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REVISING THE ILLEGAL REENTRY GUIDELINE

Nearly a decade ago, this Commission modified the illegal reentry guideline, USSG § 2L1.2, based on judicial criticism of the guideline, concerns that prosecutorial charging practices instituted in response to rising caseloads were creating inter-district disparities, and concerns that judges were creating additional disparities by attempting to compensate for an enhancement they believed was too harsh.¹ Today, five years after the Supreme Court rendered the Guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005), it is clear that USSG § 2L1.2 is still creating significant disparities, that the previous revisions did not go far enough, and that it is once again time to revisit that guideline. Revising § 2L1.2 will fulfill the Commission’s responsibility to adjust the guidelines in light of evidence about judicial practices,² and is necessary for the Commission to meet its purposes of avoiding unwarranted disparities and assuring that the § 3553(a)(2) purposes of punishment are met.³

¹ See Linda Drazga-Maxfield, *Aggravated Felonies and § 2L1.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527, 527–31 (2003).

² One of the most significant aspects of the Commission’s role is to “periodically ‘review and revise’ the guidelines,” *United States v. Mistretta*, 488 U.S. 361, 369 (1989), in light of “comments and data,” 28 U.S.C. § 994(o); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8 (1988) (“The Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time.”). Early on, the Commission itself recognized that the guidelines are part of an “evolutionary process,” and promised to further this process “by monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so.” USSG § 1A1.1(3); (4)(c).

³ Two of the Commission’s central purposes are to “establish sentencing policies and practices . . . that . . . assure the meeting of the purposes of sentencing . . . in [18 U.S.C. §] 3553(a)(2) . . . , [and to] avoid[] unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct.” 28 U.S.C. § 991(b)(1)(A) & (B); see also 28 U.S.C. § 994(f); Breyer, *supra*, at 4 (“Congress’s second purpose [in enacting the Sentencing Reform Act] was to reduce ‘unjustifiably wide’ sentencing disparity.”). In fact, the original introduction to the guidelines confidently states that the approach of basing sentences on past practice and amending the guidelines based on data and empirical evidence “will cure wide disparity.” USSG § 1A1.1(5).

Unfortunately, the current illegal reentry guidelines,⁴ in combination with the Department of Justice's illegal reentry practices, are creating rather than curing disparities. Inter-district disparities continue to proliferate as a result of "fast-track" early disposition programs that operate in certain federal districts. Meanwhile, judges in other districts are demonstrating their unhappiness with various aspects of the guideline by reducing sentences in significant numbers of cases. Those reductions, in turn, are creating additional disparities.

In my testimony I will first discuss the disparities that result from fast-track programs and from the operation of the illegal reentry guidelines. I will then examine the various aspects of § 2L1.2 that lead judges to believe that it is too harsh, and the various rationales they use to reduce sentences below the guidelines range. In conclusion, I will propose that the Commission can limit or eliminate judge- and prosecutor-created disparities in illegal reentry cases by revising the § 2L1.2 enhancement scheme and by lowering the guideline itself.

I. The Illegal Reentry Guidelines and Illegal Reentry Policy Create Significant Disparities.

Fast-track disparities undermine the Commission's fundamental goal of reducing unwarranted sentencing disparities. Because the vast majority of illegal reentry cases are prosecuted in districts with fast-track programs, the vast majority of defendants being sentenced for this offense receive below-guidelines sentences. In 2005, one court calculated that "approximately 73 percent of illegal reentry cases are already subject to fast-track dispositions." *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1268 (D. Utah 2005) (citing Bureau of Justice Statistics). The rate has climbed since then. "In fiscal year 2007, the most recent year in which statistics are available, over 79 percent of immigration guideline sentences were imposed in the sixteen districts with fast-track programs for illegal reentry." Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 FED. SENT. REP. 311, 314 (June 2009) (citing Bureau of Justice Statistics, Federal Justice Statistics Program, *available at* <http://fjsrc.urban.org>).⁵ It is therefore clear that "the otherwise applicable Guidelines sentence exceed[s] established norms for defendants convicted of similar offenses." Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After Booker*, 37 MCGEORGE L. REV. 627, 647 (2006) (noting that judicial reductions under § 3553(a)(6) are most justified when the defendant is facing a higher sentence than the typical sentence for a given offense). In sum, fast-track

⁴ USSG § 2L1.2; USSG § 5K3.1 (policy statement).

⁵ To reach this number, Gorman looked at FY 2007 sentencing statistics from the Federal Justice Statistics Resource Center, which is based upon data from the USSC's Offender Dataset (OPA Standardized Research datafile). He went to the FJSRC home page (<http://fjsrc.urban.org>) and opened the "Offenders Sentenced" query. He first selected Year 2007 and the variable "U.S. Federal judicial district," then chose the "Add Column" option, and then selected the variable "USSC offense type." The resulting data report indicated that of the 17,532 immigration sentences imposed in FY 2007, 13,859 were imposed in the 16 districts authorized to employ fast-track sentencing programs for illegal reentry. It should be noted that it would be extremely helpful if the Commission were to provide statistics for illegal reentry cases, specifically, rather than merely providing statistics for the more general category of "immigration" cases.

programs and the fast-track policy statement (USSG § 5K3.1) create significant disparities among otherwise similarly-situated individuals, and only a small minority of illegal reentry defendants actually receive sentences within the guidelines ranges dictated by USSG § 2L1.2.

Maintaining an illegal reentry guideline that many judges believe results in sentences that are too harsh also undermines the Commission's goal of avoiding unwarranted disparities. Statistical evidence and an analysis of post-*Booker* case law demonstrate that, as was the case in 2001, judges are again concerned that many of the sentences this guideline produces are too high. Moreover, judges now they have the freedom to grant lower sentences based on this concern. The sentence reductions that result from judges' concerns create disparities, because different judges reduce sentences below the guidelines range based on different rationales, and even judges using the identical rationale reduce sentences to different extents.

In the Northern District of Illinois, for example, fully 42.3% of immigration sentences issued in 2008 were below the guidelines range, and in the Southern District of New York, 44.7% of such sentences were below the range.⁶ In the Seventh Circuit and the Second Circuit, 32% and 26% of immigration sentences respectively were below the guidelines range, meaning that judges granted sentences below the range in over one quarter of all such cases in those circuits.⁷ Significantly, none of those reductions resulted from § 5K3.1 fast-track departures, because the U.S. Attorney's Offices in those districts and circuits do not operate fast-track programs, and only a handful of the below-range sentences resulted from government sponsored downward departures.

II. Reasons Courts Give For Granting Below-Guidelines Sentences in Illegal Reentry Cases

Case law demonstrates that judges are granting reductions in illegal reentry cases because they are concerned that the guidelines create unwarranted disparities under § 3553(a)(6) or do not meet the purposes of sentencing in § 3553(a)(2). Judges single out various aspects of the illegal reentry guidelines as resulting in unfairly harsh sentences: (1) the fast-track disparity; (2) the fact that § 2L1.2 double-counts criminal history; (3) the fact that the 16-level enhancement in § 2L1.2(b)(1)(A) overstates the seriousness of certain prior convictions; and (4) the fact that the Commission was not acting in its characteristic institutional role when it created the 16-level enhancement. To ameliorate these concerns, courts grant below-guidelines sentences, thus creating additional disparity.

⁶ U.S.S.C., *Statistical Information Packet, Fiscal Year 2008: Northern District of Illinois*, Table 10, available at <http://www.ussc.gov/JUDPACK/2008/iln08.pdf>; U.S.S.C., *Statistical Information Packet, Fiscal Year 2008: Southern District of New York*, Table 10, available at <http://www.ussc.gov/JUDPACK/2008/nys08.pdf>.

⁷ U.S.S.C., *Statistical Information Packet, Fiscal Year 2008: Seventh Circuit*, Table 10, available at <http://www.ussc.gov/JUDPACK/2008/7c08.pdf>; U.S.S.C., *Statistical Information Packet, Fiscal Year 2008: Second Circuit*, Table 10, available at <http://www.ussc.gov/JUDPACK/2008/2c08.pdf>.

A. The Fast-Track Disparity

Since *Booker*, many judges in districts without fast-track programs have reduced illegal reentry sentences out of a concern that those programs create unwarranted disparities. Numerous judges granted such reductions after *Booker*.⁸ Although a number of circuit courts ruled thereafter that the disparity was not a legitimate basis for granting below-range sentences,⁹ there is currently a circuit split over whether *Kimbrough v. United States*, 128 S. Ct. 558 (2007), grants judges discretion to reduce sentences based on the disparity.¹⁰ The fast-track disparity also contributes significantly to the perception that the sentences dictated by USSG § 2L1.2 are greater than necessary to meet the § 3553(a)(2) purposes of punishment. Given the Supreme Court's ongoing expansion of judicial discretion at sentencing and its consistent reversal of circuit courts' attempts to prevent judges from sentencing outside the guidelines range, the Court is likely to come down on the side of judicial discretion when and if it considers the fast-track disparity issue.¹¹

B. Double-Counting

Other judges deviate from the illegal reentry guideline based on a concern that it double-counts criminal history in a way and to a degree that results in unfair sentences. This issue was first raised in *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E.D. Wis. 2005), which noted that protection of the public and deterrence justifications for the offense-level enhancements “substantially overlap with those the Commission uses to justify increasing the

⁸ See, e.g., *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. 2005); see also *United States v. Miranda-Garcia*, No. 6:05-CR-202-ORL-31DAB, 2006 WL 1208013, at *2 (M.D. Fla. May 4, 2006); *United States v. Delgado*, No. 6:05-cr-30-Orl-31KRS, 2005 WL 5921159, at *2 (M.D. Fla. 2005); *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728, 733 (E.D. Va. 2005); *United States v. Medrano-Duran*, 386 F. Supp. 2d 943, 948 (N.D. Ill. 2005); *United States v. Linval*, No. 05 CR 345(RWS), 2005 WL 3215155, at *7 (S.D.N.Y. Nov. 23, 2005); *United States v. Santos*, 406 F. Supp. 2d 320, 329 (S.D.N.Y. 2005).

⁹ See *United States v. Andújar-Arias*, 507 F.3d 734, 738-39 (1st Cir. 2007); *United States v. Mejia*, 461 F.3d 158, 163, 164 (2nd Cir. 2006); *United States v. Vargas*, 477 F.3d 94, 98-100 (3rd Cir. 2007); *United States v. Perez-Pena*, 453 F.3d 236, 243 (4th Cir. 2006); *United States v. Aguirre-Villa*, 460 F.3d 681, 683 (5th Cir. 2006); *United States v. Hernandez-Fierros*, 453 F.3d 309, 313-4 (6th Cir. 2006); *United States v. Galicia-Cardenas*, 443 F.3d 553, 555 (7th Cir. 2006); *United States v. Sebastian*, 436 F.3d 913, 916 (8th Cir. 2006); *United States v. Marcial-Santiago*, 447 F.3d 715, 718 (9th Cir. 2006); *United States v. Martinez-Trujillo*, 468 F.3d 1266, 1269 (10th Cir. 2006); *United States v. Castro*, 455 F.3d 1249, 1252 (11th Cir. 2006).

¹⁰ Compare *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3rd Cir. 2009) and *United States v. Rodriguez*, 527 F.3d 221, 231 (1st Cir. 2008), with *United States v. Gomez-Herrera*, 523 F.3d 554, 564 (5th Cir. 2008), cert. denied, 129 S. Ct. 624 (2008), *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 741 (9th Cir. 2009), and *United States v. Vega-Castillo*, 540 F.3d 1235, 1238-39 (11th Cir. 2008), cert. denied, No. 08-8655, 2009 U.S. Lexis 4716 (June 22, 2009).

¹¹ See Alison Siegler, *Introduction: Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT. REP. 299 (June 2009).

defendant's criminal history score." *Id.* at 962; *see also id.* at 963 ("Although it is sound policy to increase a defendant's sentence based on his prior record, it is questionable whether a sentence should be increased twice on that basis."). Courts have expressed concern that using a single prior conviction to increase a defendant's sentence along both axes, especially when the offense level increase is 16-levels, results in a sentence that overstates the particular defendant's risk of recidivism and is thus greater than necessary to protect the public under § 3553(a)(2)(C). *See, e.g., United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321, 1328 (D.N.M. 2005) (holding that "a 16-level enhancement seems far out of proportion with any reasonable assessment of Defendant's dangerousness or propensity to commit crimes in the future.") (citations omitted). A number of courts have granted below-guidelines sentences based on this rationale.¹² Moreover, the Sixth Circuit recently reversed a sentence as procedurally unreasonable because the judge failed to address the defendant's argument that USSG § 2K2.1 unfairly double-counted criminal history. *See United States v. Robertson*, 2009 WL 260705, *4 (6th Cir. 2009) (unpublished).¹³ It is clear that judges within the Sixth Circuit are likewise required to consider the same argument under § 2L1.2. *See id.* at *13-14 (citing *United States v. Hernandez-Fierros*, 453 F.3d 309, 313 (6th Cir. 2006), for the proposition that double-counting is a legitimate reason for "a sentencing court [to] reject[] the recommended guidelines range" in illegal reentry cases).

In considering the double-counting argument, judges have reduced sentences to different degrees. Thus, the judge in *Carballo-Arguelles* granted a one-level reduction, 446 F. Supp. 2d at 745, the judge in *Santos* granted a three-level reduction, 406 F. Supp. 2d at 328, and the judge in *Zapata-Trevino* granted an eight-level reduction based on a combination of arguments against the application of the guidelines range, 378 F. Supp. 2d at 1329. On remand, the judge in *Robertson* granted a sentence two years below the range based on the double-counting argument, reducing the sentence from the low end of 84 months to 60 months.¹⁴ Such variant reductions have the potential to create disparities among similarly-situated defendants.

C. The 16-Level Enhancement

Numerous courts have found below-guidelines sentences justified on the grounds that the 16-level enhancement overstates the seriousness of the prior conviction. Judges are concerned

¹² *See, e.g., United States v. Andrade-Torres*, 2009 WL 3207781, at *1-2 (D.N.M. Aug. 27, 2009) (reducing a defendant guidelines by two levels because his prior drug distribution conviction, for which he had received 151 months, resulted in a 16-level enhancement and 5 criminal history points); *United States v. Evangelista*, 2008 WL 5057862, at *6 (S.D.N.Y. Nov. 26, 2008; amended Dec. 1, 2008) ("Nowhere but in the illegal re-entry Guidelines is a defendant's offense level increased threefold based solely on a prior conviction."); *United States v. Carballo-Arguelles*, 446 F. Supp. 2d 742, 745 (E.D. Mich. 2006); *United States v. Austin*, 2006 WL 305462, at *8 (S.D.N.Y. Feb. 6, 2006); *United States v. Santos*, 406 F. Supp. 2d 320, 327 (S.D.N.Y. 2005); *United States v. Ramon Ramirez*, 04-CR-1021 (S.D.N.Y. 2004; Rakoff, J.).

¹³ Like the illegal reentry guideline, § 2K2.1 uses a defendant's prior convictions to increase both his offense level and his criminal history score. *See Galvez-Barrios*, 355 F. Supp. 2d at 961 n.1.

¹⁴ *See Robertson*, 2009 WL 260705, at *5; *United States v. Robertson*, 3:07-CR-00013-1, Docket #39 (Judgment & Commitment Order), available at <https://ecf.tnmd.uscourts.gov/doc1/16911042428>.

that the 16-level enhancement sweeps too broadly, reaching prior convictions with differing levels of seriousness, including offenses that are misdemeanors under state law,¹⁵ and counting decades-old priors to the same extent as very recent priors.¹⁶ It is evident from these cases that, as with the double-counting rationale, judges grant differing offense level reductions based on these overstatement concerns.

Several circuit courts have reversed lower courts for failing to account for or grant a lower sentence based on the age or minor nature of a defendant's prior conviction. The Ninth Circuit recently reversed a within-guidelines sentence after finding that it was substantively unreasonable for the district court to apply the full 16-level enhancement to a defendant whose qualifying prior conviction for assault with great bodily harm and attempted voluntary manslaughter was 25 years old. *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009). The court's holding rested on "the staleness of Amezcua's prior conviction and his subsequent history showing no convictions for harming others or committing other crimes listed in Section 2L1.2," specifically "violent crimes." *Id.* at 1055, 1056. The court concluded that the 16-level enhancement "substantially overstates the nature and circumstances of [Amezcua's] offense [and] . . . the need for the sentence imposed . . . to reflect the seriousness of the offense, to provide respect for the law, and to provide just punishment for the offense." *Id.* The court also held that "it is unreasonable to treat a decades-old enhancing conviction as requiring as much deterrence as a recent conviction" under § 3553(a)(2)(C). In addition, the court cited *Gall v. United States*, 552 U.S. 38, 55 (2007), for the proposition that rather than creating disparity, a non-guidelines sentence would avoid "unwarranted similarities": "It is not reasonable for Amezcua's record of relative harmlessness to others for the past twenty years to subject him to the same severe offense level enhancement applied to a recent violent offender." *Amezcua*, 567 F. 3d at 1058. The Tenth Circuit has reversed a within-guidelines sentence because the judge did

¹⁵ See, e.g., *United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321, 1326-27 (D.N.M. 2005) (noting that § 2L1.2 App. Note. 1(b)(2) defines a felony as any offense punishable by a term of imprisonment of over one year, and holding that given the specifics of defendant's prior misdemeanor conviction for which he had received probation, "to subject Defendant to the same sixteen-level enhancement applied to defendants with prior convictions for much more serious crimes produces a nonsensical result that is contrary to the Guidelines' goals of uniformity and proportionality").

¹⁶ See, e.g., *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1117-18 (10th Cir. 2006) (holding that an argument requesting a reduction based on "the incongruity between the actual conduct involved in his prior . . . conviction and the 16-level increase . . . is not clearly meritless") (citing cases); *United States v. Trujillo-Terrazas*, 405 F.3d 814, 819-21 (10th Cir. 2005) (holding that because the 16-level enhancement overstated the seriousness of the defendant's conduct, "the 3553(a) factors warrant a departure, and perhaps a significant departure from . . . the Guidelines"); *United States v. Delgadillo-Gallegos*, 2009 WL 3672833 (D.N.M. Oct. 6, 2009) (granting a one-level reduction because a 16-level enhancement for the defendant's particular sexual battery "was not as severe as certain other qualifying conduct" and thus "appears excessive"); *United States v. Maleriano-Alvarez*, 2009 WL 3207925, at *1-2 (D.N.M. Aug. 27, 2009) (reducing a defendant's guidelines by five levels because the 16-level enhancement was based on a conviction for aggravated robbery that was over 20 years old, and he had "not shown any other signs of violence or significant criminality"); *United States v. Arellano-Garcia*, 2006 WL 4109665, at *6-7 (D.N.M. July 11, 2006) (reducing a defendant's guidelines by 8 levels based on the nature and circumstances of the prior conviction that led to a 16-level enhancement).

not account for “[t]he relatively trivial nature of [the defendant’s] criminal history,” a third-degree arson conviction for “tossing a lighted match through a car window” for which the defendant had received a \$35.00 fine, reasoning, “[t]o punish this prior conduct in the same manner [as more serious violence] could be seen to run afoul of 3553(a)(6).” *Trujillo-Terrazas*, 405 F.3d at 819-20.

A related concern is that the illegal reentry guideline is simply too harsh, and that the 16-level increase especially is “far out of proportion to any reasonable assessment of dangerousness.” *Galvez-Barrios*, 355 F. Supp. 2d at 963. It is striking that fully 89% of the illegal reentry defendants the Commission studied in 2001 had served less than 24 months in prison for their prior aggravated felony, and that 51% of them had served six months or less. *Drazga-Maxfield*, *supra*, at 536-37. The cases cited above suggest that many judges are simply not comfortable with imposing sentences within the illegal reentry guideline’s ranges on defendants whose prior conduct is older or was deemed relatively minor by the original judge, regardless of whether the resulting conviction is termed an aggravated felony or even a crime of violence.

D. The Commission’s Failure to Act in its Characteristic Institutional Role

As the Commission is aware, judges around the country are reducing sentences in a variety of cases based on the argument that the Commission has not fulfilled its “characteristic institutional role,” *Kimbrough*, 128 S. Ct. at 575, in creating and modifying certain guidelines.¹⁷ The Commission’s characteristic institutional role has two components: (1) the Commission “develop[s] Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports”; and (2) the Commission “collect[s] and examine[s]” data, including information about how courts are sentencing, and “revise[s] the guidelines accordingly.” *Rita*, 551 U.S. at 349. “*Kimbrough* challenges” are based on the Supreme Court’s statement that when the Commission creates and modifies guidelines based on “empirical data and national experience,” *Kimbrough*, 128 S. Ct. at 574, “it is fair to assume that [those guidelines] . . . reflect a rough approximation of sentences that might achieve 3553(a)’s objectives,” *Rita*, 127 S. Ct. at 2464-65 (quoted in *Kimbrough*, 128 S. Ct. at 574). When judges find that the Commission has not acted in its characteristic role in creating a given guideline, they conclude that that guideline results in sentences that are “greater than necessary” to achieve 3553(a)’s purposes of punishment. These judges understand that they are “free to make [their] own reasonable application of § 3553(a) factors,” and they “reject (after

¹⁷ See, e.g., *United States v. Herrera-Zuniga*, 571 F.3d 568, 586 (6th Cir. 2009) (“[A] categorical, policy-based rejection of the Guidelines . . . is permissible where the guidelines in question do not exemplify the Commission’s exercise of its characteristic institutional role.”) (citations omitted); *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008) (Because “the guidelines at issue in this case do not reflect the unique institutional strengths of the Sentencing Commission in that they are not based on study, empirical research, and data, . . . this Court ‘affords them less deference than it would to empirically-grounded guidelines.’”) (citation omitted); see also *United States v. McElheney*, 630 F. Supp. 2d 886 (E.D. Tenn. 2009); *United States v. Hanson*, 561 F. Supp. 2d 1004, 1008 (E.D. Wis. 2008); *United States v. Baird*, 580 F. Supp. 2d 889, 894-95 (D. Neb. 2008).

due consideration) the advice of the Guidelines.” *Kimbrough*, 128 S. Ct. at 577 (Scalia, J., concurring).

Some courts have held that the Commission has not fulfilled its characteristic role in creating and modifying the illegal reentry guideline. *See, e.g., United States v. Pahua-Martinez*, 2009 U.S. Dist. LEXIS 56499 (D. Neb. July 2, 2009) (reducing defendant’s sentence from a guidelines range of 46-57 months to 21 months because the “Commission was not acting in its characteristic institutional role in drafting the [illegal reentry] Guidelines and the advice imparted in those Guidelines can be afforded less deference by the Court”); *United States v. Tello-Castro*, 09-CR-136 (JMR/AJB) (D. Minn. December 30, 2009) (reducing defendant’s sentence from a guidelines range of 46-57 months to 24 months in part on the same basis); *United States v. Rodriguez-Jimenez*, 08-CR-898 (N.D. Ill. Sept. 11, 2009) (Lefkow, J.) (reducing defendant’s sentence from a guidelines range of 57-71 months to 30 months in part on the same basis).

With regard to the first prong of the Commission’s role, “the original Sentencing Commission implemented sentences ‘significantly more severe than past practice’ for . . . immigration offenses.” *Pahua-Martinez*, 2009 U.S. Dist. LEXIS 56499, at *13 (quoting USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 47 (2004)); *see also* USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987).

The Commission arguably has not fulfilled the second prong of its characteristic institutional role in revising the illegal reentry guideline, either, because (1) it “has increased the severity of punishment for immigration offenses in response to congressional directives,” *Pahua-Martinez*, 2009 U.S. Dist. LEXIS 56499, at *13;¹⁸ and (2) those revisions have not also been based on empirical data and actual sentencing practices.

In 1990, Congress expanded the definition of “aggravated felony,” and “[i]n response, the Commission raised the offense level dramatically, adding a 16-level enhancement for those aliens previously convicted of felonies designated as aggravated.” The Commission’s only justification for this substantial increase was: “The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.” USSG App. C, Amend. 375. No empirical evidence supporting this increase or the extent of the increase was presented during the hearing on Amendment 375. *Galvez-Barrrios*, 355 F. Supp. 2d at 963 (“The Commission did no study to determine if such sentences were necessary—or desirable from any penal theory. . . . No Commission studies recommended such a high level, nor did any other known grounds warrant it.”) (quoting McWhirter & Sands, 8 FED. SENT. R. 275, 276 (March/April 1996)). There was also no suggestion during the testimony on the proposed

¹⁸ Judges reason that when guidelines policy is driven by Congress rather than by empirical study, the resulting guidelines do not exemplify the Commission acting in its characteristic institutional role. *See, e.g., United States v. Huffstatler*, 571 F.3d 620, 623 (7th Cir. 2009) (“[P]erhaps for good reason, the government does not take issue with Huffstatler’s premise that the child exploitation guidelines lack an empirical basis. As the Sentencing Commission itself has stated, ‘[m]uch like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses.’”).

amendment that judges were concerned that the illegal reentry guideline was too low. Since 1991, Congress has continued to significantly enlarge the scope of the aggravated felony provision of the statute, which has in turn expanded the number of illegal reentry defendants facing offense-level increases. Drazga-Maxfield, *supra*, at 529. Although the Commission later created additional gradations of punishment for defendants with prior aggravated felony convictions, USSG App. C, Amend. 632, it does not appear that the Commission ever reconsidered whether a 16-level increase, as opposed to a lower offense-level enhancement, was appropriate for the prior convictions deemed the most serious, *see* Drazga-Maxfield, *supra*, at 533 (noting that the Commission solicited comment about whether one of the enhancements should be +10 or +12, but not mentioning any solicitation of commentary about the +16 enhancement). Accordingly, a significant number of defendants continue to face a 16-level increase that arguably was not initially based on empirical data or national experience.

III. The Solution: Revise and Lower the Illegal Reentry Guideline

The statistics and case law discussed above demonstrate that disparities are proliferating in the realm of illegal reentry sentencing. Those disparities are being created both by fast-track programs and by judges who reduce sentences below the guidelines because they believe § 2L1.2 operates unfairly and results in sentences greater than necessary to meet the § 3553(a) purposes of punishment. The original Commission’s hope was that “adherence to the guidelines [would] help to eliminate wide disparity.” USSG § 1A1.1(4)(g). To achieve adherence to the illegal reentry guideline and to thus maintain greater uniformity in illegal reentry sentencing, the Commission must revise and lower that guideline.

A. Revisit and Revise the § 2L1.2 Enhancements

As noted earlier, a central part of the Commission’s institutional role is to revise the guidelines based on empirical evidence and information about the extent to which judges are granting below-guidelines sentences, and the reasons for those reductions. In addition to assuring that the § 3553(a)(2) purposes of sentencing are met, the Commission is tasked with “develop[ing] means of measuring the degree to which the sentencing . . . practices are effective in meeting the purposes of sentencing . . . in § 3553(a)(2).” 28 U.S.C. 991(b)(2). Given these responsibilities, the Commission should revisit all of the enhancements in § 2L1.2, with a special focus on the 16-level enhancement. In so doing, the Commission should address four concerns that arise from the case law discussed above.

First, the Commission should ascertain through empirical research and an examination of judicial opinions whether these enhancements cover less serious conduct (either given the nature or the age of the prior conviction) in a way that overstates the seriousness of the offense in some cases under § 3553(a)(2)(A), and whether they cover conduct that is so disparate that they create “unwarranted similarities” in violation of § 3553(a)(6) and *Gall*, 552 U.S. at 55. The Commission should decide based on this research whether the enhancements should be lower and/or more incremental. This would include the question of whether § 2L1.2(b)(1)(A)(ii)-(vii) should count prior convictions for which the defendant received probation differently than

convictions for which the defendant was incarcerated.¹⁹ The Commission should also explore whether offenses that technically qualify as crimes of violence but do not involve actual violence should qualify for a lower enhancement.²⁰ Given the judicial criticism of the fact that the guideline places no time limitation on qualifying prior convictions, the Commission should also consider either excluding entirely the same prior convictions excluded by Chapter 4, or significantly discounting prior convictions whose age disqualifies them from consideration in calculating the criminal history category.

Second, the Commission should determine whether these enhancements are too high to meet the purposes of punishment in light of the offense-level enhancements under other guidelines. *See, e.g., Amezcua-Vasquez*, 567 F.3d at 1055 (noting that the 16-level enhancement “requires a 200 percent increase from the base offense level” if the defendant has a qualifying prior conviction); *Galvez-Barrrios*, 355 F. Supp. 2d at 962 (explaining that at the time the Commission implemented the 16-level enhancement, a defendant would have had to commit millions of dollars of theft, or tens of millions of dollars of fraud, to warrant a comparable upward adjustment).

Third, the Commission should determine whether the enhancements double-count criminal history to too great an extent, such that the resulting sentences are greater than necessary either to “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment” under § 3553(a)(2)(A), or “to protect the public from further crimes of the defendant” under § 3553(a)(2)(C).

Fourth, given the critique that the Commission has not adhered to its characteristic institutional role in creating and revising the 16-level enhancement, the Commission should determine whether that enhancement was originally supported by empirical evidence, and whether it is currently supported by empirical evidence, including evidence about whether higher illegal reentry sentences are more successful at deterring future reentries. The Commission should also consider whether the offense level enhancements should be more incremental. If the Commission revises any of the enhancements in a way that is more commensurate with the

¹⁹ In 2001, the Commission considered and rejected a proposal that the § 2L1.2 enhancements should be based on the amount of time an offender had actually served for his prior aggravated felony. *See generally* Drazga-Maxfield, *supra*. In conducting this research, the Commission also analyzed the time imposed for prior aggravated felonies and found it to be less generous than the time-served measure, but does not appear to have considered basing enhancement gradations on the time imposed. *See id.* at 536–37.

²⁰ It is possible that § 2L1.2 Application Note 7 might facilitate the amelioration of this concern. *See* App. Note 7 (“There may be cases in which the applicable offense level substantially overstates . . . the seriousness of a prior conviction.”). The Commission has stated that “this amendment addresses the concern that in some cases the categorical enhancements in section (b) may not adequately reflect the seriousness of a prior offense.” USSG Supp. App. C, Amend. 722. However, the application note’s sole example of an appropriate ground for a downward departure for a defendant facing the 16-level enhancement is when “the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43).” This example suggests that the departure applies in a very narrow subset of cases, and does not suggest that it applies under the other circumstances that lead judges to grant reduced sentences.

empirical evidence, it should explain its revisions so that the reasons behind the enhancements are more transparent to judges and defendants.

B. Lower the Illegal Reentry Guideline in Light of the Fast-Track Disparity

The Commission should endeavor to stem the unwarranted and unjust disparities being created by fast-track programs in illegal reentry cases. For some time now, the Commission has recognized that fast-track disparities are problematic. In 1995, the then-Chair of the Commission suggested that further research was needed to assess the geographic disparities created by prosecutorial discretion used in the development of fast-track sentencing. *U.S. Sentencing Commission: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary*, 104th Cong., 1st Sess. 50 (Dec. 14, 1995) (statement of Judge Richard P. Conaboy, Chairman, USSC). In 2003, the year Congress passed the Protect Act, the Commission expressed its own concern about the disparities created by fast-track programs, telling Congress: “Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.” United States Sentencing Commission, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 66-67 (2003). The following year, the Commission noted that “[p]ractitioners and commentators” have expressed concern that the selective implementation of fast-track “could lead to disparate sentencing outcomes for offenders convicted of similar conduct.” United States Sentencing Commission, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 106 (2004).

It is indisputable that fast-track programs create disparities “among defendants with similar records who have been found guilty of similar conduct,” § 3553(a)(6). The Commission has stated that these disparities may be unwarranted, and many judges believe they are definitively unwarranted. *See, e.g., United States v. Bonnet-Gruillon*, 53 F. Supp. 2d 430, 435 (S.D.N.Y. 1999) (“[I]t is difficult to imagine a sentencing disparity less warranted than one which depends upon the accident of the judicial district in which the defendant happens to be arrested.”). While the Department of Justice (DOJ) has until now expressed the belief that these disparities are warranted and therefore do not run afoul of § 3553(a)(6), earlier this year the Attorney General announced the creation of a DOJ working group tasked with reviewing fast-track policy, among other things. Brief for the United States in Opposition to Certiorari in *Vega-Castillo v. United States*, 129 S. Ct. 2825 (2009) (08-8655), at 18. Even if fast-track disparities are unwarranted, at least some of the jurisdictions in which those programs operate, including the District of Arizona, would not be able to prosecute nearly as many illegal reentry cases as they currently prosecute if their fast-track programs were eliminated.

The current situation is clearly untenable, and the Commission should therefore attempt to find a solution. One solution would be to eliminate the use of fast-track programs. Although the Commission cannot itself abolish fast-track, it could unequivocally oppose the continued operation of such programs, as it opposed the crack/powder disparity. While the elimination of

fast track might resolve the disparity problem, the caseload pressures that have supposedly led to the proliferation of fast-track programs would resurface and the government would not be able to prosecute as many defendants for illegal reentry.

The second potential solution is far more tenable, because it is in the hands of the Commission and does not jeopardize the government's ability to prosecute violators. The Commission should significantly lower USSG § 2L1.2 as it applies to all cases, thus minimizing the need for fast-track programs in districts with high illegal reentry case loads. The fact that nearly 80% of the immigration cases prosecuted in this country are prosecuted in fast-track districts means that the vast majority of illegal reentry defendants already receive sentences significantly below the guidelines range. And statistics and case law demonstrate that even in many of the non-fast-track districts, judges are sentencing significant numbers of illegal reentry defendants below the guidelines range. Consequently, § 2L1.2 applies with full force only to the few illegal reentry defendants who are unlucky enough to be caught in a district where the U.S. Attorney does not operate a fast-track program, and unlucky enough to appear before a judge who sentences them within the guidelines range.

This current situation, in which the vast majority of defendants receive light sentences and a small minority receive harsh sentences, not only creates dramatic disparities among otherwise similarly-situated defendants, but also strongly suggests that the guideline results in sentences that are "greater than necessary" to serve the § 3553(a)(2) goals. Moreover, when a guideline is being applied to only a handful of defendants, the Commission's responsibility to revise that guideline to ensure wider and more consistent application is at its height. Lowering § 2L1.2 in all cases would minimize and possibly eliminate fast-track disparities and the disparities created by judicial variances, would lead to sentences that judges believe are sufficient but not greater than necessary to meet the § 3553(a) purposes of punishment, and would fulfill the Commission's mandate to revise the Guidelines in light of empirical evidence and judicial practices.

ACCOUNTING FOR OFFENDER CHARACTERISTICS AT SENTENCING

To fulfill its dual responsibilities of ensuring that the purposes of punishment in § 3553(a)(2) are met and avoiding unwarranted disparities, the Commission should revise the guidelines and policy statements that relate to offender characteristics to reflect its own empirical research. The Commission originally promised to “consider research relating to other possible predictors of recidivism besides criminal history” and to incorporate that research into the guidelines. U.S.S.C., *Supplementary Report on the Initial Guidelines and Policy Statements*, at 44 (1987). The Commission has conducted the promised research and has discovered that a number of offender characteristics correlate with lower risks of recidivism, meaning that those characteristics relate directly to § 3553(a)(2)(C), the protection of the public factor. Specifically, the Commission has determined that age, gender, past employment, education level, military service, drug use, marital history, and numerous other characteristics correlate positively with the risk of recidivism. See generally U.S.S.C., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf.²¹

The Commission’s empirical findings regarding offender characteristics and risk of recidivism mean that the guidelines as currently written provide sentences that are greater than necessary for some individuals, and treat differently-situated offenders similarly. For example, the Commission has found that offenders who are over 50 and in Criminal History Category I have the lowest risk of recidivism of all federal offenders: Only 6 of every 100 offenders in that group reoffend. See *id.* at 28 (Exh. 9). Because the Commission has not incorporated this empirical evidence into the guidelines, the guidelines range for an offender who is over 50 and in CHC I is identical to the guidelines range for an offender who is under 21 and in CHC I, even though 30 out of every 100 such offenders reoffend. See *id.* Although the 51 year old offender is five times less likely to reoffend than the 20 year old offender, the guidelines impose identical sentences on the two offenders. The guidelines thus (1) provide a sentence that is greater than necessary under § 3553(a)(2) to protect the public from the 51 year old offender; and (2) create unwarranted similarities among offenders who are differently situated, in violation of § 3553(a)(6) and *Gall*.

Given that the Commission deviated from past practice in limiting or prohibiting consideration of most offender characteristics,²² the continued failure to revise the guidelines to account for empirical evidence that the Commission itself gathered six years ago opens it up to the charge that it is not abiding by its characteristic institutional role. Revising the guidelines and

²¹ Notably, the Commission eliminated from consideration even characteristics, such as age and drug abuse history, that had demonstrated predictive power in determining a defendant’s risk of recidivism under the parole commission’s Salient Factor Score. Peter B. Hoffman, *Twenty Years of Operational Use of a Risk Prediction Instrument: The United States Parole Commission’s Salient Factor Score*, 22 J. Crim. Just. 477, 486 (1994).

²² It has been argued that the Commission did not give a justification for its decision to limit consideration of offender characteristics, or cite to any data or research for this decision. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1717 (1992).

policy statements that relate to offender characteristics is also necessary to bring the guidelines in line with the Supreme Court's current sentencing law and to give full effect to Congress's sentencing statutes. All of the offender characteristics that the guidelines caution judges against considering or forbid them from considering altogether "are matters that 3553(a) authorizes the sentencing judge to consider." *Rita*, 127 S.Ct. at 2473 (Stevens, J., concurring) ("[T]he Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug and alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines."). Congress has also authorized judges to consider any and all offender characteristics under 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person . . . which a court may receive and consider for the purpose of imposing an appropriate sentence.").

Allowing judges to consider offender characteristics in no way runs afoul of 28 U.S.C. § 994(e), which states: "The Commission shall assure that the guidelines . . . reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" in recommending a term of imprisonment or the length of a term of imprisonment. According to the relevant Senate report, the purpose of this provision was to prevent the Commission and judges from incarcerating defendants simply because they lacked certain positive characteristics. *See* S. Rep. No. 98-225 at 174-75 ("The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties."). The Report explained: "[E]ach of the[] factors [listed in § 994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community." *Id.*

When § 994(e) is considered in conjunction with § 3553(a), § 3661, and 28 U.S.C. § 994(d), it is clear that Congress wanted judges to be able to consider offender characteristics, and wanted the Commission to study the extent to which certain characteristics were relevant in determining a sentence. Now that the Commission has conducted such studies, it should incorporate its findings into the guidelines and should explicitly allow judges to consider offender characteristics at sentencing.