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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case by virtue of 8 U.S.C. §1326(a) and (b)(2). This Court has jurisdiction over this appeal by virtue of 28 U.S.C. §1291 and 18 U.S.C. §3742(b). The United States filed a timely notice of appeal on October 13, 2005. This appeal is from a final order.

ISSUES PRESENTED FOR REVIEW

Whether the district court acted unreasonably when it determined that the mitigating circumstances of the appellee's criminal record and the sentences received by other similarly situated defendants justified a lower sentence in this case than that called for by the advisory sentencing guidelines.

STATEMENT OF THE CASE

On March 9, 2005, the appellee, Enrique Perez-Pena, was named in a one-count indictment and charged with illegal re-entry into the United States after having been convicted of an aggravated felony in violation of 8 U.S.C. §1326(a) and (b)(2). (J.A. 9). Mr. Perez-Pena pled guilty to this charge on May 2, 2005. (J.A. 10). He did not have a plea agreement with the government.

On September 7, 2005, the district court sentenced Mr. Perez-Pena to 24 months in prison to be followed by a three-year term of supervised release. (J.A. 238).

The government filed a timely notice of appeal on October 13th, 2005. (J.A. 244).

STATEMENT OF THE FACTS

Offense Conduct and Guilty Plea

On February 2, 2005, a car driven by the appellee, Enrique Perez-Pena, was stopped for a traffic violation by an officer of the North Carolina Highway Patrol. The officer arrested Mr. Perez-Pena after discovering that he was in this country illegally. (J.A. 250). Mr. Perez-Pena was interviewed a week later by agents of Bureau of Immigration and Customs Enforcement and admitted that he was a Mexican citizen and had been deported to his home country in 1998 following a conviction in Florida of lewd, lascivious or indecent act upon a child earlier that year. (J.A. 250).

Mr. Perez-Pena admitted that reentered the United States in 2004. He settled in North Carolina and obtained work as a brick mason. According to his employer, Mr. Perez-Pena was a valued employee whom he would consider rehiring. (J.A. 253). Since returning to the United States, Mr. Perez-Pena maintained an unblemished record of law-abiding behavior. He has had no arrests or convictions since 1998.

On March 9, 2005, Mr. Perez-Pena was indicted and charged with one-count of illegal reentry into the United States following deportation after conviction of an aggravated felony in violation 8 U.S.C. §1326(a) and

(b)(2). (J.A. 9). Mr. Perez-Pena pled guilty to this charge on May 2, 2005.

(J.A. 10). He did not enter into a plea agreement with the government.

Sentencing Proceedings

Following his guilty plea, the Probation Office prepared a presentence report (PSR) which calculated Mr. Perez-Pena's advisory guideline range under the United States Sentencing Guidelines. The PSR determined that Mr. Perez-Pena's base offense level under U.S.S.G. §2L1.1 was 8. (J.A. 254). The report added 16 levels because Mr. Perez-Pena had previously been convicted of a felony crime of violence. The report subtracted 3 levels for acceptance of responsibility which resulted in a final offense level of 21. (J.A. 254). The report found that Mr. Perez-Pena had only the single prior conviction noted above for which he had received a sentence of house arrest plus a term of probation. He received one criminal history point for this offense. (J.A. 251). The PSR added two more points on the ground that there was a probation warrant outstanding against Mr. Perez-Pena at the time of his arrest.¹ (J.A. 251). His total of 3 criminal history points placed

¹The PSR noted, however, that this warrant was administrative in nature and was not the result of any probation violation committed by Mr. Perez-Pena. The report suggested that inclusion of these two points might cause Mr. Perez-Pena's criminal history score to over-represent his criminal history. (J.A. 256).

Mr. Perez-Pena in Criminal History Category II which, when combined with his offense level of 21, resulted in an advisory guideline imprisonment range of 41 to 51 months. (J.A. 255).

Prior to the sentencing hearing, Mr. Perez-Pena filed a lengthy sentencing memorandum in which he urged the court to impose a sentence below that recommended by the advisory guidelines. (J.A. 24). In his memorandum, Mr. Perez-Pena presented evidence that, by virtue of early disposition programs operating in other judicial districts but not formally available in the Eastern District of North Carolina, a great number of defendants convicted of the same crime as Mr. Perez-Pena received sentences much lower than the 41 to 51 months called for by the PSR in his case. Mr. Perez-Pena argued the sentences imposed on these similarly situated defendants were relevant to several of the sentencing factors the district court was required to take into account pursuant to 18 U.S.C. §3553(a), including the need for the sentence to reflect the seriousness of the offense, the need to promote respect for the law, and the need to avoid unwarranted disparities. (J.A. 24-33).

Mr. Perez-Pena also argued that the particular circumstances of his case and character—his minimal criminal record, the unusual circumstances of his one conviction, his strong work history, his agreement to return to

Mexico—all argued in favor of a sentence lower than that recommended by the Guidelines. (J.A. 32-33).

Mr. Perez-Pena's sentencing hearing began on August 2, 2005. At the outset of hearing, the court found that Mr. Perez-Pena should not have been assessed the two criminal history points based on the outstanding probation violation warrant. This finding reduced Mr. Perez-Pena's Criminal History Category to I and reduced his advisory guideline range to 37-46 months. (J.A. 196-197). The government does not appeal this ruling.

Mr. Perez-Pena then expanded on the arguments made in his memorandum. He made it clear that his argument for a reduced sentence was based on a combination of factors, not just the sentencing disparities caused by fast-track programs. He suggested that based on all the factors listed in §3553(a) a sentence of six months would be an appropriate punishment in this case. (J.A. 201).

The government focused its response on the fast-track component of Mr. Perez-Pena's argument. It noted that another judge in the Eastern District of North Carolina had rejected a similar argument and that, therefore, adoption of Mr. Perez-Pena's position would create intra-district disparity. (J.A. 201-02). It also argued that any inter-district disparities

created by early disposition programs were authorized by Congress. (J.A. 202-03).

After hearing the arguments of both parties, the district court concluded it did not have enough information to decide the issue and determined that further briefing was needed. Accordingly, it continued the hearing to allow the government to file a written response to Mr. Perez-Pena's memorandum. (J.A. 212).

On August 17, 2006, the government responded to Mr. Perez-Pena's argument with an lengthy memorandum of its own. (J.A. 51). It contended that the district court was forbidden to consider, for any purpose, the sentences received by defendants in districts with so-called "fast-track" programs. It argued that the disparities created by these programs were not unwarranted and that it would damage the operation of the programs if courts in non-fast-track jurisdictions were able to take into account sentences received by fast-track defendants.

Mr. Perez-Pena filed a reply to the government's memorandum which responded to both its factual and legal claims. (J.A. 98). He pointed out that, despite the absence of a formal fast-track program, some illegal immigrants federally prosecuted in eastern North Carolina had been afforded a similar form of expedited disposition and argued there was no

reason why he should not be eligible for like treatment. (J.A. 105-108). He emphasized that the sentence he sought was based on a consideration of all the §3553(a) factors, not simply the need to avoid disparities caused by fast-track programs as the government appeared to believe. (J.A. 99-100). He reiterated that the sentences received by defendants very similar to himself were relevant to a number of different §3553(a) factors and, therefore, the government's argument that Congress had determined that fast-track disparities were not unwarranted was, at best, an incomplete response to his claims. (J.A. 100).

Ultimately, the district court agreed with Mr. Perez-Pena that a variance from the advisory guideline range was appropriate. (J.A. 233-35). However, the court did not agree with the extent of the variance proposed by Mr. Perez-Pena. The court rejected Mr. Perez-Pena's request for a 6-month sentence and, instead, sentenced him to 24 months in prison to be followed by a 3-year term of supervised release. (J.A. 233). This represented the equivalent of a four-level departure from the advisory guideline range. In support of this decision, the court relied upon both Mr. Perez-Pena's minimal criminal record and the sentences received by similarly-situated defendants. (J.A. 235, 258-260).

The government filed a timely notice of appeal from the district court's order. (J.A. 244).

SUMMARY OF ARGUMENT

The government argues that the district court erred as a matter of law when, in sentencing the appellee, Enrique Perez-Pena, it took into account the disparity between the sentence prescribed for Mr. Perez-Pena by the advisory sentencing guidelines and the much lower sentences received by defendants convicted of the exact same crime as a result of early disposition or fast-track programs operating in many parts of the country. The government's argument is unavailing, however, because under 18 U.S.C. §3553(a)(6), a sentencing court is required to consider the "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The government's claim that these fast-track-driven disparities are not "unwarranted" because they resulted from a program authorized by Congress does not withstand scrutiny.

First, it 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. Indeed, the Sentencing Commission itself has stated that fast-track programs create unwarranted disparities. Second, the government's claim that the disparities are warranted because fast-track programs serve certain instrumental ends that Congress deems

desirable cannot be squared with the text of §3553(a)(6) which makes it plain that this provision is concerned with maximizing an equality of outcomes among similarly situated defendants, not advancing the general administrative needs of the government. Finally, Congress has never stated that courts may not ameliorate the disparities caused by fast-track programs under the aegis of §3553(a)(6). Indeed, it would be odd if it had since the explicit purpose of fast-track programs is not to foster geographic sentence disparity but to increase the number of illegal reentry prosecutions in overburdened districts and this goal is not threatened by allowing courts, under the authority granted them under §3556(a)(6), to take into account fast-track sentences in sentencing similarly situated defendants convicted of identical offenses.

In any event, even if this Court were to find that the disparities caused by fast-track programs were somehow warranted, it would not follow that the sentence imposed in this case was unreasonable. As Mr. Perez-Pena argued in the district court, the sentences received by similarly situated defendants are relevant to a number of the other purposes of sentencing, including the need for the sentence to reflect the seriousness of the offense, to afford adequate deterrence and to promote respect for the law. More fundamentally, these government-sponsored fast-track sentences are

relevant to the court's statutory duty to impose a sentence which is sufficient but not greater than necessary to achieve the purposes of sentencing. Because it must be assumed that the government would never endorse a sentence it believed threatened public safety or failed to mete out adequate punishment, these fast-track sentences provide the district court with an objective, concrete basis to conclude that a sentence lower than that called for by the advisory guidelines is not unreasonable in this type of case.

Finally, the district court did not act unreasonably in concluding that, given the mitigating circumstances of Mr. Perez-Pena's one prior conviction and his otherwise clean record and strong work history, he presented little danger to the public and a minimal risk of recidivism. Nor did the court err in giving weight to these factors, both of which are contained in §3553(a), in fashioning the sentence it imposed.

Because the 24-month sentence imposed in this case was not unreasonable, it must be affirmed by this Court.

ARGUMENT

THE DISTRICT COURT DID NOT ACT UNREASONABLY WHEN IT DETERMINED THAT THE MITIGATING CIRCUMSTANCES OF THE APPELLEE'S CRIMINAL RECORD AND THE SENTENCES RECEIVED BY OTHER SIMILARLY SITUATED DEFENDANTS JUSTIFIED A LOWER SENTENCE IN THIS CASE THAN THAT CALLED FOR BY THE ADVISORY SENTENCING GUIDELINES.

Standard of Review

The sentence imposed by the district court may be reversed only if it is unreasonable. *United States v. Booker*, 543 U.S. 220, 260-61 (2005).

Argument

A. The Sentence Imposed Was Not Unreasonable.

The twenty-four month sentence imposed on Enrique Perez-Pena by the district court was not unreasonable. The court properly took into account information relevant to a number of the statutory purposes of sentencing it was required to consider and fashioned a sentence which was objectively “sufficient, but not greater than necessary,” to comply with these purposes. 18 U.S.C. §3553(a). Contrary to the arguments of the government, the district court did not establish its own “fast-track” program, did not violate any Congressional command, and did not infringe on prosecutorial control over charging and plea bargaining decisions. Rather, the court conscientiously carried out the responsibilities bestowed

upon it by Congress and the Supreme Court in *Booker* to exercise its discretion to craft a sentence which does justice in the individual case. Because the actual sentence imposed by the court was not unreasonable, it must be affirmed by this court. *Booker*, 543 U.S. at 260-61.

The government, in its brief, tries to limit this Court's inquiry to a single, narrow question: whether the inter-district sentence disparities caused by fast-track programs in illegal reentry cases are warranted or unwarranted within the meaning of §3553(a)(6). The short answer to this question is that such disparities are not warranted, at least on the level of the individual case, and may be ameliorated by a district court. The longer answer is that the government's formulation mis-frames and truncates the inquiry. The government is wrong to focus solely on the issue of sentence disparity which is only one of at least twelve factors a court is required to consider when passing sentence. The sentences received by similar defendants convicted of identical crimes are relevant to a number of these factors, including the need for the sentence to reflect the seriousness of the offense, the need to afford adequate deterrence, and the need to promote respect for the law. That is to say, wholly apart from the issue of disparity, a court could not fulfill its duties under §3553(a) if it were barred from considering the sentences of other defendants convicted of the exact same

crime since these sentences are the clearest expression of the collective wisdom of the bench and bar regarding an appropriate punishment for this offense. *See United States v. Newton*, 428 F.3d 685, 688 (7th Cir. 2005) (permissible for a court to look to sentences received by other defendants when weighing §3553(a) factors).

The issue in this case is not whether fast-track programs have been or should be adopted in the Eastern District of North Carolina either by executive action or judicial fiat. The issue is not whether these programs are wise or efficacious. The issue is whether, viewed against the backdrop of all defendants convicted of Mr. Perez-Pena's crime and in light of his personal qualities and the circumstances of his offense, the twenty-four month sentenced imposed on him was unreasonable. It was not and must be affirmed.

B. Fast-track Programs and Unwarranted Disparity.

Fast-track or early disposition programs have existed in districts with high numbers of illegal reentry cases for many years. While the specific details of these programs vary from district to district, in general they work as follows:

Through charge bargaining or stipulated departures, these programs allow a §1326 offender who agrees to a quick guilty plea and uncontested removal to receive a reduced sentence...

In the Southern District of California, for example, defendants subject to 20 year statutory maximums and guideline ranges of 70-87 months were allowed to plead guilty to an offense carrying a two year statutory maximum penalty. *See United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir.2000). In other border districts, defendants received downward departures to induce fast pleas. See Erin T. Middleton, *Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border Are Undermining the Sentencing Guidelines and Violating Equal Protection*, 2004 Utah L. Rev. 827 (. Recently, in the PROTECT Act, Congress made fast-track programs official, see Middleton, *supra*, at 838-40, and the Commission then enacted a guideline, §5K3.1, providing for a 4 level departure on the government's motion pursuant to an early disposition program.

United States v. Galvez-Barrios, 355 F.Supp.2d 958, 963 (E.D.Wis.2005).

In essence, under these early disposition programs, defendants agree to a quick plea and uncontested removal, saving the government time and money, in exchange for a lower sentence.

While fast-track programs are ostensibly restricted to districts with unmanageably high numbers of §1326 cases, in fact, they have sprouted up across the country with little obvious correlation to immigration caseloads. The Attorney General has authorized programs for such unlikely districts as Georgia, Idaho, Nebraska, Oregon and even North Dakota. *See United States v. Perez-Chavez*, 2005 U.S. Dist. LEXIS 9252, *9 (D.Utah 2005) (unpublished). According to data collected by the United States Sentencing

Commission, none of these districts are overwhelmed with illegal reentry prosecutions.²

Moreover, despite a September 2003 memo from the Attorney General instructing pre-existing fast-track programs to cease operations unless authorized by the Department of Justice, (J.A. 72), there are suggestions that some districts may continue to operate fast-track-like programs on an ad hoc or unofficial basis. The Sentencing Commission reported—in October 2003—that as many as one-half of the nation’s 94 judicial districts operated fast-track programs. United States Sentencing Commission, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines*, 64 (October 2003). A more recent Sentencing Commission report stated that the number of districts employing fast-track programs is “not known.”³ Indeed, in this case, Mr.

² In 2003, for instance, immigration cases made up only 18.7% of North Dakota’s federal prosecutions, 11.4% of Nebraska’s prosecutions and 6.3% of Georgia’s prosecutions, all well below the national percentage of 21.9%. United States Sentencing Commission, *2003 Federal Sentencing Statistics* (available at <http://www.ussc.gov/JUDPACK/JP2003.htm>) By comparison, the immigration prosecutions made up 53.6% of all prosecutions in Arizona, 56.2% in New Mexico and 54.9% in Southern California. *Id.*

³United 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 (November

Perez-Pena presented extensive evidence of a fast-track-like disposition of a large group of illegal immigrants in the Eastern District of North Carolina despite the absence of a formal fast-track program. (J.A. 103-105, 183, 189).

While precise information is difficult to obtain, fast-track programs are clearly widespread. They have, in fact, become the tail that wags the dog in immigration prosecutions. In 2002, more than 30% of all immigration cases (not merely illegal reentry cases) received downward departures via fast-track programs. United States Sentencing Commission, *2002 Federal Sentencing Statistics* (<http://www.ussc.gov/JUDPACK/JP2002.htm>).

These figures do not capture the significant number of defendants whose sentences were reduced via charge-bargaining rather than downward departure. When these cases are included, it is fair to estimate that, broadly speaking, somewhere between 30 to 50% of all illegal reentry defendants received some form of fast-track related reduction. Most strikingly, according to the Federal Justice Statistics Resource Center, approximately 73% of all illegal re-entry cases are prosecuted in jurisdictions with fast-track programs. *Perez-Chavez*, 2005 U.S. Dist. LEXIS 9252 at *10. Thus, the fact that Mr. Perez-Pena was not even eligible to seek a fast-track disposition places him in the distinct minority of defendants nationwide.

2004)(available at http://www.ussc.gov/15_year/15year.htm).

Falling within the small group of defendants excluded from fast-track consideration undeniably worked to Mr. Perez-Pena's disadvantage. A defendant, who by happenstance of geography, is eligible for a fast-track disposition can expect to receive a sentence substantially shorter than an identical defendant who had the misfortune of being apprehended in a non-fast-track jurisdiction. In its submission to the district court, the government set out the sentence reductions a defendant might be expected to receive in the various jurisdictions with fast-track programs. In Nebraska and Idaho, for instance, the government recommends a two-level departure from the guideline range established at sentencing; in North Dakota, a four-level departure, in Eastern California, a four-level departure, in Arizona, up to a four-level departure. (J.A. 60-69).

For districts that utilize a charge-bargaining approach, even more dramatic reductions are possible. *See United States v. Medrano-Duran*, 386 F.Supp.2d 943, 947 (N.D.Ill. 2005). In Central and Southern California, for instance, the government may allow the defendant to plea guilty to either one or two counts of the lesser charge of Improper Entry of an Alien (8 U.S.C. §1325) which has the effect of capping a defendant's maximum sentence at six or thirty months respectively. (J.A. 62-64). While

the details vary, fast-track programs can easily slice years off a defendant's sentence.⁴

Without question, then, fast-track programs create sentence disparities among similarly situated defendants. The government does not seriously dispute this fact but argues that these disparities are uncorrectable because Congress authorized the program which created them. The government argues that because Congress knew fast-track programs would cause disparities, these disparities must have been

⁴Take, for instance the following example: assume three illegal aliens came across the Mexican border: Diego, Santiago, and Raul. All of them have the same criminal history category of V, and all have a prior aggravated felony conviction for a crime of violence. They go to the bus station in San Diego. Diego is immediately picked up by the Border Patrol. His recommended sentencing range, if he pled guilty and received an acceptance of responsibility reduction, based on an offense level of 21 and criminal history category of V, would be 70 to 87 months. However, Diego is lucky. He is prosecuted in a district with a fast-track program, and so he is offered a "fast-track" deal involving charge-bargaining, for which he receives a 30-month sentence. (J.A. 63). His two friends, Santiago and Raul, continue north. Santiago gets off the bus in Sacramento, where he is arrested. He is in another fast-track district; however, in this district the fast-track deal is for a four-level reduction from the offense level in addition to the three-level reduction for acceptance of responsibility, which results in an adjusted offense level of 17, and thus a possible sentencing range of 46 to 57 months. (J.A. 62). Raul heads east and makes it across the boarder into Nevada where he is arrested in Reno. Raul is not so fortunate as his countrymen. There is no "fast-track" deal offered. He pleads guilty, receives the standard three-level reduction for acceptance of responsibility, and receives a sentence of between 70 and 87 months. Three identical defendants, three very different sentences.

intended and are, therefore, not “unwarranted” within the meaning of §3553(a)(6).

The government’s argument is unpersuasive for a number of reasons. First, it defies basic principles of equity, fairness, and commonsense. As one court has noted, “It 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.” *United States v. Bonnet-Grullon*, 53 F.Supp.2d 430, 435 (S.D.N.Y. 1999). Indeed, this is view of the Sentencing Commission which has itself observed that fast-track “geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly-situated offenders.” *Downward Departures Report*, 67. To the extent our system of criminal justice is predicated on notions of just desserts and proportional punishment, outcomes which are untethered from the qualities of the individual defendant or circumstances of his offense and which vary wildly based solely on arbitrary factors such as the locality of the prosecution undermine and offend these principles. See Paul J. Hofer, et al., *The Effects of the Federal Sentencing Guidelines on Inter-Judge Disparity*, 90 J. Crim. L. & Criminology 239, 241 (1999) (“A truism of

sentencing research is that sentences should vary according to the seriousness of the crime and the dangerousness of the offender...”).

This reflexive, intuitive sense that such outcomes are unjust and contrary to the purposes enshrined in §3553(a) finds concrete support in a textual analysis of the phrase “unwarranted disparity” used in the statute. The government argues that the sentence disparities caused by fast-track are warranted because these programs serve certain instrumental ends that Congress deems desirable. However, as one court has explained, §3556(a)(6) is explicitly concerned with maximizing an equality of outcomes among similarly situated defendants, not advancing the general administrative needs of the government:

The question is when Section 3553(a)(6) speaks of “unwarranted sentencing disparities” what are the criteria against which one is to determine whether any given disparity is unwarranted? Inasmuch as the statute speaks of imposing a sentence that considers “the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct,” the text of the Sentencing Reform Act strongly suggests that the measure of whether a disparity is warranted depends upon the characteristics of the defendants and their conduct, not overall considerations of law enforcement efficiency or administrative convenience.

United States v. Santos, 406 F.Supp.2d 320, 325-26 (S.D.N.Y. 2005)

(quoting *United States v. Krukowski*, 04 Cr. 1309(LWK)(S.D.N.Y. 2005)).

Accordingly, the focus of the inquiry under §3553(a)(6) must be on whether a disparate outcome can be justified in terms of the individual defendant, not whether it arguably serves some broader societal goal. Here, the fast-track disparities impact individual defendants arbitrarily, in ways completely disconnected from their personal culpability, therefore, such disparities are quintessentially “unwarranted” within the meaning of §3553(a)(6).

Moreover, Congress has said nothing to the contrary. The government’s position that Congress has somehow forbidden courts from ameliorating fast-track-driven disparities is not grounded in the language of any statute. Instead, it is based on inferences drawn from the fact that Congress, in passing the PROTECT Act of 2003, granted the Attorney General the authority to create fast-track programs and instructed the United States Sentencing Commission to create a policy statement authorizing downward departures pursuant to such authorized programs.

However, the government’s conclusion does not follow from its premise. Congress’s purpose in establishing fast-track programs was not to create geographic sentencing disparities, it was to increase the number of prosecutions in districts swamped with illegal reentry cases. Increasing disparity is not a goal of fast-track, rather it is an undesirable, albeit not

unexpected, by-product of the pursuit of more illegal reentry prosecutions. Disparity is not a feature of the fast-track program, it is a bug; a cost to be minimized, not a benefit to be preserved. Because there is no indication from Congress that it desired *more* disparity when it authorized fast-track, there is no basis to infer a Congressional intent to bar sentencing courts from ameliorating this negative effect of fast-track programs under the aegis of §3553(a)(6). Perhaps Congress could have instituted such a bar, there is simply no evidence that it did.

Moreover, even if one accepts the government's PROTECT Act argument, it fails to address the charge-bargaining-based fast-track programs which were not authorized by the PROTECT Act. There has been absolutely no finding by Congress that the sentence disparities caused by these programs are warranted. Thus, as the court in *Medrano-Duran* concluded, there is no prohibition against a district court taking into account sentence disparities caused by fast-track programs which operate outside the bounds of PROTECT Act authorization. 386 F.Supp.2d at 947-49.

Next, the government implies that the operation of fast-track programs would be damaged if courts in non-fast-track districts were able to take into account the sentences received by fast-track defendants. It is

difficult to see why this would be so. A defendant's incentive to accept a fast-track disposition is not decreased simply because a similarly-situated defendant elsewhere might be eligible for a comparable sentence. In fact, defendants in fast-track jurisdictions will always enjoy a great advantage over defendants in other districts because they receive the benefit of a formal government recommendation for a lower sentence. In other jurisdictions, defendants will, as in this case, have to overcome strenuous governmental opposition to any sentence outside the guideline range. *See United States v. Williams*, 372 F.Supp.2d 1335, 1337 (M.D. Fla. 2005) (discussing formal Department of Justice policy to oppose any sentence outside guideline range absent extraordinary circumstances). Moreover, in a non-fast-track jurisdiction, there is no guarantee that a finding of disparity will result in a reduced sentence. *See United States v. Peralta-Espinoza*, 383 F.Supp.2d 1107 (E.D. Wis. 2005) (fact that fast-track program caused disparity in defendant's case did not warrant sentence below guideline range when considered in light of other statutory sentencing factors). It is, thus, a red herring to argue that the primary goal of the fast-track program—increased prosecutions in busy districts—will somehow be compromised unless the harmful disparities these programs create remain wholly immune from amelioration.

Another red herring advanced by the government is that the district court's action in this case somehow infringed on prosecutorial discretion over charging and plea-bargaining decisions. Mr. Perez-Pena did not ask the court to force the government to enter into a plea bargain with him. He did not ask to be charged with a particular offense. He did not ask the court to establish a fast-track program in the Eastern District of North Carolina. All he asked was that the court consider the sentences of those who had committed identical criminal acts and who had criminal records similar to his when it fashioned his sentence. Nothing in that request implicated any broader separation of powers conflict or invaded the prosecutorial discretion vested with the executive. *Medrano-Duran*, 386 F.Supp.2d at 947-48. It was a mere request that the court, when exercising its proper judicial function, consider the factors mandated by Congress.

Finally, the government argues that it would be "unseemly" if some judges within a district adjusted sentences based on the disparities created by fast-track programs and other judges did not. Gov't Br. at 21. First, it is difficult to see why this is any more distasteful than the current state of affairs which predicates wild sentencing swings on nothing more than the defendant's place of arrest. Second, this complaint seems faintly hypocritical given that the government has no objection to intra-district

disparities when they suit its purposes. In Western Texas, for instance, the government offers fast-track dispositions in some divisions of the court and not in others. (J.A. 68). Third, some greater degree of judge-to-judge variability is an inevitable by-product of the demise of mandatory guidelines. The *Booker* court recognized that uniformity would probably decrease with advisory guidelines but, nonetheless, made it very clear that a system mandating strict uniformity must give way to a system granting judges wider discretion. *See*, 543 U.S. at 765-66. Forcing judges to maintain intra-district uniformity on sentencing issues is thus directly contrary to *Booker*.

Congress has instructed courts to take into account unwarranted sentence disparities at sentencing. It is undisputed that fast-track programs cause disparity. The district court, after carefully considering the matter, determined that the disparities, in this case, were unwarranted. This finding was not forbidden by Congress and was in accord with the conclusion of several other courts which have considered the same issue. *See, United States v. Ramirez-Ramirez*, 365 F.Supp.2d 728 (E.D. Va. 2005); *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019, 1030-31 (D.Neb. 2005); *Galvez-Barrios*, 355 F.Supp.2d at 953; *Santos*, 406

F.Supp.2d at 325-26. Accordingly, the court's finding was not unreasonable and must be affirmed by this Court.

C. Fast-Track Programs and the Other Purposes of Sentencing.

Moreover, even if this court were to find that the disparities caused by fast-track programs were somehow warranted, it would not follow that the sentence imposed in this case was unreasonable. Though the government's brief ignores the fact, Mr. Perez-Pena's argument for a lower sentence did not rest exclusively on the need to avoid a disparity between his sentence and those received by fast-track defendants. There are at least twelve distinct purposes of sentencing enumerated in §3553(a) and, as Mr. Perez-Pena argued to the district court, the sentences received by other similarly situated defendants are relevant to a great number of them.

1. Seriousness of the Offense

One factor a court is statutorily bound to consider in passing sentence is the "seriousness of the offense." 18 U.S.C. §3553(a)(2)(A). One measure of a crime's seriousness is, of course, the offense level assigned to it by the Sentencing Guidelines; however, it is not the only measure. Another means of gauging offense seriousness is to look to the actual sentences imposed on defendants. Indeed, this was the very approach taken by the Sentencing

Commission when it began its work formulating the Guidelines more than two decades ago. The Commission reviewed over 10,000 presentence reports and calculated the average sentence received by defendants for a particular offense. U.S.S.G. §1A1.1. It then attempted to peg the guideline ranges at a level which would “approximate existing practice.”⁵ *Id.* The Sentencing Commission recognized that sentence length was an objective measure of how serious an offense was viewed by the judicial system.

If this outward-looking approach was good enough for the Sentencing Commission, it was surely good enough for the district court in this case. Such review was instructive because it revealed an obvious disjunct between the measure of offense seriousness encoded in the Guideline offense level and that reflected by the actual sentences received by defendants across the country. This information was obviously relevant to the independent review of seriousness that the district court was required by law to undertake.

The government may argue that the only measure of offense seriousness that a district court can consider is that reflected in the Guidelines. This, however, can not be right. On its very face, §3553(a)(2)(A)

⁵Of course, as a result of ever increasing guideline ranges, the current Guidelines no longer reflect the pre-Guideline sentence lengths.

directs the sentencing judge to consider the seriousness of the offense. This command is separate from the independent statutory dictates to consider the effect of the Guidelines (18 U.S.C. §3553(a)(4)) and the individual circumstances of the defendant and the crime (18 U.S.C. §3553(a)(1)).

If §3553(a)(2)(A)'s directive to consider the "seriousness of the offense" is simply an instruction to follow the seriousness of the offense as reflected in the Guidelines, the instruction is redundant of §3553(a)(4), which requires consideration of the Guidelines. Similarly, if the government urges that this is an instruction merely to consider the seriousness of the offense only as to the individual characteristics of the criminal and the crime, that would make §3553(a)(2)(A) redundant of §3553(a)(1), which requires the consideration of "the nature and circumstances of the offense and the history and characteristics of the crime."

Thus, the meaning left to attach to §3553(a)(2)(A) is that the judge must evaluate the seriousness of that type of offense, independent of the guideline range and the individual aspects of the case. Reading the language of §3553(a)(2)(A) as redundant, rather than requiring an independent evaluation of the seriousness of that type of offense by the sentencing court, runs contrary to the Supreme Court's instructions regarding statutory construction, which direct that statutes should not be

construed so as to render one part inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *see also Scott v. United States*, 328 F.3d 132, 139 (4th Cir. 2003) (“Where possible, we must give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous”).

2. Respect for the Law

Sentencing courts have further been instructed by Congress to fashion sentences which promote respect for the law. §3553(a)(2)(A). Such respect is not engendered by punishments which are random, arbitrary or capricious. *See Williams*, 372 F.Supp.2d at 1339. To insist that a district court *must* give a defendant a sentence twice as long as that received by an identical defendant convicted of the same crime simply because he had the misfortune of being arrested in the wrong locale is to endorse sentencing by lottery not reason. To predicate life-altering consequences on whimsical circumstances is not law, but caprice. Such outcomes surely erode, rather than promote, respect for the law and a sentencing court acts properly to avoid them.

3. The Prime Directive of Sentencing

The overarching directive of the federal sentencing statute is set out at its beginning: “The court *shall* impose a sentence sufficient, but not greater

than necessary, to comply with the purposes set out in paragraph (2) of this subsection.” §3553(a)(emphasis supplied). Through this directive, Congress embedded in federal sentencing legislation the moral imperative to impose on any individual the least suffering that is demanded by the general welfare—a concept known in the sentencing literature as the principle of parsimony. *See e.g.* Richard S. Frase, *Punishment Purposes*, 58 *Stan. L.Rev.* 67, 82 (2005)(discussing purposes of §3553(a)); *United States v. Carey*, 368 *F.Supp.2d* 891, 895, n.4 (E.D.Wis. 2005). Under this rule, a person must be given the sentence which is sufficient but not greater than is necessary for the protection of society. The sentence which is lawful is the sentence which is “minimally sufficient.” *See United States v. Kikumura*, 918 *F.2d* 1084, 1111 (3rd Cir. 1990)(per Becker, J.).

In determining what sentence is “minimally sufficient” in a given case, it is obviously helpful to know what courts and prosecutors have deemed sufficient in similar cases. In literally thousands of cases involving defendants guilty of crimes identical to Mr. Perez-Pena’s, the government actively sought sentences lower than those called for by the Guidelines. It must be assumed that, in so doing, the government did not exalt expediency or administrative convenience over public safety or the general welfare. Likewise, the government, presumably, did not seek sentences which it

believed did not “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct;...[and] to provide the defendant with needed...correctional treatment in the most effective manner.”

§3553(a)(2). Simply put, these cases reflect the government’s determination that in many, many instances, illegal reentry defendants may be sufficiently punished by sentences below the advisory guideline range.

It is surely not inappropriate then for a district court, as it attempts to fashion a sentence, to look to the government’s own evaluation of what constitutes “minimally sufficient” punishment in very similar cases. Indeed, the Seventh Circuit has specifically held that “[n]ow that the district court is obliged directly to confront all of the §3553(a) factors...comparison of sentences has become a permissible part of the overall sentencing determination.” *Newton*, 428 F.3d at 688. Mr. Perez-Pena would go farther and argue that a court would be remiss in not considering such information. This, of course, does not mean that the government could not argue for a different outcome based on the individual circumstances of a particular case or that the court’s independent evaluation of sufficiency could not differ from the government’s. However, what could be more relevant to the court’s inquiry than a data set consisting of thousands of

functionally identical cases where the government has come into court and positively represented that a sentence less than that called for by the Guidelines constitutes adequate punishment?

This data is especially critical in light of this Court's recent decision in *United States v. Green*, 2006 WL 267217 (4th Cir. 2005) holding that the guideline range is presumptively reasonable because it provides the court with a concrete, objective basis for concluding that, in this particular set of cases, an alternative sentence might be equally reasonable.

The district court, by taking into account the sentences received by other defendants granted fast-track dispositions, did nothing more than fulfill its Congressionally-mandated responsibility to consider all the purposes of sentencing listed in §3553(a) and to impose a sentence that was sufficient but not greater than necessary to comply with those purposes. Its actions were not contrary to any other Congressional dictate, did not infringe on prosecutorial discretion, and were not unreasonable.

D. The District Court's Use of The Appellee's Criminal Record as a Mitigating Factor.

Finally, the government briefly argues that the district court acted unreasonably when it relied on the unique and mitigating circumstances surrounding Mr. Perez-Pena's single criminal conviction as a partial basis

for its sentence. The government contends that since Mr. Perez-Pena was already in the lowest criminal history category under the Guidelines, there was no basis for the district court to make any further mitigating adjustment based on Mr. Perez-Pena's criminal record. In making this argument, the government again falls into the trap of acting as if *Booker* were never decided and that the dictates of the Guidelines remain binding on the court.

Section 3553(a) specifically requires the court to consider "the history and characteristics of the defendant" and the need to "afford adequate deterrence to criminal conduct." As noted above, both these commands are independent from the court's duty to consider the Guideline range and any applicable policy statements. As much as the government would like to preserve a Guideline-centric world view, this is simply not the state of the law post-*Booker*.

Here, Mr. Perez-Pena has a single prior criminal conviction. In 1998, while in his early twenties, he engaged in a sexual relationship with a twelve-year-old girl whom he was led to believe was much older. (J.A. 32, 251). While clearly illegal, this relationship was, by all accounts, consensual and non-violent. The fact that he was given no prison time is a clear indication that the sentencing court did not believe that Mr. Perez-Pena's

actions were aggravated or predatory. Apart from this one conviction eight years ago, Mr. Perez-Pena's only other involvement with the law was a single arrest for trespassing in 1997. (J.A. 252).

It was not unreasonable for the court to conclude, based on this record, that Mr. Perez-Pena posed little danger to society and presented a minimal risk of recidivism. Nor was it unreasonable for the court to allow this conclusion to influence its choice of sentence. *See Huerta-Rodriguez*, 355 F.Supp.2d at 1030-31 (downward adjustment to sentence of illegal reentry defendant warranted where prior aggravated felony was almost ten years old and defendant had stayed employed and out of trouble since that time). This is especially true since, in this case, the effect of the court's finding on the defendant's sentence was modest. The district court's 24-month sentence represented the equivalent of a four-level reduction from the advisory guideline range. Therefore, it is fair to conclude that the portion of the court's adjustment based on Mr. Perez-Pena's criminal history amounted to no more than the equivalent of a one or two offense-level reduction in the guideline range.

The fact that this Court might not have viewed Mr. Perez-Pena's record in quite the same way or given it precisely the same weight as the district court is of no moment. The district court's finding is entitled to

deference on appeal. As the Seventh Circuit has held, “[O]ur role is not that of the sentencing court. The question is not how we ourselves would have resolved the factors identified as relevant by section 3553(a).” *United States v. Welch*, 429 F.3d 702 (7th Cir. 2005). Post-*Booker*, a reviewing court must approach its task with humility and refrain from substituting its judgment for that of the district court. It should only step in where the district court has acted in a clearly unreasonable manner. Such was not the case here. Mr. Perez-Pena’s sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the appellee, Enrique Perez-Pena, respectfully requests the sentence imposed by the district court be affirmed.

REQUEST FOR ORAL ARGUMENT

Because of the significance of the issues presented in this appeal, the appellant respectfully requests that oral argument be granted in this case.

Respectfully submitted this 17th day of March, 2006.

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