by this appeal is the *legal* issue of whether Deckmejian's conditions, *even as described by his own doctor*, rise to the level that warrants a departure. On that question, the district court bears a heavy burden to justify the departure, because "[t]he standards for a downward departure on medical grounds are strict." *United States v. Persico*, 164 F.3d 796, 806 (2d Cir.), *cert. denied*, 527 U.S. 1039 and 528 U.S. 870 (1999); *accord United States v. Altman*, 48 F.3d 96, 104 (2d Cir. 1995) (defendant must be "seriously infirm").

The downward departure here fails this standard because, even taking the facts in the light most favorable to Deckmejian, his condition is hardly extraordinary. As described by Dr. Berenson, Deckmejian's own doctor:

- Deckmejian's cancer is in remission, and he requires only checkups at several month intervals, A-76, 87, 90;
- His diabetes is mild enough that it does not require medication, A-86;
- His blood pressure is under control from medication, A-75, 83-84;

- His reduced kidney function requires no separate medication, A-75-76;
- His alleged sleep apnea is so inconsequential that Dr. Berenson did not even mention it in his testimony. *See also* A-228 (no treatment required);[1]
- His occasional episodes of diverticulitis are controlled by drinking liquids and, if necessary, antibiotics, A-79;
- He has varying levels of pain in his feet, A-77, but overall, Deckmejian's conditions do not restrict him from working, traveling, or normal daily activities, A-75, 87.

Deckmejian cannot plausibly be described as "seriously infirm" or has having any condition, individually or collectively, that is "extraordinary," USSG § 5H1.4, for a 69-year old man. Deckmejian testified that he would be willing to work, even in a grocery store. A-116. Even Dr. Berenson did not describe any of Deckmejian's conditions as extraordinary, either in the sense of being extremely rare or in the sense of being unusually severe. Accordingly, the downward departure can be reversed as a matter of law without determining any of the district court's factual findings to be clearly erroneous.

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[1] Deckmejian's brief also lists gout, but this also was so trivial that Dr. Berenson merely referred to it in passing, without any discussion, in his testimony. Nor was there any evidence in the medical records produced by Deckmejian that he even has gout. A-228.

Nevertheless, the district court's most important factual determination *was* clearly erroneous. The court based the departure entirely on Dr. Berenson's pre-sentencing letter, which offered the conclusory assertions that "Given [Deckmejian's] age and condition, the possibility of death in the event of further physical deterioration will be increased if he is incarcerated," and "the possibility of incarceration in itself is enough to put him at the highest risk of physical deterioration." A-121. But these assertions were undermined by Dr. Berenson's admission, when asked by *Deckmejian's counsel* specifically why he thought incarceration would adversely affect Deckmejian, that the entire adverse effect would be Deckmejian not being able to telephone Dr. Berenson in the middle of the night should the need arise. A-78-79. Dr. Berenson never gave a single example of a medical treatment, procedure, or medication that Deckmejian needs now, or might need in the future, that would not be available in prison. Indeed, Dr. Berenson admitted that he had no familiarity with Bureau of Prisons medical services or facilities. A-82. The conclusions in Dr. Berenson's letter therefore were simply speculation, because Dr. Berenson had no knowledge of how "incarceration" might differ from Deckmejian's current treatment. The district court's finding that imprisonment might put Deckmejian at risk therefore was clearly erroneous.

B. The District Court Made No Finding that the Bureau of Prisons Would Be Unable to Care for Deckmejian's Medical Conditions

Deckmejian does not dispute that the district court made no finding on the Bureau of Prisons' ability to accommodate Deckmejian's medical conditions. Instead, he contends that no such finding was necessary to justify the departure. Deckmejian is wrong. This Court's precedents require a medical condition that cannot be accommodated in prison as a prerequisite to finding an "extraordinary physical impairment." USSG § 5H1.4. But even if the law did not require a finding on potential care in prison, the district court's failure to make any finding here fatally undermines its specific rationale for the departure.

In *United States v. Persico*, 164 F.3d 796, 806 (2d Cir. 1999), this Court stated, parenthetically, that the "extraordinary physical impairment" required for a downward departure "requires medical conditions that [the] Bureau of Prisons is unable to accommodate" (citing *United States v. Altman*, 48 F.3d 96 (2d Cir. 1995)). Deckmejian attempts to characterize this as *dicta*, or as a mis-description of *Altman*, but it is neither. In *Persico*, the relevant defendant, Fusco, had argued that his health deteriorated while in prison, and he therefore was entitled to withdraw his plea agreement. *See Persico*, 164 F.3d at 801. The district court treated the request "as a motion for a downward departure," *id.*, and the

government argued that Fusco's medical conditions were not extraordinary. The district court agreed with the government's view that "the only relevant fact for departure purposes was that the medical staff of the Bureau of Prisons was able to provide adequate care for Fusco." *Id.* When this Court mentioned at the end of its opinion, regarding Fusco, the need for finding a medical condition that the Bureau of Prisons cannot accommodate, it was referring back to this reasoning of the district court. This Court thereby endorsed the district court's specific reasoning in a holding that rejected Fusco's appeal.

Similarly, in *United States v. Martinez*, 207 F.3d 133, 139 (2d Cir. 2000), this Court held that a defendant's diabetes did not justify a downward departure for aberrant behavior because there was no evidence "that Martinez's diabetes is of a type that cannot be adequately cared for within the prison system." The opinion cites *Altman* in the same way that *Persico* did.

At least two other circuits agree with this Court's reasoning as set forth in *Persico* and *Martinez*. In *United States v. Krilich*, 257 F.3d 689, 693 (7th Cir. 2001), *cert. denied*, 534 U.S. 1163 (2002), the court declared that to justify a departure, a medical problem must be "extraordinary in the sense that prison medical facilities cannot cope with it." *United States v. Johnson*, 318 F.3d 821, 826 (8th Cir. 2003), quoted from *Krilich* and reasoned that the phrase

"extraordinary physical impairment" requires that "a defendant's physical condition must be assessed in the light of the situation the defendant would encounter while imprisoned." Because Johnson's heart disease would not restrict his ability to function more "in prison than in the outside world," *id.*, the court reversed a downward departure.

In the face of this authority, the most that Deckmejian can cite is the disagreement of one district court, *United States v. Jimenez*, 212 F. Supp.2d 214 (S.D.N.Y. 2002), which is not the law in this Circuit in light of *Persico/Martinez* and not controlling here.[2] *United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996), also

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[2] In any event, *Jimenez* is wrong in suggesting that *Persico* mis-cited *Altman*, both for the reasons set forth above (because the holding in *Persico* was based independently on the district court's reasoning in that case, not just on *Altman*) and because *Altman* supports the government's position. In *Altman*, the district court found that the defendant's medical conditions "simply need monitoring," and further found that "the Bureau of Prisons would be fully able to monitor his health." 48 F.3d at 104. This Court wrote that it "can conclude," *from these facts*, "that the district court did not consider Altman to have an extraordinary physical impairment." *Id.* The ability of the Bureau of Prisons to meet a defendant's needs therefore can preclude any finding of extraordinary impairment. And given that preclusion, a district court cannot properly find an extraordinary physical impairment without determining what the Bureau of Prisons can accommodate or determining that this potentially preclusive condition does not apply.

Jimenez is also wrong in suggesting that this Court has said anything inconsistent with USSG § 5H1.4. *Persico*, *Martinez*, and *Altman* did nothing more than interpret the phrase "extraordinary physical impairment," the meaning of which is not self-evident. *See also McEwan v. United States*, 279 F. Supp.2d 462, 465 (S.D.N.Y. 2003) (disagreeing with *Jimenez* and concluding that "since there

cited by Deckmejian, adds nothing to Deckmejian's argument because, in that pre-*Persico* case, the ability of the Bureau of Prisons to accommodate the defendant's conditions is not discussed. Before *Persico* and *Martinez*, a district court did not have to discuss this question, and the silence of *Rioux* on the point therefore is meaningless.

Nor does *United States v. Martinez-Guerrero*, 987 F.2d 618 (9th Cir. 1993), support Deckmejian. That case holds that a district court properly can consider the Bureau of Prisons' ability to care for a defendant in finding that an alleged disability is *not* an extraordinary impairment warranting a downward departure. *See id.* at 620. It does not say that a court can grant a downward departure for health reasons *despite the fact* that the Bureau of Prisons can accommodate the defendant's condition.

But even if *Persico* and *Martinez* did not exist, and Deckmejian was correct that the law does not require a finding that the Bureau of Prisons will be unable to address his medical conditions, the district court's failure to make that finding here undermines its specific rationale for the downward departure. The district court did not base the departure on finding that Deckmejian has an extremely *rare* or

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was no showing . . . that the Bureau of Prisons is not fully equipped and capable of ministering to petitioner's medical needs," petitioner's conditions "did not rise to the level of an 'extraordinary physical impairment'").

bizarre condition that makes him extraordinary. Nor did it reason that the *severity* of any particular medical condition makes Deckmejian extraordinary. Instead, the district court based its decision specifically on Dr. Berenson's assertion that "*incarceration*" will worsen Deckmejian's health. A-121 (emphasis added). But *all* of the evidence before the court (because Dr. Berenson admitted to knowing nothing about Bureau of Prisons capabilities, A-82, and Deckmejian offered nothing more) – including Dr. Foley's testimony and the Bureau of Prisons letter – showed that the Bureau of Prisons could care for Deckmejian's conditions.

Given the district court's total reliance on the supposition that the prison environment would adversely affect Deckmejian, the court's failure to make any finding on the Bureau of Prisons' capabilities, its contrary assumption that an appropriate prison *could* accommodate Deckmejian, A-71, and its disregard of the uncontested evidence, destroy the rationale for the downward departure. Even *Jimenez*, on which Deckmejian relies, supports this conclusion, saying that if the defendant's argument is that his "physical frailty will render confinement far more onerous for that defendant than it would otherwise be," 212 F. Supp.2d at 219 n.1, which is precisely Deckmejian's argument, then "the authorities' ability to provide adequate medical care is highly relevant, because it will tend to rebut the claim that imprisonment will be unfairly dangerous or painful for the defendant." *Id.*

C. The District Court Relied on a Legally Inappropriate Factor

Deckmejian misleadingly attempts to spin Judge Griesa's declaration that he relied in part on his own "acquaint[ance] with prison medical facilities" in granting the departure, A-132-133, into an assertion that the judge merely applied his judicial "experience" (Deckmejian Br. 16-17). But Judge Griesa did not say that he relied on his experience in "criminal sentencing" (Deckmejian Br. 17, quoting *United States v. Thorn*, 317 F.3d 107 (2d Cir. 2003)). Instead, he claimed to know what kinds, or degree, of medical care the Bureau of Prisons *currently* could give Deckmejian based on *past*, unidentified, and unexplained "applications I have had from people who are incarcerated in federal institutions," A-120, and one visit to a New York *state* prison, A-95, which indisputably cannot be legally relevant. This was an inappropriate basis for a departure.[3]

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[3] Deckmejian's citations to *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), and *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991), are inapposite on this point. The district courts in these cases did not purport to rely on their own anecdotal knowledge of prison capabilities. In addition, this Court determined that "[e]xtreme vulnerability of criminal defendants is a factor that was not adequately considered by the Commission," 905 F.2d at 605, whereas health plainly was considered by the Sentencing Commission. More generally, it is one thing for courts to acknowledge in these cases, at a very general level, that a risk of attack always exists in prison. It is quite different to presume, as the district court did here, and without even knowing to what prison Deckmejian might be assigned, that the Bureau of Prisons will not be able to provide adequate care for specific medical conditions.

But even if a district court could rely on its own subjective and anecdotal knowledge to draw conclusions about Bureau of Prisons medical care, the court's reasoning still does not justify a departure. On the district court's reasoning, no defendant with medical conditions could *ever* be sent to prison because of the possibility that he or she might not receive the same level of medical care as could be obtained from top private specialists. That is not the law. *See Krilich*, 257 F.3d at 694; *United States v. Restrepo*, 999 F.2d 640, 645-46 (2d Cir.), *cert. denied*, 510 U.S. 954 (1993).

D. The District Court Never Compared Deckmejian's Circumstances to Any Other Case

Deckmejian's brief does not even try to defend the district court's refusal, A-134-135, to compare Deckmejian's situation to those of other defendants sentenced under the Guidelines. Because the question whether a discouraged factor, like health, "'nonetheless justifies departure because it is present in some unusual or exceptional way, [is] . . . determined in large part by comparison with the facts of other Guidelines cases,'" *United States v. Senatamu*, 212 F.3d 127, 134 (2d Cir. 2000) (quoting *Koon v. United States,* 518 U.S. 81, 98 (1996)), the district court's refusal to make any comparison further undermines the basis for the departure.

E. The District Court Made No Finding that Deckmejian's Age Was Unusual in Any Respect

Deckmejian's brief does not even try to argue that his age is extraordinary. He suggests only that the district court was entitled to consider age and physical condition together (Deckmejian Br. 18 n.4). But the district court stated that "69 years of age is not elderly[.]" A-71. Since the court did not even consider Deckmejian to be elderly, USSG § 5H1.1 provides no basis for a departure. To the extent that the court's finding of an extraordinary physical impairment was based on age, that finding was clearly erroneous.

II. The Extent of the Downward Departure Was an Abuse of Discretion

To have properly exercised its discretion over the degree of the departure, the district court should have explained why its concern about Deckmejian's health could not be satisfied by a sentence other than an extreme departure that excused Deckmejian from prison altogether. In this case, two alternatives were readily available: sentencing Deckmejian to prison with a recommendation that he be designated to a Bureau of Prisons medical facility, or sentencing him to a prison term of less than 24 months followed by home detention or supervised release.

Deckmejian attempts to defend the district court's rejection of the first alternative by suggesting (contrary to his earlier rhetoric) that he is not so ill as to

need to be sentenced "to a hospital" (Deckmejian Br. 25). But the government never suggested that Deckmejian had to be confined to bed. Even in a hospital facility, "[h]e could get up and walk around, he could read, he could exercise, he could do whatever they do in the general [prison system]." A-131. A hospital facility simply makes hospital services readily available in case a defendant needs them, and provides closer monitoring of medical conditions. A-130. The district court rejected this option by setting up a straw man – saying "If he went to a hospital and got into a hospital room in a hospital bed, can you imagine anything worse?" A-131 – and then knocking down that straw man. The court never explained why Deckmejian could not reasonably, and safely, be sentenced to prison and then designated, like Alfred Taubman and many other defendants, to a facility that has a working relationship with the Mayo Clinic or other sources of medical expertise.

Deckmejian's brief offers no argument on the district court's failure to explain why a less extreme departure would not have sufficed. The district courts in *United States v. Taubman* and other cases chose this solution for defendants who manifestly were more acutely ill than Deckmejian, and thereby balanced the defendant's condition with the a critical purpose of the criminal laws and the Sentencing Guidelines – deterring future crimes.

By contrast, the district court here did not balance any competing considerations, summarily disregarded all alternatives offered by the prosecution, and simply excused Deckmejian from prison altogether. Given the non-critical nature of Deckmejian's conditions, which simply require monitoring and basic medications, this refusal to impose any period of imprisonment was an abuse of discretion.

III. The District Court Erred by Refusing to Impose Any Fine

Deckmejian's contention that the district court waived a fine based on the burden it might impose on Deckmejian's dependents is frivolous. As an initial matter, Deckmejian does not dispute that he did not even attempt to prove inability to pay, and the court's finding that "there is money available to pay substantial restitution [of $186,000]," A-170, plus the Presentence Report's finding of almost $2 million in net worth, refute any inability to pay. Moreover, nothing in the Final Judgment mentions dependents in connection with a fine. To the contrary, the Judgment says: "Fine waived or below the guideline range *because of inability to pay*." SPA-29 (emphasis added).

Nor does the transcript excerpt quoted by Deckmejian (Deckmejian Br. 26) support his position. The court does not make any finding of a potential fine causing an undue burden on Deckmejian's family (and could not have done so,

because Deckmejian never argued the point or offered any evidence). Instead, Judge Griesa's statement "It seems to me that the maximum consideration should go to reimbursing the victims, *and that's why* I am agreeing with the Government . . . and I'm ordering payment of all of that in the way of restitution, but that is enough of a financial penalty," A-171 (emphasis added), confirms that the court believed that restitution could substitute for a fine. But restitution and fines serve fundamentally different purposes, and the district court's belief therefore was erroneous as a matter of law, a point that Deckmejian does not contest.

In short, the district court did not act within its discretion because, under the circumstances, it had no discretion. The Guidelines made imposition of a fine mandatory absent Deckmejian's proof of inability to pay, and since no evidence was offered to support such a finding, the Judgment was clearly erroneous on that point and the court's substitution of restitution for a fine was an error of law.

UNITED STATES' OPPOSITION TO CROSS-APPEAL

ARGUMENT

I. At Present, There Is No *Blakely* Issue in this Circuit

As of the date of this brief, Deckmejian has no claim based on *Blakely v. Washington*, 124 S. Ct. 2531 (2004), because in this Circuit that decision does not apply to the Federal Sentencing Guidelines. In *United States v. Mincey*, 380 F.3d 102, 106 (2d Cir. 2004), this Court held that it would not apply *Blakely* to the Guidelines "[u]nless and until the Supreme Court rules otherwise[.]" Until then, the prevailing law of this Circuit does not require that the facts on which the district court bases sentencing enhancements be determined by a jury beyond a reasonable doubt. *Accord*, *e.g.*, *United States v. Slaughter*, __ F.3d __, 2004 WL 2303442 (2d Cir. Oct. 14, 2004); *United States v. Morgan*, __ F.3d __, 2004 WL 2251664 (2d Cir. Oct. 7, 2004).

II. In the Alternative, Deckmejian's Failures to Object Bar Any Relief

Even if *Blakely* did apply to the Federal Sentencing Guidelines, a defendant bears a difficult burden in claiming that a court's sentencing findings violated his right to a jury trial when the defendant did not object to those findings or when the issue is a question of law that would not have been decided by the jury in any event. Failure to make a timely constitutional objection in the district court,

including objections based on the case that *Blakely* applied and construed, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), subjects the alleged error to plain error review under Fed. R. Crim. P. 52(b). *United States v. Joyner*, 313 F.3d 40, 45 (2d Cir. 2002); *United States v. Outen*, 286 F.3d 622, 634 (2d Cir. 2002); *accord United States v. Candelario*, 240 F.3d 1300, 1304 & n.4 (11th Cir. 2001).

Here, Deckmejian failed to raise any objection based on *Blakely* or *Apprendi*. Indeed, he did not object *on any factual ground* to the findings about which he now complains:

1. Loss of $450,000 – The district court expressly asked Deckmejian's counsel, Mr. Santangelo, whether he objected to the $450,000 figure, and counsel said he had no objection:

> THE COURT: Is it $450,000 even?
>
> MS. MEIKLEJOHN: No, I don't think so, your Honor. I think it came out to an uneven number, but it was certainly about that number.
>
> THE COURT: Just limiting the issue to that, Mr. Santangelo, is there an issue about that amount?
>
> *MR. SANTANGELO: No, sir.*
>
> THE COURT: That is helpful.

A-35 (emphasis added). *See also* A-117 (court reiterates: "You agreed to all the illegal conduct which is charged and that the loss was foreseeable, the loss in the

amount of $450,000.").

Instead, Deckmejian's position was a *legal* argument: that Deckmejian could be held responsible only "for the amount of the fraud that he intends to commit." A-33. The court rejected that view of the law, saying that Deckmejian should be responsible for the amount "[t]hat he foresees if he is convicted of a conspiracy." *Id.* Similarly, when the district court gave its ruling on the issue, the court said: "*It is my understanding of the law* that Mr. Deckmejian is responsible, in the sense of calculating the guidelines, for an amount which he either knew about or was foreseeable, and I find that that amount is $450,000." A-116. Accordingly, even under a hypothetical regime that would require the jury to find the facts necessary to support sentencing enhancements, there was no dispute here on the factual issue of the loss, and the legal dispute would not have gone to the jury.

Because Deckmejian made no factual objection to the loss calculation of $450,000, his claim that this enhancement "directly affected the imposition of restitution in the amount of $186,000" (Deckmejian Br. 28) also fails.

2. Increase for "more than minimal planning" – When the district court mentioned this enhancement, Deckmejian made no objection whatsoever, factual or legal. A-117. In fact, Deckmejian's written objections to the Presentence Report *agree with* the two-level enhancement. A-186 ("The adjusted offense level

should be calculated as base offense level 6, +2 for more than minimal planning . . . .").

Under the circumstances of this case, Deckmejian's failures to object mean that he cannot satisfy at least two of the prerequisite conditions for surviving plain error review. *See Joyner*, 313 F.3d at 45. First, even assuming that failure to submit the quantity of the loss and more than minimal planning issues to the jury was error, that error did not "affect substantial rights," *id.,* because Deckmejian did not dispute the $450,000 figure or the fact that his offense involved more than minimal planning. Deckmejian's concessions mean that the jury could not have made findings on these issues different from the court's, and the sentence would not have been any different. Second, and for the same reason, the error did not seriously affect the "fairness, integrity, or public perception" of Deckmejian's trial or sentence, *id.* at 46, because the facts improperly found by a judge, rather than by a jury, were "essentially uncontroverted," *Johnson v. United States*, 520 U.S. 461, 470 (1997). *See also Joyner*, 313 F.3d at 46 (no basis for relief of plain error where pertinent facts undisputed).[4]

[4] Given the split in the courts of appeals on whether *Blakely* applies to the Federal Sentencing Guidelines, any *Blakely*-related error could not be considered "plain."

CONCLUSION

For the reasons set forth above, and in the United States' opening brief, the sentence should be vacated in all respects other than the restitution order, and the case remanded with instructions to re-sentence Deckmejian to imprisonment within the Guideline range and a fine within the Guideline range. Deckmejian's cross-appeal should be dismissed.

Respectfully submitted.

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
JAMES J. GRIFFIN
Deputy Assistant Attorneys General

RALPH T. GIORDANO
REBECCA MEIKLEJOHN
DOUGLAS M. TWEEN
ELIZABETH PREWITT
Attorneys
U.S. Department of Justice
Antitrust Division
26 Federal Plaza, Room 3630
New York, NY 10278

JOHN J. POWERS, III
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice
Antitrust Division
R.F.K. Main Justice Building
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-2414

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Dated: November 3, 2004

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John J. Powers III

CERTIFICATE OF SERVICE

I hereby certify that today, November 3, 2004, I caused two copies of the accompanying Reply Brief and Opposition to Cross-Appeal for Appellant United States of America to be served on the following by Federal Express:

George L. Santangelo, Esq.
111 Broadway, Room 1706
New York, New York 10006

Attorney for Defendant – Appellee – Cross-Appellant Birj Deckmejian

_____
Steven J. Mintz