



WINNING STRATEGIES SEMINAR

“The Fallacies Underlying The Immigration Guidelines”

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The Fallacies Underlying Immigration Guideline §2L1.2

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The Fallacies Underlying Immigration Guideline §2L1.2

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I. INTRODUCTION

When a person is convicted of illegal reentry after removal, in violation of 8 U.S.C. § 1326, the guideline used to determine the sentencing range is §2L1.2 in the GUIDELINES MANUAL. The §2L1.2 sentencing ranges are largely driven by the nature of the defendant's prior conviction(s). This paper identifies some of the problems underlying the §2L1.2 guideline and suggests approaches to getting judges to sentence below the recommended sentencing range.

A. THE ILLEGAL REENTRY STATUTE

An individual convicted of illegal reentry is subject to a statutory maximum sentence of 2 years' imprisonment. *See* 8 U.S.C. § 1326(a). The maximum imprisonment term increases to 10 years if the removal occurred subsequent to a felony conviction or three misdemeanor convictions, and to 20 years if subsequent to an aggravated felony conviction. *See* 8 U.S.C. § 1326(b)(1) & (2). For purposes of the statute, the term "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43).

B. THE ILLEGAL REENTRY GUIDELINE

Guideline §2L1.2(a) assigns a base offense level of 8 for an illegal reentry offense. That offense level correlates to sentencing ranges of between 0-6 months (Criminal History Category I) and 18-24 months (Criminal History Category VI).

Section 2L1.2(b) provides for offense level enhancements of 4, 8, 12 and 16 levels, depending upon the character of a defendant's prior conviction:

- A 16-level enhancement applies if the defendant was removed after a felony conviction for (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense. U.S.S.G. §2L1.2(b)(1)(A).
- A 12-level enhancement applies if the defendant was removed after a felony drug trafficking offense for which the sentence imposed was 13 months or less. U.S.S.G. §2L1.2(b)(1)(B).
- An 8-level enhancement applies if the defendant was removed after an aggravated

felony conviction. U.S.S.G. §2L1.2(b)(1)(C).

- A 4-level enhancement applies if the defendant was removed after a felony conviction or three or more convictions for misdemeanor crimes of violence or drug trafficking offenses. U.S.S.G. §2L1.2(b)(1)(D) & (E).

The terms used in the enhancements are defined in the commentary to guideline §2L1.2.

These enhancements are added to the base offense level of 8. The enhanced offense levels correlate to sentencing ranges of between 10–16 months (adjusted offense level 12, Criminal History Category I) and 100–125 months (adjusted offense level 24, Criminal History Category VI). Prior to the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), sentencing courts were required to sentence within the guideline range, except under certain limited circumstances.

II. SENTENCING AFTER *BOOKER*

The Supreme Court’s decision in *United States v. Booker* dramatically changed the landscape of federal sentencing. 543 U.S. 220 (2005). In *Booker*, the Supreme Court held that the mandatory federal sentencing guidelines violated the Sixth Amendment. 543 U.S. at 233–34. To remedy the problem, the Court effectively made the guidelines advisory by excising 18 U.S.C. §§ 3553(b)(1) and 3742(e). *Id.* at 245.

Now 18 U.S.C. § 3553(a) governs a court’s sentencing decision. Section 3553(a) directs the sentencing court to “impose a sentence sufficient, but not greater than necessary” to comply with the purposes of sentencing. Those purposes are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2). In determining the appropriate sentence to be imposed, the court is also to consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (3) the kinds of sentences available;

- (4) the guideline sentencing range;
- (5) any pertinent policy statements issued by the Sentencing Commission;
- (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct;
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). So the guideline range is only one of many factors the district court must consider in determining the appropriate individualized sentence.

III. CONSIDERING THE GUIDELINE RANGE

While the district court must consider the guideline range, it does not have to sentence within that range. The court may reject a guideline sentence because of the unique facts of the case or the characteristics of the individual defendant. The court may reject a guideline sentence “based solely on policy considerations, including disagreements with the guidelines.” *Kimbrough v. United States*, 552 U.S. 85, 102 (2007). The court may also reject a guideline sentence “because the Guidelines sentence itself fails to properly reflect § 3553(a) considerations and thus reflect[s] an unsound judgment.” Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: an Important New Role for District Courts*, 57 DRAKE L. REV. 575, 576 (2009) (internal quotations omitted).

How does a sentencing court determine how much weight it should give a particular guideline? An important consideration is how that guideline was developed. Congress directed the Sentencing Commission to develop guidelines that met the sentencing goals of 18 U.S.C. § 3553(a). When the members of the Commission could not agree on which of those purposes should predominate, they agreed to use past practice and experience as a proxy for the purposes. U.S.S.G. § 1A1.1, comment. (n.3), p.s. (Commission resolved disagreement by taking “empirical approach”). The Commission’s empirical approach involved the “examination of 10,000 presentence reports” that reflected the past practices of sentencing judges. *Rita v. United States*, 551 U.S. 338, 349 (2007). Statistical analysis of data and past sentencing practices established the offense levels for many crimes, levels that were directly linked to the recommended imprisonment range under the guideline.

But not all sentencing guidelines were developed this way. In *Kimbrough*, the Supreme Court recognized that some guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role.” 552 U.S. at 109. They do not take account of empirical data and national experience, but instead are driven by other factors. *Id.* at 109–10. Those guidelines are entitled to less deference by the courts. *Id.* When a guideline was not developed based on “empirical data and national experience,” a district court is within its discretion to conclude that it “yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.” *Id.*

IV. LACK OF EMPIRICAL BASIS FOR ILLEGAL REENTRY GUIDELINE

How was the illegal reentry guideline developed? Like the crack-cocaine guideline considered in *Kimbrough*, the illegal reentry guideline lacks empirical support. The illegal reentry guideline is largely driven by the nature of the defendant's prior convictions. While this may have some superficial appeal, the Sentencing Commission has never explained in any detail why so much weight is placed on these prior convictions.

The original illegal reentry guideline in 1987 had a base offense level of 6 and a 2-level upward adjustment if the defendant had previously unlawfully entered or remained in the United States. This guideline was developed based on analysis of past sentencing practices. *See United States v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E.D. Wis. 2005). In 1988, the base offense level was increased to 8. In 1989, a 4-level increase for having a prior felony conviction was added.

Then, in 1991, the Commission added a 16-level increase for having a prior aggravated felony conviction, as that term is defined in the Immigration Code under 8 U.S.C. 1101(a)(43). The 16-level enhancement is "one of the most severe in the entire Guideline scheme." *See James P. Fleissner & James A. Shapiro, Federal Sentences for Aliens Convicted of Illegal Reentry Following Deportation: Who Needs the Aggravation*, 9 GEO. IMMIGR. L.J. 451, 476 (Summer 1995). The Commission's stated reason for the enhancement was that:

Previously, such cases were addressed by a recommendation for consideration of an upward departure . . . The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.

U.S.S.G., App C (amend. 375). But there is no evidence that any study or research recommended or supported "such a drastic upheaval" to §2L1.2. *Galvez-Barrios*, 355 F. Supp. 2d at 962 (internal citation omitted). No study had been done to determine if such sentences were necessary or desirable. *Id.* Apparently, the 16-level increase was selected because one Commissioner, Michael Gelacak, suggested it, and the suggestion was adopted with relatively little discussion. *See id.*

At the time the term "aggravated felony" was incorporated into §2L1.2, relatively few crimes fell within that definition in the immigration context. The statute included only murder, specified types of drug trafficking, specified types of illicit trafficking in firearms or destructive devices, and any attempt or conspiracy to commit such acts. *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, 529 (Spring 2003); *see also* 8 U.S.C. § 1101(a)(43) (1990). But Congress added crimes to the term in 1990 and 1994, and, with the passage of the Illegal Immigration Reform and Immigration Responsibility Act, the term was "expanded to include some crimes that might not be classified as a 'felony' . . . and might not convey the common expectation of especially dangerous 'aggravated' behavior." *See Drazga Maxfield*, at 529. Each time the term "aggravated felony" was expanded in the

immigration context, the number of defendants subject to the 16-level adjustment under §2L1.2 increased.

Then, in 2001, the Sentencing Commission amended §2L1.2 to provide for graduated enhancements. This amendment was in response to the general dissatisfaction with the 16-level aggravated felony enhancement, especially among judges in southwest border districts. *Id.* at 530. The definition was too broad and captured many relatively minor, nonviolent offenses “motivated by family separation circumstances rather than sinister criminal intentions.” *Id.* But even though the Commission amended the guideline in response to information on current sentencing practices, the starting point was the 16-level enhancement, introduced in 1991 without any empirical basis.

Like the crack guidelines challenged in *Kimbrough*, the illegal reentry guideline §2L1.2 fails to “exemplify the Commission’s exercise of its characteristic institutional role.” 552 U.S. at 109. The guideline has been criticized repeatedly and considered for revision on multiple occasions. *See, e.g.*, 71 Fed. Reg. 4782, 4786–87 (Jan. 26, 2006); 72 Fed. Reg. 4372, 4393–97 (Jan. 20, 2007). The guideline’s enhancements have resulted in excessive sentences for immigration offenses. U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 47 (2004) (guideline ranges for immigration offenses set above historical imprisonment levels).

Courts have given below-guideline sentences based on the fact that §2L1.2 lacks an empirical basis. *See Galvez-Barrios*, 355 F. Supp. 2d at 961–62. And the Fifth Circuit held, in an illegal reentry case, that district courts can “consider the policy decisions behind the Guidelines, including the presence or absence of empirical data,” and sentence below the guideline range on this basis. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 366 (5th Cir. 2009).

V. OFFENSE LEVEL COMPARISON TO OTHER GUIDELINES

A guideline offense level is supposed to reflect the seriousness of that offense. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 3 (1998). It is therefore a useful exercise to assess how the Guidelines characterization of illegal reentry, that is the base offense level of 8 and the base offense level modified by the adjustments of 16, 12, 8 and 4, compares to other base offense levels assigned to other offenses defined by the *Guidelines*. In attempting to simplify this comparison, individual guidelines with multiple base offense levels were assigned the highest base offense level available. Guidelines requiring tabular references were not assigned values as the fact-specific nature of those determinations typically involves sentences based on actual offense conduct rather than recidivism and thus cannot reasonably be limited to a value. In such case, the *Guidelines* are said not to define a specific base offense level.

With the aforementioned constraints, if one were to consider each of the individual guidelines for each of the adjusted offense levels, one would find that (1) 57% of offenses

exceed a base offense level of 8; (2) 41% of offenses exceed a base offense level of 12; (3) 33% of offenses exceed a base offense level of 16; (4) 30% of offenses exceed a base offense level of 20; and (4) 24% of offenses exceed a base offense level of 24. These results indicate the offense of illegal reentry with a prior conviction is characterized by the Guidelines as more serious, more worthy of imprisonment, than 76% of the Guideline offenses.

This outcome appears unreasonable considering the offenses to which the Guidelines assign a lower base offense level. The resulting offense level of 24 after adding the 16-level upward adjustment, when compared to the base offense levels of other offenses, belies the irrational characterization of this offense in light of the inherent dangerousness of other offenses with lesser offense levels. The offense level of 24 exceeds the base offense level for involuntary manslaughter, U.S.S.G. §2A1.4, aggravated assault, U.S.S.G. §2A2.2, abusive sexual contact, U.S.S.G. §2A3.4, stalking or domestic violence, U.S.S.G. §2A6.2, and robbery, U.S.S.G. §2B3.1, to name only a few offenses. As such, the Sentencing Commission through these offense levels asks sentencing courts to conclude that a purely administrative, non-violent violation, entry without authorization of a United States official, poses a greater threat than approximately three-fourths of the offenses addressed by federal criminal law.

VI. INCONGRUOUS RESULTS UNDER CLASSIC CRIMINAL LAW THEORY

Turning to classic criminal law theory, “[a]n offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by statute.” *State v Horton*, 51 S.E. 945, 946 (N.C. 1905). Traditionally in sentencing, a *malum in se* crime, for example murder, rape and arson, received harsher punishments while *mala prohibita* crimes, or public welfare offenses, carried lesser penalties. Leo P. Martinez, *Taxes, Morals, and Legitimacy*, 1994 B.Y.U.L. REV. 521, 553 (1994). The sentences meted out by §2L1.2 do not recognize this practice. It has been noted “[i]llegal immigration appears to be the ultimate *malum prohibitum* offense; a person who, without force, disobeys a law she had no voice in making so that she can work hard at low wages to provide subsistence for herself and her family hardly seems culpable.” Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 244 (2002). As noted above, the *Guideline* sentences for illegal reentry are severe, even when compared to offenses typically classified as *malum in se*.

As acknowledged by the Sentencing Commission and recounted in the history of §2L1.2 above, increased penalties defined by the guideline appear to be tied to Congressional calls to “get tough” on offenders unaccompanied by the traditional measures to guarantee such a result, such as mandatory minimum sentences. As one criminal law professor notes

From 1992 to 2006 there was a 187% increase in immigration charges. From a small number to a bigger number, the numbers are still not overwhelming but the increase is quite dramatic. Today, 11.2% of the total federal inmate population - or 20,970 of the 187,241 inmates - consists of immigration offenders. Most of these inmates are

not smugglers or terrorists. They are mostly people who came initially looking for work and then established their homes and families in this country. In addition to a large percentage of the corrections budget, significant federal prosecution resources have been used to target this group of people. As of 2004, immigration crimes represented the single largest group of all federal prosecutions at thirty-two percent.

Sandra Guerra Thompson, *Latinas and Their Families in Detention: the Growing Intersection of Immigration Law and Criminal Law*, 14 WM. & MARY J. WOMEN & L. 225, 241(2008).

Regardless of the purported justifications for the higher sentences, whether terrorism concerns or failed attempts to restrict unsanctioned immigration into the United States, the burgeoning prison population and the character of the current inmates comprising that population stands as evidence of a system in which the criminal justice system is turned on its head. Regardless of the justification, a form of trespassing does not merit sentences greater than traditional *mala in se* crimes.

VII. OTHER PROBLEMS WITH THE ILLEGAL REENTRY GUIDELINE

A. DOUBLE COUNTING

Double counting occurs when a defendant's prior conviction is used both to enhance his offense level and to calculate his criminal history score. Most guidelines in Chapter 2 of the GUIDELINES MANUAL establish offense levels based on defendant's offense conduct. Guideline §2L1.2 bases the offense level on the defendant's criminal history. But that criminal history is already taken into account in calculating the defendant's criminal history category in Chapter 4. *See* U.S.S.G. §2L1.2, comment. (n.6). In this way, §2L1.2 double counts a defendant's criminal history. This double counting, while permitted by the guidelines, could be the basis for a below-guideline sentence.

"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." *Galvez-Barrios*, 355 F. Supp. 2d at 963. While it may be that illegal reentry defendants with serious felonies should be punished more severely—to protect the public from such dangerous persons or as a deterrent to reentry—these reasons "substantially overlap with those the Commission uses to justify increasing the defendant's criminal history score." *Id.* at 962.

Some illegal reentry defendants' prior convictions may subject them to even more than double counting. A prior conviction can be counted in the offense level, under §2L1.2(b), counted for criminal history points, under §4A1.1(a), (b) & (c), counted for criminal history recency points, under §4A1.1(d) & (e), and result in a revocation sentence that may be run consecutively to the illegal reentry sentence, under §5G1.3.

Courts have given below-guideline sentences based on double counting. *See United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321 (N.M. 2005) (below-guideline sentence imposed,

in part, to offset prior conviction being used to enhance both offense level and criminal history score); *United States v. Santos*, 406 F. Supp. 2d 320 (S.D.N.Y. 2005) (same).

B. NO REMOTENESS LIMITATION

A prior conviction can be used to enhance a defendant's offense level in §2L1.2 even if it is too old to be used in criminal history computation. *Compare* U.S.S.G. §2L1.2 with §4A1.1, comment. (n. 1, 2 & 3). So while a prior conviction may be too old to add months to a sentence through the criminal history calculation, it can still be used to add years to the sentence through the §2L1.2 offense level adjustments. The age of a prior conviction used for enhancement purposes in §2L1.2 could be the basis for a below-guideline sentence.

The Sentencing Commission has provided no explanation for this treatment of old prior convictions in §2L1.2. Numerous courts have simply accepted the guidelines' differing treatment of stale convictions without questioning the rationale for it. *See, e.g., United States v. King*, 516 F.3d 425, 428–32 (6th Cir. 2008) (discussing Chapter 2 and 4 treatment of stale convictions). The Seventh Circuit has suggested that “[t]he criminal history section is designed to punish likely recidivists more severely, while the enhancement under §2L1.2 is designed to deter aliens who have been convicted of a felony from re-entering the United States.” *United States v. Gonzalez*, 112 F.3d 1325, 1330 (7th Cir. 1997).

Recently, however, the Ninth Circuit held that a within-guideline §2L1.2 sentence was substantively unreasonable because of the age of the prior conviction. *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1052 (9th Cir. 2009). “Although it may be reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country, it does not follow that it is inevitably reasonable to assume that a decades-old prior conviction is deserving of the same severe additional punishment as a recent one.” *Id.* at 1055–56. The court held that, while the “staleness of the conviction does not affect the Guidelines calculation, [] it does affect the § 3553(a) analysis.” *Id.* at 1056.

Courts have given below-guideline sentences based on the age of the prior conviction. *See United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (Neb. 2005) (sentence reduced, in part, because conduct resulting in +16 occurred almost 10 years before).

C. OVERBREADTH OF ENHANCEMENT CATEGORIES

Some of the enhancement categories under §2L1.2 are very broad. *See, e.g.*, U.S.S.G. §2L1.2(b)(1)(A)(I)–(vii) (16-level enhancement for prior convictions coming within certain categories including “crimes of violence”); §2L1.2(b)(1)(C) (8-level enhancement for prior “aggravated felony” convictions). Many disparate offenses can come within the definitions. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A)–(U) (defining “aggravated felony” offenses). There are cases in which the defendant’s prior conviction comes within the enhancement category, but the actual conduct involved does not merit such an extensive enhancement. *See, e.g., Zapata-Trevino*, 378 F. Supp. 2d at 1326–27 (holding that although 16-level enhancement applied, defendant’s actual conduct underlying prior conviction was “trivial in nature”). The defendant’s actual conduct underlying a prior conviction could be the basis for a below-guideline sentence.¹

The 16-level enhancement includes a broad range of offenses, from terrorism offenses to a nonviolent alien-smuggling offense. *See, e.g., United States v. United States v. Tapia-Leon*, 193 Fed. Appx. 818 (10th Cir. 2006) (prior alien-smuggling conviction of defendant, an illegal alien, involved transporting illegal aliens within the United States by taking a turn driving). An offense can qualify for the 16-level increase even though it does not qualify as an aggravated felony and, therefore, would not merit the 8-level increase. *Compare* §2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(3)) (crime of violence definition for 16-level enhancement has no requirement for any minimum term of imprisonment to have been imposed) *with* 8 U.S.C. § 1101(a)(43)(F) (crime of violence definition for 8-level enhancement in §2L1.2(b)(1)(C) requires at least one year of imprisonment imposed).² In fact, this is a suggested departure ground in the guideline commentary. U.S.S.G. §2L1.2, comment. (n.7). The broad categories can lead to sentencing enhancement differences that are clearly without any empirical basis.

Courts have given below-guideline sentences based on the overbreadth of the enhancement category, after considering the actual conduct underlying a prior conviction. *See Zapata-Trevino*, 378 F. Supp. at 1326–27 (below-guideline sentence imposed because defendant’s actual conduct in prior assault conviction did not warrant greater sentence); *United States v. Perez-Nunez*, 368 F. Supp. 2d 1265 (NM 2005) (same).

¹ There is also the danger that, in some cases, the defendant’s actual conduct could be the basis for an above-guideline sentence. *See, e.g., United States v. Lemus-Vasquez*, 323 Fed. Appx. 343 (5th Cir. 2009) (district court imposed above-guideline sentence because 8-level enhancement was not sufficient to capture the seriousness of the prior offense).

² This situation arises not infrequently when the prior conviction is from a Texas state court because Texas has two forms of probation—“straight” in which a sentence of imprisonment is imposed and then suspended, TEX. CODE CRIM. PROC. ANN. § 42.12, §3 (2009); and “deferred adjudication” in which a sentence of imprisonment is not imposed, TEX. CODE CRIM. PROC. ANN. § 42.12, §5 (2009).

D. LACK OF A FAST TRACK PROGRAM

Some districts, but not all, use fast-track programs to induce quick guilty pleas in illegal reentry cases. These programs allow for up to a four-level downward departure to give defendants sentencing concessions in exchange for a prompt guilty plea and the waiver of procedural rights such as the right to appeal. *See* U.S.S.G. §5K3.1. As of March 2006, the Attorney General had approved programs in only 16 of 94 federal districts. *See* Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 777 (2008).

One of the factors a sentencing court must consider is “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). In districts with a “fast track” program, a defendant may receive a sentence on the average 17 months shorter, with a substantially greater prospect of a sentencing departure, than would a comparable defendant appearing in a district without such a program. *See United States v. Ramirez-Ramirez*, 365 F. Supp 2d 728, 732 (E.D. Va. 2005).

One of the stated purposes of the Sentencing Commission is to “establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.” 28 U.S.C. § 991(b)(1)(B). The lack of “fast track” programs in certain districts contributes to the type of unwarranted disparity that the sentencing guidelines were meant to eliminate.

It should be noted that sentencing disparity in illegal reentry prosecutions was not created simply by “fast track” programs alone. Prior to the PROTECT Act, there was ample evidence of dissimilar sentencing outcomes for similar offenders attributable to “differing prosecution and plea practices in the districts.” *See, e.g.,* Linda Drazga Maxfield, *Fiscal Year 2000 Update of Unlawful Entry Offenses*, 14 Fed. Sentencing Rep. 267, 269 (2002). As such, “fast track” did not create the disparity in sentencing, it simply added an additional issue into the plea and sentencing formula that likely further exacerbated the already evident disparity.

Courts have given below-guideline sentences based on the lack of a fast track program in their district. *See United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1030-31 (D. Neb. Feb 1, 2005) (imposing sentence below guideline range based in part on the “regional sentencing disparities that occur in the prosecution and charging of immigration offenses and [on the fact] that in other districts a similar defendant would not be prosecuted for illegal entry, but would be simply deported”).

At present, there is a Circuit split as to whether the lack of a fast track program represents an appropriate ground on which to vary from a *Guideline* sentence. The Fifth Circuit has held

that the sentencing disparities resulting from fast track do not reflect the sort of disparity by which a sentencing court may vary from the guideline range. *United States v. Gomez-Herrera*, 523 F.3d 554, 562 (5th Cir. 2008). In contrast, the First and Third Circuits have held that the fast track disparity is precisely the sort of disparity permitting a below-guideline sentence. See *United States v. Arrelucea-Zamudio*, No. 08-4397, 2009 WL 2914495 (3d Cir. Sept. 14, 2009); *United States v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008) (holding that “consideration of fast-track disparity is not categorically barred as a sentence-evaluating datum within the overall ambit of 18 U.S.C. § 3553(a)”).

E. ILLEGAL REENTRY DEFENDANTS DO HARDER TIME

Being an illegal alien in U.S. prison system can create stricter circumstances of confinement. Frequently, illegal aliens spend time in immigration custody before charges are brought and after their sentence is served. The Bureau of Prisons (BOP) does not give the defendant credit for time spent in immigration detention. Illegal alien inmates “shall be housed in at least a Low security level institution.” Bureau of Prisons, Program Statement, Inmate Security Designation and Custody Classification, P5100.08 Ch. 5, page 9 (9/12/2006). Illegal alien defendants are also ineligible for halfway house. See Chapter 4: Description of Drug Treatment Programs and Services, page 70, available at <http://www.bop.gov/policy>. In prison, they cannot participate in many of the programs available to U.S. citizens. They are often warehoused in private facilities that have harsh conditions and no programs whatsoever.

Courts have given below-guideline sentences because of the extra harsh treatment an illegal alien inmate will face. See *Zapata-Trevino*, 378 F. Supp. 2d at 1328 (“Because of his immigration status, Defendant may not be eligible for certain Bureau of Prisons programming, and must be placed, at the minimum, in a low-security facility rather than at a more relaxed ‘camp.’ Additionally, Defendant will not be eligible for early release.”).

This can also be the basis for an argument against imposing a term of supervised release. Many courts impose a term of supervised release in illegal reentry cases but these terms are unsupervised. The primary purpose of supervised release is to ease a defendant’s transition into the community and provide post-confinement rehabilitation assistance. See *United States v. Johnson*, 529 U.S. 53, 59 (2000). The illegal alien defendant gets none of the intended benefits of supervised release.

VIII. PRESENTING YOUR BELOW-GUIDELINE ARGUMENTS

A. Put It in Writing.

Take the time to prepare and file a written sentencing memorandum. Give the court clear reasons for a below-guideline sentence. Samples are attached to this paper. See Appendix A, B, C. Some involve standard legal arguments that can be used as is, others involve common factual arguments that will need to be tailored to the facts of your particular client.

B. Tie Your Arguments to the Factors in 3553(a).

Factor: the nature of the offense; the seriousness of the offense. 18 U.S.C. §§ 3553(a)(1) & (2)(A). What can you say about your client's illegal reentry offense? It is a nonviolent offense that is essentially an international trespass. It is a status offense. That the seriousness of the offense is mitigated by your client's motive, e.g. to visit his family, to work to support his family. That once your client entered the United States illegally, that he did not violate the law in any other way.

Factor: the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1). Here is your chance to introduce the judge to your client. Bring out all of the positive, mitigating facts that you can. Look at your client's health and age. Is he at an age where the risk of recidivism is lower? Look at his family ties and relationships. Did he work to support his family? Look at his work history. Does his employer value him? Does he have a skill or a trade? Attempt to explain or minimize your client's criminal history. Are there mitigating circumstances for those prior convictions. Was he a young man when he committed the offenses? Did he commit the offenses because of an addiction? There are judges who are sympathetic to claims of cultural assimilation. At a recent Sentencing Commission hearing, two border judges testified that illegal reentry sentences were too high for young defendants who had spent their entire lives in the United States and had no ties to the country to which they were deported.

Factor: to protect the public. 18 U.S.C. § 3553(a)(2)(C). The prosecutor will argue that the sentences needs to promote respect for immigration law and to deter removed felons from reentering. Point out if your client's prior convictions are for nonviolent offenses. Argue that your client is not dangerous and therefore a lengthy term of imprisonment is not necessary to protect the public.

Factor: the need to avoid unwarranted sentencing disparities. 18 U.S.C. § 3553(a)(6). This is when you make an argument based on the lack of a fast-track program in your district. Be sure to put in evidence of an existing fast track program elsewhere, and facts showing that your client would have been eligible for a fast track reduction had he entered or been found in that other district.

Factor: the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2)(D). Point out to the court that being an illegal alien in U.S. prison system can create stricter circumstances of confinement.

C. Keep Challenging the Guideline Calculations

The district court should begin all sentencing proceedings by correctly calculating the applicable guideline range. *Gall v. United States*, 552 U.S. 38 (2007). In your rush to challenge the §2L1.2 guideline, don't forget to check the guideline calculations. You may be able to get your client a lower sentence because, contrary to the probation officer's recommendation, the prior conviction does not come within the enhancement category.

Appendix A: Sample Sentencing Arguments

DISTRICT COURT’S AUTHORITY UNDER ADVISORY GUIDELINES:

To remedy the constitutional problem created by mandatory sentencing guidelines, the Supreme Court struck 18 U.S.C. § 3553(b)(1), and thus rendered the guidelines “effectively advisory.” *United States v. Booker*, 543 U.S. 220, 245 (2005). Sentencing courts are still required to consider the guideline imprisonment ranges, but are free to “tailor the sentence in light of other statutory concerns as well,” *id.*, and are to consider all information concerning the background, character and conduct of a defendant. 18 U.S.C. § 3661. *Booker* thus returns substantial discretion to a sentencing court in imposing a reasonable sentence under the circumstances, guided by the overarching goal in sentence known as the parsimony principle, to “impose a sentence sufficient, but not greater than necessary.” 18 U.S.C. § 3553(a).

GUIDELINE §2L1.2 LACKS EMPIRICAL BASIS

Example 1:

The illegal reentry guideline, §2L1.2, is not empirically supported. The 16-level increase was originally applied only to prior “aggravated felonies.” *See* U.S.S.G. App. C, amend. 375. No empirical research supported this increase, and the Commission later acknowledged that the overbroad aggravated-felony definition “sometimes result[ed] in disproportionate penalties.” *Id.*, amend. 632.; *see also* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47 (2004), available at <http://www.ussc.gov/15year/15year.htm> (guideline ranges for immigration offenses set above historical imprisonment levels). In later amendments, the Commission abandoned that 16-level enhancement definition in favor of others, including one for “crime of violence.” *Id.* There is no indication from the Commission that its amendments were based on empirical data. *See id.* at 67 (parsing was based on congressional directive and complaints from practitioners).

The Commission has never justified these enhancements, their extremity, or their breadth with recidivist data or with any other empirical evidence. *See* U.S.S.G. App. C, amend. 193 (justifying initial four-level offense-level increase by noting that it is designed to “provide an increase”); *id.* at amend. 375 (justifying 16-level increase by noting that it is “appropriate to

reflect the serious nature of these offenses”). The illegal-reentry guideline thus fails to “exemplify the Commission’s exercise of its characteristic institutional role” because it is not empirically based. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (crack cocaine guideline). The flawed nature of the illegal reentry guideline has produced a sentence range in Defendant’s case that is “greater than necessary” to achieve § 3553(a)’s goals.

Example 2:

Section 2L1.2 lacks the reliable, empirical, historical basis that many guidelines rest upon. *See, e.g., Kimbrough v. United States*, 552 U.S. 85, 102 (2007) (observing individual guidelines may lack objective basis); *United States v. Mondragon-Santiago*, 564 F.3d 357, 366 (5th Cir. 2009) (policy decisions of guidelines may be disagreed with by district court); *see also* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47 (2004), available at <http://www.ussc.gov/15year/15year.htm> (guideline ranges for immigration offenses set above historical imprisonment levels). The lack of such a basis means §2L1.2 proffers unreliable recommended sentence ranges. Instead of empiricism, §2L1.2 rests on a belief in past wrongs, to the exclusion of the other §3553 factors. This approach often results, as it does here, in a total failure to account for the nature and circumstances of the offense, the history of the particular offender, and justice.

NATURE OF THE OFFENSE

The guideline range overstates the seriousness of Defendant’s unlawful entry offense. *See* 18 U.S.C. § 3553(a)(1) (sentence must not be greater than necessary to reflect seriousness of offense). Defendant entered the United States after being removed and told not to return. He did not commit a crime of violence. His crime did not pose a danger to others. And his offense was not evil in itself. It was, at bottom, an international trespass.

The guideline range also failed to account for the mitigating circumstances of Defendant’s offense. He reentered the United States to seek employment and to see his family. While Defendant’s good motive for returning to this country does not excuse his unlawful reentry, it mitigates the seriousness of the offense. *See United States v. Galvez-Barrios*, 355 F.

Supp. 2d 958, 960 (E.D. Wis. 2005) (reentry for positive motive mitigates seriousness of § 1326 offense); *see also* 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.3(b) (2d ed. 2003) (“Motives are most relevant when the trial judge sets the defendant’s sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives.”).

HISTORY AND CHARACTERISTICS OF THE DEFENDANT:

Example 1:

Mr. Defendant is 32 years of age and a father to 2 children, ages 5 and 8, both of whom are United States citizens. His relationship with the children’s mother, Sonia XXX, who resides in Colorado, has endured despite his deportation. Given the young age of his children, a substantial sentence that effectively requires him to repeat the Washington State sentence already served would deny him any opportunity to have a relationship with his family before his children grow to adults. His deportation has presented a serious impediment to this relationship, incarceration will only compound the difficulties he must face.

Example 2:

A guideline sentence is greater than necessary considering Defendant’s personal history and characteristics. *See* 18 U.S.C. § 3553(a)(1) (court shall consider the history and characteristics of the defendant). In 1979, at the age of 14, Defendant immigrated illegally to this country with his family. (P.R. 13.) His entire family—his parents, siblings, and four children—all live legally in the United States today. (*Id.*) Unfortunately, Defendant had an alcohol problem and, as a result, he sustained a number of convictions and lost the right to stay in the United States. (P.R. 4–11.) But Defendant does not pose a danger to society; for the last ten years, his only crimes have been illegal reentry offenses. (P.R. 9–11.)

DEFENDANT’S CULTURAL ASSIMILATION

Defendant’s asks the court to impose a below-guideline sentence based on his cultural assimilation to the United States. When Defendant was a young child, only 7 years old, his family brought him to the U.S. For a number of years, Defendant had legal permission to live and work in the U.S. He attended Fabens High School, but stopped school in the 11th grade, at age 16, to begin working to support his family. He is fluent in both English and Spanish. Today, Defendant has his own family, a wife and two children, who are U.S. citizens. Defendant’s mother, father, and siblings all continue live in the U.S. legally.

The Fifth Circuit has affirmed that in sentencing aliens for illegal reentry after removal, the “cultural assimilation” of the alien is a basis for a lower sentence. *United States v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir. 2001) (cultural assimilation can be basis for downward departure). The Sentencing Commission’s guidelines do not consider, or do not adequately consider, that aliens who return to the U.S. because it has been their home since youth—and continues to be the family home—are substantially less culpable than aliens who return for purely economic motivation. *See id.* at 432–33. The desire to be with one’s family, friends, and homeland is a profound, positive, and instinctive drive of human nature that mitigates against the severe punishment otherwise called for by the illegal reentry guideline.

DEFENDANT’S AGE INDICATES LESS RISK OF RECIDIVISM

It should further be noted that the defendant is over 40 years of age. As such, he is statistically less likely to engage in recidivist criminal conduct. *See* J. Ulmer & C. Van Asten, *Restrictive Intermediate Punishments and Recidivism in Pennsylvania*, 16 FED. SENT. R. 182 (2004)(noting in analysis of sentencing data finding “[r]ecidivism declines considerably with age”). As the defendant is statistically less likely to break the law, this Court need not impose a harsher sentence serving the ends of deterrence of future criminal conduct.

DEFENDANT’S CRIMINAL HISTORY IS OVER-REPRESENTED

Defendant’s prior conviction represents the only blemish on his otherwise law-abiding life. Despite this single entry on his criminal record for criminal history purposes, he was assessed 5 criminal history points, the equivalent of two separate criminal convictions resulting in more than 13 months punishment, see U.S.S.G. §4A1.1(a), or 6 minor criminal convictions carrying some sentence, see U.S.S.G. §4A1.1(c). By premising its liberal tally of criminal history points on the recency of this single prior conviction, Defendant’s criminal history is over-represented. Although the guidelines indicate a proper sentence requires consideration of “the likelihood of recidivism and future criminal behavior,” U.S.S.G. Ch. 4 (introductory comments), it is not apparent how a defendant with a single prior conviction would be properly characterized as a dangerous, repeat offender as category III characterization suggests.

UNWARRANTED DISPARITY CAUSED BY LACK OF FAST TRACK

The guideline range is also excessive because it results in unwarranted disparity between defendants like Defendant, who cannot avail themselves of a “fast track” program, and defendants in other districts, who can. *See United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. 2005) (imposing sentence below advisory range in part to account for fast-track program); *see also* 18 U.S.C. § 3553(a)(6). This disparity occurs because some districts, but not others, use fast-track programs to induce quick guilty pleas. *See Galvez-Barrios*, 355 F. Supp.2d at 963; *see also United States v. Banuelos-Rodriguez*, 215 F.3d 969, 971 & n.2 (9th Cir. 2000) (noting fast-track policies in some California districts). These programs can result in a decrease of up to four levels for some illegal reentry defendants. *See* U.S.S.G. §5K3.1, p.s.

Because no fast-track program exists in the El Paso division of the Western District of Texas, Defendant lacks the opportunity to reduce his sentence by pleading guilty, an opportunity that is afforded to illegal reentry defendants purely on geographical happenstance. As the Sentencing Commission itself has observed, “[d]efendants sentenced in districts without authorized [fast-track] programs . . . can be expected to receive longer sentences This type of geographical disparity appears to be at odds with the . . . goal of reducing unwarranted sentencing disparity[.]” UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS:

DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES, 66–67 (Oct. 2003), available at <http://www.ussc.gov/departprt03>. With the advent of the advisory guideline system, a sentence below the advisory range would reflect “the need to avoid unwarranted sentencing disparities” caused by the fast-track program. 18 U.S.C. § 3553(a)(6).

APPENDIX B: SAMPLE SENTENCING MEMORANDUM

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

V.

ABEL CLIENT

§

§

§

NO. A 09 CR 0000

SENTENCING MEMORANDUM

(Requesting sentence below advisory guideline range)

Abel Client was the taco truck man. He was the man who built the ball area for the kids in his neighborhood. He was the man who built those kids a play area. He was the man, who with his wife, Maria, made sure that his kids knew the importance of hard work and of doing well in school, and who helped the neighboring kids with homework. He was the man who, when told by a state judge in December 2008 that he could pay a fine or serve a few days in jail, chose jail to conserve his family's limited money. That choice unraveled Client's world, for, at 62, he was also a man who lacked permission to be here.

After Client self-reported to serve his sentence, federal agents put an immigration detainer on him. He was indicted for illegal reentry, and pleaded guilty. The advisory sentencing guidelines, focusing obtusely and narrowly on Client's distant past, suggest an imprisonment range of 37 to 46 months for his reentry offense. That suggestion should go unheeded. A sentence that high would be unjust and far greater than necessary to fulfill the purposes of 18 U.S.C. § 3553(a). An appropriate sentence, one that puts Client's quarter-century old alien-transporting convictions in the context of his family-supporting, neighborhood-improving life, would be six months.

A six-month sentence would be just and would fulfill the "overarching" command of § 3553: that a sentence be "sufficient, but not greater than necessary" to fulfill the purposes of sentencing set out in the statute. 18 U.S.C. § 3553(a); *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). The guideline-suggested ranges are supposed to reflect a "rough approximation" of an appropriate sentence in a "mine-run" case, but, as the Supreme Court has recognized, the guidelines can "fail[] properly to reflect" the § 3553 considerations in atypical cases. *Rita v. United States*, 127 S. Ct. 2456, 2463–68 (2007). Client's case differs markedly from the mine-run illegal reentry case, and it is nothing like the aggravated cases to which the

16-level enhancement of §2L1.2(b)(1)(A) accurately applies. Because of these differences, the guideline range wildly misapproximates the appropriate sentence in his case.³

Guideline offense levels are not usually determined by reference to prior convictions. Section 2L1.2 offense levels are calculated that way, however. The guideline reaches back indefinitely until it finds some conviction to raise the offense level.⁴ *See United States v. Galvez-Barrios*, 355 F.Supp. 2d. 958, 961–63 (E.D. Wis. 2005) (pointing out unusualness of §2L1.2). In Client’s case, the guideline reached back 25 years, to his prior convictions for alien transporting. Client was punished for those offenses, and the punishment took. Client has no felony convictions since then; he has only the minor infractions in 2008 that he chose to go to jail for. The 16-level guideline enhancement acknowledges neither the age of Client’s convictions nor the positive direction of his life after them.

Nor does the guideline enhancement accurately weigh the nature of Client’s prior convictions. In 1983 and 1985 Client was convicted of transporting aliens. (P.R. paras. 24–25, at 6.) Those offenses trigger the 16-level increase because transporting aliens is considered a smuggling offense for purposes of §2L1.2(b)(1)(A)(vii). *See United States v. Solis-Campozano*,

³This is unsurprising. Section 2L1.2 lacks the reliable, empirical, historical basis that many guidelines rest upon. *See, e.g., Kimbrough*, 128 S. Ct. at 575 (observing individual guidelines may lack objective basis); *United States v. Mondragon-Santiago*, No. 07–41099 2009 WL 782894 (5th Cir. Mar. 26, 2009) (policy decisions of guidelines may be disagreed with by district court); *see also* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47 (2004), available at <http://www.ussc.gov/15year/15year.htm> (guideline ranges for immigration offenses set above historical imprisonment levels). The lack of such a basis means §2L1.2 proffers unreliable recommended sentence ranges. Instead of empiricism, §2L1.2 rests on a belief in past wrongs, to the exclusion of the other §3553 factors. This approach often results, as it does here, in a total failure to account for the nature and circumstances of the offense, the history of the particular offender, and justice. *Cf. Kimbrough*, 128 S. Ct. at 574 (sentencing judge in better position than sentencing commission to judge individual case); *Mondragon*, 2009 WL 782894 at *9 (sentencing courts free to disagree with §2L1.2 policy and adjust sentence appropriately).

⁴The criminal history chapter of the sentencing guidelines puts a 15-year limit on the prior convictions deemed relevant in assessing sentence. See U.S.S.G. §4A1.1, § 4A1.2(e). This limit reflects an understanding that the distant past is a poor predictor of the future and an understanding that recidivism declines markedly as men age.

312 F.3d 164 (5th Cir. 2002). Smuggling aliens across the border into the United States is, however, an offense qualitatively different from transporting aliens within the United States. Smuggling involves arranging to bring aliens to the border and introducing them surreptitiously into the country, often for a substantial fee, often as part of a substantial and continuing criminal business, and often at substantial risk to the lives and safety of the aliens. Transporting aliens, as it did in Client's case, often involves little more than driving a vehicle. See (P.R.6.)

That assessing 16 levels for driving aliens overstates the nature of Client's old prior offenses is further made clear by a review of other prior convictions that trigger the 16-level increase. The 16-level increase applies to many different types of offenders, lumping together serial rapists with those who sell the small amounts of drugs and child molesters with men who drive fellow illegal aliens. See U.S.S.G. § 2L1.2 cmt. n. 1(B)(iii) (listing offenses that qualify for a 16 level enhancement). Under this shotgun approach, all these people are assessed the same enhancement and all are placed in similarly high sentencing ranges. In so classifying Client, the guideline ignores that Client has shown in the past two decades that he is not dangerous to the public. *Cf.* 18 U.S.C. § 3553(a)(2)(C) (sentence should be no greater than necessary to reflect risk of danger). He is not dangerous and is not in need of a lengthy prison term to deter him from criminal conduct. He has been behaving for a quarter of a century, and he has a place to go after a shorter sentence. His family owns land in Mexico. While he would obviously prefer to be with his family, because that is not possible, Client has resolved to make his way on the family land, creating a place where he can be visited by his children. *Cf.* 18 U.S.C. § 3553(a)(2)(B) (sentence should be no greater than necessary to reflect risk of danger).

The narrow categorical approach of §2L1.2 range fails to accurately reflect the § 3553(a) factors in other important respects. Because Client is not the dangerous, predatory alien contemplated by the guideline, treating him as if he were by sentencing within the guideline range fails to provide just punishment. 18 U.S.C. § 3553(a)(2)(A). For the same reasons, sentencing within the guideline range fails to promote respect for the law, for the public expects the law to distinguish between less serious and more serious offenders. 18 U.S.C. § 3553(a)(2)(A) (sentence should promote respect for the law). Sentencing Client within the range suggested by 16-level increase would also create unwarranted similarity between differently situated defendants. *Cf.* 18 U.S.C. § 3553(a)(6); *United States. v. Macias-Prado*, 2008 WL

2337088 (E. D. Wis. 2008) (observing that unwarranted similarity is wrong). And, the 16-level increase does more than overstate Client's past behavior; it overstates the seriousness of his reentry offense.

In all these ways, the guideline-suggested sentence is inappropriate. But the most important way in which it is inappropriate is in its inability to see the good and the real and the present in Client's life. The law must "tak[e] into account the real conduct and circumstances involved in sentencing," *Gall v. United States*, 128 S. Ct. 586, 599 (2007), as well as the defendant's personal history and characteristics, 18 U.S.C. § 3553(a)(1). The guidelines cannot do these things because they have no way to convert Client's life into a table entry. The Court must do what the guidelines cannot: "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.* at 598 (internal citation omitted).

The real conduct of this offense and the facts of Client life show that a sentence of six months imprisonment is appropriate. Client has been back in the United States for years. In that time here, Client has committed no new offenses, except the infractions of 2008 for which he voluntarily accepted jail time and voluntarily reported to the jail. In his time here, Client has worked hard, first laying carpeting and flooring, then, starting his own business—the taco truck that fed workers throughout the area. In his time here, Client has been an exemplary father and neighbor, as the stories about him in the attached letters and photographs attest. His family loves and respects Client and they have benefitted from his presence. That is to be expected, one might say, but he is also beloved and respected by his neighbors and their children, whose lives have been improved by Client's presence. He has built play areas. He has taught children to dance and sing and play soccer. He has provided a model of the honest, dedicated, hard-working father. He has tutored his own children and helped the neighborhood children with their homework. He has been, in every way, the exact opposite of the reentry offender imagined by the guidelines; he has made things not more dangerous in his neighborhood, but less so; he has made lives better and the futures brighter for his own children and their friends and neighbors.

A six-month sentence would reflect these real and good circumstances, while impressing upon Client the seriousness of his offense and the imperative that he must not return to this country unlawfully. Six months' imprisonment would accurately reflect the considerations of §

3553(a) and carry out its command of measured sufficiency.

Conclusion

For these reasons, Client asks that the Court sentence him below the range suggested by the advisory guidelines.

APPENDIX C: SAMPLE SENTENCING MEMORANDUM

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA)
)
v.) **CAUSE NO. EP-09-CR-00000**
)
CARLOS CLIENT)

**SENTENCING MEMORANDUM AND MOTION FOR
SENTENCE BELOW ADVISORY RANGE**

CARLOS CLIENT is before this Court for sentencing after pleading guilty to illegal reentry in violation of 8 U.S.C. § 1326. Mr. Client reasserts his objection to the 16-level adjustment and separately requests the Court impose a reasonable sentence below the advisory range pursuant to 18 U.S.C. § 3553.

I. OBJECTION TO 16-LEVEL ADJUSTMENT

Mr. Client objects to the 16-level adjustment for commission of a crime of violence pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii). The adjustment is based on a 2007 conviction for committing or attempting lewd act upon child under sixteen in violation of the Code of Laws of South Carolina 1976 Annotated § 16-15-140 (2006). That statute provided in relevant part “[i]t is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.” In this case, the indictment provided does no more than track the aforementioned statutory language and add relevant dates and the identity of the alleged victim. As such, it adds no information pertinent to a categorical analysis if such analysis is deemed applicable to the statute of conviction.

U.S.S.G. § 2L1.2 Application Note 1(B)(iii) defines “crime of violence” to include “sexual abuse of a minor.” In defining an enumerated offense for purposes of comparing the definition to a statute of conviction, a sentencing court must “apply a common sense approach and give the offense its generic, contemporary meaning.” *United States v. Velez-Alderete*, 569 F.3d 541, 543 (5th Cir. 2009)(internal quotation marks omitted). The generic, contemporary meaning of “sexual abuse of a minor” may be found in *United States v. Najera-Najera*, 519 F.3d 509, 511-12 (5th Cir. 2008), in which the Fifth Circuit defines that term as having the following elements: (1) conduct involving a “child”; (2) conduct is defined as “sexual”; and (3) conduct is defined as “abusive.” In *Najera-Najera*, the Fifth Circuit concludes indecent exposure qualifies as sexual abuse as “abuse” can be satisfied without contact given the psychological trauma inflicted on the child by the experience itself.

Central to this definition is the requirement that conduct be abusive. In *Najera-Najera*, the Fifth Circuit focuses on the effect conduct may have on the minor, observing that a minor subjected to a defendant who indecently exposes himself suffers abuse in the form of psychological trauma. This reflects an objective standard measuring the typical response of a minor to the scenario described. As interpreted, “[t]he crime of committing a lewd act on a minor . . . does not require a sexual battery. Rather, the person committing the crime must act with the intent of appealing to the lust or passions of himself or the child.” *State v. Norton*, 332 S.E.2d 531, 533 (S.C. 1985). South Carolina does not require an inappropriate touching, in fact by all appearances the touching may be characterized as innocent or otherwise appropriate. The statute focuses on the mental state of the defendant in conducting such touching. There is no requirement that the victim be aware of the defendant’s mental state, nor is there a requirement

that the victim be harmed in any way, shape or form by the physical contact.

In light of the foregoing, the proposed 16-level adjustment for commission of a crime of violence is inappropriate.

II. THE COURT'S POST-*BOOKER* AUTHORITY

To remedy the constitutional problem created by mandatory sentencing guidelines, the Supreme Court struck 18 U.S.C. § 3553(b)(1), and thus rendered the guidelines “effectively advisory.” *United States v. Booker*, 543 U.S. 220, 245 (2005). Sentencing courts are still required to consider the guideline imprisonment ranges, but are free to “tailor the sentence in light of other statutory concerns as well,” *id.*, and are to consider all information concerning the background, character and conduct of a defendant. 18 U.S.C. § 3661. *Booker* thus returns substantial discretion to a sentencing court in imposing a reasonable sentence under the circumstances, guided by the overarching goal in sentence known as the parsimony principle, to “impose a sentence sufficient, but not greater than necessary.” 18 U.S.C. § 3553(a).

III. SENTENCE OUTSIDE THE ADVISORY GUIDELINE RANGE WOULD BE REASONABLE AND COMPLY WITH THE DIRECTIVES OF § 3553(A)

Mr. Client is asking the Court for a sentence below the total offense level. *Booker* and § 3553(a) allow a court to take a more nuanced view of the offender and his offense. Consideration of the circumstances of Mr. Client’s offense, his history and characteristics, and the purposes of sentencing as expressed by the § 3553(a) factors, demonstrates that the guideline range is, in this case, greater than necessary to comply with the directives of § 3553(a).

A. Nature and Circumstances of the Offense

Mr. Client was arrested for illegal reentry. He did not resist arrest and cooperated fully with investigating agents when offered the opportunity to do so. The offense of which he was convicted is a victimless crime that did not involve either drugs or violence.

As an initial matter, the 16-level adjustment premised on conviction for a crime of violence adds approximately 4 to 6 years to his sentence. It is dubious at best, given the absence of empirical data supporting the adjustment, *see Kimbrough v. United States*, 128 S. Ct. 558, 567 (2007), to impose such a substantial increase in a term of imprisonment based on a drug trafficking offense for which a defendant has already served a term of imprisonment.

In *Kimbrough*, the Supreme Court explained that tacit approval of an appellate presumption of reasonableness when reviewing within Guideline sentences derived from the “empirical data and national experience” upon which the Sentencing Commission typically promulgates guidelines in its institutional capacity in analyzing and digesting volumes of sentencing data. 128 S. Ct. at 574 (citations omitted). However, the Court noted that certain guidelines do not take account of this data and experience, and, as a result, the same presumption does not necessarily apply to them. *Id.* at 574–75. In other words, sentencing courts are free to disagree with a guideline sentencing choice made by the Sentencing Commission, particularly in cases where there was no empirical support for the guideline. *Id.* Further, the Supreme Court explained that district courts are free to “vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.” *Id.* at 570.

The sixteen-level increase in § 2L1.2(b)(1)(A)(ii) lacks any empirical support. See *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 962 (E.D. Wis. 2005). This lack of

historical support has resulted in excessive sentences for immigration offenses. U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 47 (2004) (guideline ranges for immigration offenses set above historical imprisonment levels).

Like the crack cocaine guideline considered in *Kimbrough*, the illegal reentry guideline fails to “exemplify the Commission’s exercise of its characteristic institutional role” because it is not empirically based. 128 S. Ct. at 575. Per the Supreme Court, the flawed nature of such guidelines may produce a sentence “greater than necessary” to achieve § 3553(a)’s goals “even in a mine-run case.” *Id.* at 575.

B. History and Characteristics of Defendant

Mr. Client is 46 years of age, a husband, and a father to 4 children, 3 of whom are United States citizens. His criminal history reflects no violations preceding the aforementioned conviction nor subsequent to that conviction, making the conduct supporting the conviction an aberration. Even the mandatory Guidelines contemplate less severe treatment of criminal conduct that may be characterized as an aberration, *see* U.S.S.G. § 5K2.20 (providing for downward departure based on aberrant behavior), and sentencing courts are not bound to follow the precise rules set forth in those policy statements for establishing an entitlement to a variance.

C. Need to Avoid Unwarranted Sentence Disparities

It is acknowledged that the precedent of this Circuit forecloses the possibility of an objection based on disparities resulting from “fast track.” However, to preserve this issue on appeal, the recommended sentence fails to address “the need to avoid unwarranted sentence

disparities among defendants with similar records who have been found guilty of similar conduct” given the substantially reduced sentences available to similarly situated defendants in “fast track” jurisdictions but unavailable in non-fast track jurisdictions such as this one.

Although the argument is presently foreclosed this Circuit due to its decision *United States v. Gomez-Herrera*, 523 F.3d 554, 562 (5th Cir. 2008), Mr. Client wishes to preserve his objection that this disparity results in an unreasonable sentence in the event the Fifth Circuit Court of Appeals revisits this position or the Supreme Court reverses *Gomez-Herrera* in light of the contrary decision reached in *United States v. Rodriguez*, 527 F.3d 221, 229-30 (1st Cir. 2008).

IV. CONCLUSION

Mr. Client respectfully requests that the Court reject the 16-level adjustment proposed in this case. He further requests the Court impose a sentence that is not greater than necessary to comply with the purposes of sentencing. A long sentence is not necessary for purposes of deterrence, to promote respect for the law, or to protect the public. Mr. Client is extremely remorseful and is not likely to re-offend. Based upon the foregoing, Mr. Client respectfully asks this Court to impose a reasonable sentence below the suggested Guideline range.