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 UNITED STATES OF AMERICA  
 9

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,	)	SA CR No. 07-69(A)-AG
	)	
13 Plaintiff,	)	<u>GOVERNMENT'S SUPPLEMENTAL</u>
	)	<u>SENTENCING POSITION</u>
14 v.	)	
	)	
15 LEO WINSTON SMITH,	)	
	)	
16 Defendant.	)	
_____	)	

17  
 18 **I. An Evidentiary Hearing is Not Necessary**

19 The government filed a thorough position, setting forth  
 20 evidence which supports the sentencing enhancements sought.  
 21 Similarly, the Presentence Report set forth specific findings  
 22 regarding each sentencing enhancement. In reply, defendant made  
 23 only a "general objection to all factual findings and conclusions  
 24 [in the Presentence Report] regarding the 2003 payments."  
 25 (Def.'s Objections at 1). Defendant did not specifically address  
 26 any of the evidence offered by the government or address the  
 27  
 28

1 specific factual findings contained in the PSR that justified the  
2 application of the sentencing enhancements.<sup>1</sup>

3 Rule 32 "does not create a 'general right to an evidentiary  
4 hearing at sentencing.'" United States v. Stein, 127 F.3d 777,  
5 780 (9th Cir. 1997); see also United States v. Houston, 217 F.3d  
6 1204, 1206-07 (9th Cir. 2000) (holding that a district court's  
7 decision not to hold an evidentiary hearing in resolving disputed  
8 matters at sentencing is reviewed for abuse of discretion).

9 As long as the district court allows a defendant to "rebut  
10 the recommendations and allegations of the presentence report  
11 either orally or through the submission of written affidavits or  
12 briefs, Rule 32 does not require an evidentiary hearing." Stein,  
13 127 F.3d at 780-81 (internal quotation omitted). Here, defendant  
14 will have an opportunity to argue his case during the sentencing  
15 hearing scheduled for Friday, December 18, 2009. Thus, Rule 32  
16 is satisfied without the need for a prolonged evidentiary  
17 hearing.

18 Indeed, because defendant made only a general objection, an  
19 evidentiary hearing is not warranted. See United States v.  
20 Nguyen, 303 Fed. Appx. 441 (9th Cir. 2008) (stating "[defendant]  
21 made general objections that he did not qualify for the two  
22 enhancements and did qualify for safety valve adjustment, he did  
23  
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25  
26 <sup>1</sup> While defendant made some objections to the language used  
27 in the PSR (Def.'s Objections at 2-3), those objections do not  
affect the findings made by the Probation Office with regard to  
the enhancements and the Guidelines calculation.

1 not specifically contest any facts in the Presentence Report.  
2 Therefore, a hearing was not necessary." ).

3       Although Rule 32(i)(3)(B) provides that at sentencing a  
4 court "must -- for any disputed portion of the presentence report  
5 or other controverted matter -- rule on the dispute or determine  
6 that a ruling is unnecessary either because the matter will not  
7 affect sentencing, or because the court will not consider the  
8 matter in sentencing," only specific factual objections trigger  
9 Rule 32(i)(3)(B). See United States v. Saeteurn, 504 F.3d 1175,  
10 1181 (9th Cir. 2007) (holding that Rule 32(i)(3)(B) "is limited  
11 to factual disputes which affect the temporal term of the  
12 sentence the district court imposes"); United States v. Lindholm,  
13 24 F.3d 1078, 1085 n.7 (9th Cir. 1994) (holding that Rule  
14 32(c)(3)(D), Rule 32(i)(3)(B)'s predecessor, "only applies to  
15 factual inaccuracies, not to recommendations, opinions or  
16 conclusions not factual in nature").

17       Although defendant objected to certain paragraphs of the  
18 PSR, he never alleged what information was inaccurate. The  
19 required specific factual objections are absent from defendant's  
20 objection.

21       Indeed as noted by the D.C. Circuit:

22             The burden is on the government to prove facts in  
23 support of a sentence enhancement by a preponderance of  
24 the evidence. Once the presentence report has been  
25 prepared, however, the court may generally, unless the  
26 defendant contests the report's factual assertions,  
27 assume they are correct without conducting its own  
28 inquiry. Indeed, a general objection, in the form of a  
claim that the report does not satisfy the government's

1 burden of proof, is not enough to draw the facts into  
2 question.

3 United States v. Washington, 115 F.3d 1008, 1010 (D.C. Cir. 1997)  
4 (internal citations omitted); see also United States v. Pinnick,  
5 47 F.3d 434, 437 (D.C. Cir. 1995) (stating objecting to a  
6 presentence report's legal conclusion does not suffice to dispute  
7 the factual assertions on which that conclusion rests, there must  
8 be a clear and specific objection required to place a factual  
9 assertion in dispute.).

10 Given the lack of any evidence contradicting the facts set  
11 forth in the PSR and in light of the evidence set forth in the  
12 government's filing, the district court should adopt the PSR as  
13 "reliable" and "established." See United States v. Rosales, 917  
14 F.2d 1220, 1222 (9th Cir. 1990) ("In resolving objections to the  
15 presentence report, the district court should make clear on the  
16 record its resolution of all disputed matters, . . . and specific  
17 findings of fact are to be encouraged. The district court  
18 satisfies [this] requirement by adopting the conclusions in the  
19 PSR.").

20 Based on the lack of a specific objection, the government  
21 will submit on its filings and the findings in the Presentence  
22 Report. Thus, a two-day evidentiary hearing is not necessary.  
23 However, the government reserves the right to present rebuttal  
24 evidence at the sentencing hearing on Friday, December 18, 2009,  
25 if defendant presents evidence at that time.  
26  
27  
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1 **II. The Government Recommends A Fine of \$7,500**

2 In it's initial sentencing papers, the government sought a  
3 fine at the high-end of the fine range. However, based on  
4 ambiguity of paragraph 19 of the plea agreement, the government  
5 agrees to apply its low-end recommendation to the fine.  
6 Accordingly, in accordance with the plea agreement and the PSR,  
7 the government recommends that this Court fine defendant in the  
8 amount of \$7,500.

9 Dated: December 11, 2009

10 Respectfully submitted,

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