

Sentencing in Illegal Reentry Cases

Getting the Departures and Variances your Client Deserves

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1. Scope

- a. These materials discuss ways to bring the client's sentence down from the guideline OSL.
- b. Jim Langell's materials cover ways to avoid or minimize enhancements from the basic offense level.

2. Materials Description

- a. Sentencing in Illegal Reentry Cases - Getting the Departures and Variances your Client Deserves
- b. Sample Sentencing Motions
- c. New amendments to illegal reentry guideline and supervised release guideline
- d. "Help, I Need Somebody" - helpful internet resources

3. Sentencing issues

a. Attacks on criminal history

i. Remoteness

On November 1, 2011, an amendment to the illegal reentry guideline took effect, which lessens the impact of remote prior serious convictions. Under the new guideline, here is how the offense severity levels change if the conviction is sufficiently remote so that it does not count under USSG Chapter 4 for criminal history:

Predicate offense	old OSL¹	new OSL
crimes of violence, drug trafficking > 13 months, alien smuggling, etc.	24	20
drug trafficking < 13 months	20	16
aggravated felony	16	16
non-agg felony, 3 violent or drug misdemeanors	12	12

Disparities will emerge from this amendment. Persons convicted of less serious felonies will derive *no* benefit from the fact that they have remained crime-free for a decade or more, whereas those who were convicted of more serious crimes will get a sentencing break. 18 U.S.C. § 3553(a)(6). seeks both to avoid unwarranted disparities and unwarranted equal treatment. *See, Gall v. United States*, 552 U.S. 38, 55 (2007), noting that the district court “also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated.” Citing caselaw, one can argue that those with +4 or +8 enhancements also merit consideration for the staleness of their convictions.

Strong arguments will also exist for variances with “almost old enough” cases. A CHC² I defendant with a 120 month old crime of violence faces a 33-41 month range. A CHC I defendant with a 119 month old crime of violence faces a 51-63 month sentence. Is one extra month of recency worth another year and a half sentence?? In *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) the Ninth Circuit said that “[t]he staleness of the conviction does not affect the Guidelines calculation, but it does affect the § 3553(a) analysis.” *Id.* at 1056. In *United States v. Chavez-Suarez*, 597 F.3d 1137 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 286 (2010), the Tenth Circuit discussed *Amezcua-Vasquez* and “agree[d] with the Ninth Circuit that the staleness of an underlying conviction may, in certain instances, warrant a below-Guidelines sentence.” 597 F.3d at 1138. But just recently, it appears to have retreated from this position. In *United States v. Carrillo-Rodriguez*, Slip Copy, 2011 WL 6242550 (C.A.10 (Colo.))(Not Selected for publication in the Federal Reporter) the district court framed the issue as whether the criminal history “substantially overrepresent[s] his criminal history category or the likelihood of recidivism,” which is a Chapter 4 over representation standard, not a § 3553 standard. Still, the Tenth Circuit upheld it, noting that their standard of review of sentences is substantially more deferential than the Ninth’s, and factually distinguishing the case. These factors include the fact Carrillo had returned several years earlier, committing a series of offenses and blowing his opportunity to prove he was harmless, Carrillo’s crimes were not victimless, and

¹ “OSL” - Offense Severity Level

² “CHC” = Criminal History Category

Amezcuá's offense was not an aggravated felony at the time he committed it. To the extent these factors favor your client, *Carrillo-Rodriguez* may have a silver lining. The Fifth Circuit, likewise, has been hostile to staleness arguments, deferring with less analysis than the Tenth, to the sentencing judge, but citing a greater criminal history and insufficient deterrence. *See, United States v. Perez*, Slip Copy, 2011 WL 5105797 (5th Cir. 2011) (Not Selected for publication in the Federal Reporter).

The staleness argument will work most successfully, as shown above, for clients with little or no subsequent/recent criminal history. For example, in *United States v. Vargas Maya*, 426 Fed.Appx. 320, 2011 WL 1990837 (5th Cir. 2011) (Not Selected for publication in the Federal Reporter) the conviction leading to the 16 level increase was ten years old, committed when Vargas Maya was 19. "The district court considered Vargas–Maya's [subsequent] criminal trespass and firearms convictions in the context of weighing the factors of danger to the community and promotion of respect for the law, *noting that Vargas–Maya had continued to break the law after his burglary conviction* and had a loaded firearm in a vehicle (which was under his seat and which he reached for when the police stopped the vehicle). Vargas–Maya has not shown that the district court's balancing of these factors 'represents a clear error of judgment.'" 426 Fed. Appx. at 321 (emphasis added).

In the same way, courts have dispensed with cultural assimilation arguments (*See* USSG § 2L1.2 App. Note 8) on the ground that the person has an extensive criminal background. *See, eg., United States v. Hernandez Mejia*, 426 Fed.Appx. 825, 2011 WL 1835266 (11th Cir. 2011)(Not Selected for publication in the Federal Reporter) ("Hernandez's criminal history included several serious offenses such as battery and aggravated assault on police officers, aggravated fleeing from law enforcement, and possession of a firearm by a convicted felon. The district court specifically stated that a low-range sentence was necessary to provide just punishment and serve as an adequate deterrence, and the court was permitted to 'attach great weight' to these factors."). Counsel should emphasize the lack of criminality on behalf of clients with extensive backgrounds in the United States but minimal criminal history, and distinguish cases such as *Hernandez Mejia* in support of a cultural assimilation argument.

Three months before the amendment, in *United States v. Vasquez-Alcares*, 647 F.3d 973 (10th Cir. 2011) the court held that the guideline sentence imposed was substantively reasonable, even though the cocaine trafficking conviction that triggered a 12-level increase was 15 years old and didn't count for criminal history purposes. The court held that the fact that the Sentencing Commission had proposed that a stale conviction like the defendant's should only get an 8-level adjustment did not make *this* sentence unreasonable; a defendant can only get the benefit of the change if the Commission applies it retroactively. This decision underscores the importance of framing the sentencing argument as an equitable variance, rather than as a departure.

ii. *Uncounseled misdemeanors - Faretta*

Few *pro se* misdemeanor dispositions included the full inquiry required by *Faretta v.*

California, 422 U.S. 806, 834-36 (1975).

When exercised, the right of self-representation ‘usually increases the likelihood of a trial outcome unfavorable to the defendant.’ *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). As a result, ‘its denial is not amenable to ‘harmless error’ analysis. The right is either respected or denied; its deprivation cannot be harmless.’ *Id.*; accord *United States v. Baker*, 84 F.3d 1263, 1264 (10th Cir. 1996). To invoke the right, a defendant must meet several requirements. First, the defendant must ‘clearly and unequivocally’ assert his intention to represent himself. *United States v. Floyd*, 81 F.3d 1517, 1527 (10th Cir. 1996). Second, the defendant must make this assertion in a timely fashion. *United States v. McKinley*, 58 F.3d 1475, 1480 (10th Cir. 1995). Third, the defendant must ‘knowingly and intelligently’ relinquish the benefits of representation by counsel. [*United States v. Boigegrain*, 155 F.3d 1181, 1189 (10th Cir. 1998).] To ensure that the defendant’s waiver of counsel is knowing and intelligent, the trial judge should ‘conduct a thorough and comprehensive formal inquiry of the defendant on the record to demonstrate that the defendant is aware of the nature of the charges, the range of allowable punishments and possible defenses, and is fully informed of the risks of proceeding *pro se*.’ *United States v. Willie*, 941 F.2d 1384, 1388 (10th Cir. 1991); accord *United States v. Padilla*, 819 F.2d 952, 959 (10th Cir. 1987).

United States v. Mackovich, 209 F.3d 1227, 1236 (10th Cir. 2000).

Do not leave unchallenged a PSR’s statement that counsel was waived. Order the tape or transcript of the plea hearing. It is the defense’s burden to prove that he was denied counsel. *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938), *United States v. Cruz-Alcala*, 338 F.3d 1194, 1197 (10th Cir. 2003). This burden can likely be met with the client’s testimony or affidavit, or with evidence from the hearing. In one case I handled, the tape showed the judge literally screaming at the client to intimidate him into waiving counsel.

The background comment to USSG § 4A1.2, definitions and instructions, says, “Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.” While this means in all likelihood prior uncounseled misdemeanors with probationary sentences will count for criminal history, it opens the door to over representation. Was the defendant detained until sentencing due to an immigration hold, resulting in a 2- or 3- point conviction whereas a citizen would have received probation and only one point? Was there a defense but he just plead guilty to get out of jail?

iii. *avoiding 2 points for “being found”*

Where the client is “found” by ICE in a county jail and a hold is put on him, it is the practice in some districts to claim the person was “found” when the person is transferred into federal custody on the ICE detainer, and not on the date that the detainer was placed. Frequently,

the person is not under a criminal justice sentence at the time the hold is placed, but is at the time s/he is transferred to ICE custody. This results in the person getting two criminal history points for “being under a criminal justice sentence at the time the new offense was committed,” under USSG § 4A1.1(d). In *United States v. Jimenez-Borja*, 378 F.3d 853, 858 (9th Cir.), *cert. denied* 543 U.S. 1030 (2004), the “[defendant] could have been charged with having been ‘found in’ the United States on October 5, 2001 when he was found in Escondido, California by local police (as he was), or on March 14, 2002 when he was discovered by the INS, or on any date in between -- but not after March 14, 2002. On that date, having been discovered by the INS, Jimenez-Borja’s continuing violation ended.” Insist that the charging document your client pleads to has the “found” date as the date the client was discovered by ICE, otherwise you may be held to have waived the issue, or plead the client to the approximate date of entry, not the “found in” date.

iv. over representation

It is not uncommon for a person to spend a term in prison, including for another reentry, and turn around and immediately return, earning 5 points for that prior reentry. This is the epitome of over representation, particularly considering the non-violent, victim-less nature of illegal reentries. USSG § 4A1.3(e) provides, “The court may conclude that the defendant’s criminal history was significantly less serious than that of most defendants in the same criminal history category . . . and therefore consider a downward departure from the guidelines.”

Another important amendment to the sentencing guidelines took effect on November 1, 2011, which could ameliorate this result. USSG § 5D1.1 was amended to add the the following:

*“(c) The court ordinarily should **not** impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.”*

(emphasis added.) The Sentencing Commission explains that supervision is unnecessary, and that *“If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution should the offender return illegally.”*³

Marjorie Meyers, Federal Public Defender for the Southern District of Texas, writing on behalf of the federal defender organization to the Sentencing Commission in its *Public Comment on USSC Notice of Proposed Priorities for Cycle Ending May 1, 2011*, wrote,

[T]he Commission should extinguish the term of supervision upon deportation. “Congress intended supervised release to assist individuals in their transition to community life.” “It is not meant to be punitive.” Given that purpose, it makes no sense for defendants who will be deported to face terms of supervised release. As the Defender

³ USSG § 5D1.1, App. Note 5.

in the Western District of Texas explained at the Commission's regional hearing in Phoenix:

"Supervised" release is a misnomer when it comes to deported defendants. They receive no supervision at all – no opportunities for training, education programs, drug or alcohol addiction or psychiatric treatment, or any of the other benefits regularly available to U.S. citizen releases as they attempt to reenter society. Deported defendants are simply dropped on the other side of the border and told not to return.

For these defendants, supervised release simply provides a means of additional punishment should they return. In addition to the draconian multiple counting of the prior reentry conviction in any new prosecution, the defendant will face a revocation of his supervised release term and a consecutive sentence of imprisonment under §7B1.3(f). To remedy the punitive nature of supervised release terms for deported defendants, we urge the Commission to amend §5D1.1 to recommend against automatic imposition of supervised release on defendants facing deportation.⁴

The rationale for the amendment as set out in its commentary and as elaborated by Ms. Meyers applies to and can be argued at sentencing of offenders who are on supervised release for one illegal reentry when they commit another.

Frequently, our § 1326 clients pick up points for offenses where citizens might not, such as for not understanding conditions of probation and not reporting, or for having warrants issued for them because they were deported and not here to report. Or, they pick up additional points under USSG § 4A1.1(b) or (c), getting two or three points for offenses which would be one-pointers for citizens, due to an inability to make bond set high or set at no bond due to an immigration hold. Or, they pick up the points due to utter ignorance about our system. I once had a client spend six months in pretrial detention for a DWI, without a single court appearance! He didn't know it wasn't supposed to happen that way, and there was a discrepancy between his name as booked into the jail and on the criminal complaint, so the court never figured out he was in custody.

United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019 (D. Neb. 2005), an illegal reentry case, the court substantially reduced the defendant's sentence from what the guideline range indicated, noting that pre-*Booker* it would have granted a downward departure for over representation of criminal history due to several DWI's causing the defendant to be in criminal history category V. The court noted, "[his offense of conviction] does not involve the same level of culpability as the crimes of violence that form the basis of the steep increase in sentence under the Guidelines." 355 F. Supp. 2d at 1031.

⁴ *Defender Comment Re: USSC Proposed Priorities for Cycle Ending 5/1/11 at 42-43* (footnotes deleted).

In *United States v. Harfst*, 168 F.3d 398 (10th Cir. 1999), the court departed downward where it found that *two* misdemeanor convictions, resulting in a criminal history level of II, significantly over represented Harfst's criminal history. The government did not appeal this determination, so the issue was not addressed on appeal.

v. *finality*

Note that while for many purposes, a conviction is final once "the judgment of conviction [has been] rendered, the availability of appeal exhausted, and the time for petition for certiorari . . . elapsed." *Teague v. Lane*, 489 U.S. 288, 295, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) (*citing Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986) (per curiam)), all that is needed for a case to count for criminal history points is that guilt be established, whether by plea or verdict, § 4A1.2(a)(1), (3). But for increases under § 2L1.2, (offense severity), the narrower definition applies.

b. Booker sentencing issues

i. *social history*

United States v. Booker, 543 U.S. 220 (2005) and 18 U.S.C. § 3553(a)⁵ establish that a client's background is a necessary consideration in determining what sentence is sufficient, but

⁵ (a) *Factors To Be Considered in Imposing a Sentence*. - The court shall impose a sentence **sufficient, but not greater than necessary**, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed -
 - (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;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for -
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; . . .
 - (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

not greater than necessary, to carry out the sentencing purposes of just punishment, deterrence, protection, rehabilitation, and lack of disparity.

It is critical, therefore, to take a detailed social history of the client. Mitigating factors are limited only by counsel's imagination, and her ability to learn enough about the client to know what there is in the client's life story that is mitigating.

At a bare minimum, the social history should cover the following:

- facts, role, mitigation of prior offense
- family situation - health, economic
- attempts to avoid returning
- unusual harm suffered by this arrest
- what client understood re right to return
- reason for return
- evidence of good character
- acculturation
- mental status/condition
- unusual harm suffered by future incarceration

One of my first federal appeals concerned a young man who had made his way from southern Mexico alone to New York City as a young teen. After only a month, he was abandoned by his relatives there and left to fend for himself. He found work and housing, and was making it, but got crosswise in a gang fight (he himself was not a gang member) and was prosecuted. He was deported across the border with no way to make it back to his home in southern Mexico. He worked for a few weeks in a church in Juárez, but still didn't have the money for a bus fare. He determined to cross back to the US just to earn enough for his bus fare home. The rest is history. The problem is that his first attorney *never* interviewed his client, *never* took a social history and *never* learned any of this. Astonishingly, the visiting sentencing judge said (pre-*Booker*) that he didn't want to have to give this youth so much time, and asked the defense attorney to research to see if there wasn't some reason for a departure. Even more astonishingly, the attorney *still* did nothing; still didn't ask the client a single question about himself. Reluctantly the judge imposed the minimum guidelines sentence, and the case went to outside counsel because of the apparent IAC claim. The window of opportunity had passed; neither the appellate court, nor the subsequent judge on the habeas felt that failure to investigate and present mitigating evidence constituted ineffective assistance. *cf. Wiggins v. Smith*, 539 U.S. 510, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003), finding the contrary in the capital context.

ii. common mitigation themes

A good starting point for brainstorming mitigation themes or drafting a sentencing memorandum is Michael Levine's "171 EASY MITIGATING FACTORS,"⁶ a wonderful compendium of different mitigating factors with caselaw in support of each. Footnoted below is a sample of

⁶ Available by googling "easy mitigating factors"

the Easy Mitigating Factors that might commonly apply to a § 1326 client.⁷

Another excellent source of ideas is the sentencing resource page at the Federal Defender website - www.fd.org. Articles on the deconstructing guideline page include:

- *The Fallacies Underlying Immigration Guideline §2L1.2*
by Maureen Franco, Deputy Federal Public Defender, W.D. TX, Judy Madewell,
Assistant Federal Public Defender, W.D. TX, Mike Gorman, Legal Research & Writing
Assistant, W.D. TX
- *Why the Prior Conviction Sentencing Enhancements In Illegal Re-Entry Cases Are
Unjust and Unjustified (and Unreasonable Too)*

-
- ⁷ 6. Lack of knowledge or criminal intent or mens rea
20. The defendant's criminal history overstates his propensity to commit crimes
 44. Defendant's conduct did not threaten the harm sought to be prevented by the law proscribing the offense—perceived lesser harm
 84. Extraordinary family situations or responsibilities or where incarceration would have harsh effect on innocent family members
 87. Good deeds (e.g., saving a life)
 88. Defendant's status as war refugee and his lack of education
 90. Diminished capacity
 91. Mental retardation or impaired intellectual functioning
 94. Defendant's extraordinary mental and emotional condition
 106. Ineffective assistance of counsel
 115. Defendant subject to extraordinary punishment not contemplated by the guidelines
 118. Defendant subject to abuse in prison
 119. Cultural heritage and sociological factors
 123. Defendant's tragic personal history
 136. Duress or coercion
 138. Disparity in sentencing
 139. Disparity in plea-bargaining policies between districts
 110. Credit for time served on INS/ICE detainer
 153. Defendant is alien facing more severe prison conditions than non-alien
 154. Alien who will be deported because of guilty plea punished too severely
 155. Alien who reentered for honorable motive or to prevent perceived greater harm
 156. Alien who consents to deportation
 157. Alien who illegally reenters and whose prior aggravated felony is not serious
 158. Alien for whom sixteen level bump for prior conviction is arbitrary and capricious and unfair because unfairly raises both guideline and criminal history and is arbitrary
 159. Alien whose criminal history score is overstated
 160. Alien who has assimilated into American culture
 161. Alien who should receive credit on INS/ICE detainer
 162. Alien in district with no fast track policy

by Doug Keller, formerly an attorney with the Federal Defenders of San Diego, Inc.⁸

Articles on the specific guideline / statutory sentencing issues include:

- *Challenging the Upward Bumps: The Categorical Approach and Other Sentencing Strategies for Illegal Re-Entry (8 U.S.C. §1326) Cases*
by Francisco Morales, Assistant Federal Public Defender, S.D. TX
- *Analyzing Presentence Reports and Common Sentencing Issues in Illegal Reentry Cases*
by Shari Allison and James Langell, Assistant Federal Public Defenders D. NM
- *Crimes of Violence Under §2L1.2*
compiled by Anne Berton, Assistant Federal Public Defender, W.D. TX
- *Case List: Sentencing Issues in Reentry Cases*
by Shari Allison, Research and Writing Specialist; and James Langell, Assistant Federal Public Defender, D. NM
- *Defending Against Sentencing Enhancements in Immigration Cases*
by Anne Berton, Assistant Federal Defender, W.D. TX, & Mike Gorman, Staff Attorney, Office of the Federal Defender, W.D. TX.

Many of these documents make the excellent policy/deconstruction argument that the 16 level enhancement is without empirical support. Indeed, this is so. See, Robert McWhirter and Jon Sands, "*Does the Punishment Fit the Crime?*" 8 FED. SENT. R. 275, 1996 WL 671556 (April 1, 1996):

The Commission did no study to determine if such sentences were necessary - or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16- level increase and the Commission passed it with relatively little discussion. The 16-level increase, therefore, is a guideline anomaly - an anomaly with dire consequences.

Unfortunately, this policy argument falls mostly on judicial deaf ears. But of all places, the Fourth Circuit last year reversed a case where this empirical argument was made. In *United*

⁸ This article is no longer linked from the fd.org website. It is, however, available from other sites, including:
<http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3117&context=bclr&sei-redir=1#search=%22Why%20Prior%20Conviction%20Sentencing%20Enhancements%20Illegal%20Re-Entry%20Cases%20Unjust%20Unjustified%20%28and%20Unreasonable%20Too%29%22>

States v. Myers, Slip Copy, 2011 WL 3468288 (4th Cir. 2011) (Not Selected for publication in the Federal Reporter) the district court said, “I’m sitting here in the Fourth Circuit and I am not the King of the World. I cannot undo what they have done. Because I, unlike Mr. Myers, abide by the law. Now, so all of these objections or requests for some kind of lenient treatment flowing from these arguments will be rejected by the Court.” *Id.* at *2 Reversing the court, the Fourth Circuit held, “It is now well established that a court may consider policy objections to the Sentencing Guidelines. *See Kimbrough*, 552 U.S. at 101–07, 128 S.Ct. 558. . . . The record does not conclusively indicate that the district court was unaware of its authority to impose a variance sentence based on a disagreement with the policy behind the illegal reentry Guideline.” *Id.* at *3.⁹

iii. *Situation in Mexico*

The current situation in Mexico deserves special mention. Many of the border offices represent many clients who have fled deadly violence. In the 70's and 80's, many Central Americans fled violence in their countries, and eventually, Congress responded with Temporary Protected Status, and by offering asylum to the refugees. Likely because of the massive scale of the violence and the tens of millions affected by it, as well as the political relationship¹⁰ between the United States and Mexico, no similar relief has been extended yet to the refugees of this war. It is important to educate judges on the conditions our clients are fleeing. Even those not personally touched by the violence have seen their livelihoods destroyed, as tourists stay home and businesses close due to lack of business and/or extortion by the cartel assassins.

Attached to these materials is are two sample sentencing memoranda from different states laying out the deadly border situation (among other sentencing issues). It is distressingly easy to update and customize the research for different clients' home towns. Simple online searches of the client's home town + search terms such as “cartel violence” turn up multiple articles.

Several governmental sites also provide valuable information. The Congressional Research Service has published an extensive report entitled “Mexico's Drug Related Violence.”¹¹

⁹ Postscript: The district court judge, having been made aware of his variance authority, resentenced Mr. Myers to the same sentence. The case is once again on appeal.

¹⁰ Extending such status or granting asylum would be a direct political/diplomatic acknowledgment that Mexico has lost control of the situation and is unable to protect its citizens from the cartel violence, although in issuing a travel warning, the United States government has pretty much done just that. “Travel Warnings are issued when long-term, protracted conditions that make a country dangerous or unstable lead the State Department to recommend that Americans avoid or consider the risk of travel to that country.” http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html

¹¹ Available, among other sources, at <http://www.fas.org/sgp/crs/row/R40582.pdf>

The State Department has issued a travel warning for Mexico. This April 22, 2011 update provides much more specific information about specific border regions than previous travel warnings:

General Conditions

Since 2006, the Mexican government has engaged in an extensive effort to combat transnational criminal organizations (TCOs). The TCOs, meanwhile, have been engaged in a vicious struggle to control drug trafficking routes and other criminal activity. According to Government of Mexico figures, 34,612 people have been killed in narcotics-related violence in Mexico since December 2006. More than 15,000 narcotics-related homicides occurred in 2010, an increase of almost two-thirds compared to 2009. Most of those killed in narcotics-related violence since 2006 have been members of TCOs. However, innocent persons have also been killed as have Mexican law enforcement and military personnel. . . .

Violence along the U.S. - Mexico Border

You should be especially aware of safety and security concerns when visiting the northern border states of Northern Baja California, Sonora, Chihuahua, Nuevo Leon, and Tamaulipas. Much of the country's narcotics-related violence has occurred in the border region. More than a third of all U.S. citizens killed in Mexico in 2010 whose deaths were reported to the U.S. government were killed in the border cities of Ciudad Juarez and Tijuana. Narcotics-related homicide rates in the border states of Nuevo Leon and Tamaulipas have increased dramatically in the past two years.

Carjacking and highway robbery are serious problems in many parts of the border region and U.S. citizens have been murdered in such incidents. Most victims who complied with carjackers at these checkpoints have reported that they were not physically harmed. Incidents have occurred during the day and at night, and carjackers have used a variety of techniques, including bumping moving vehicles to force them to stop and running vehicles off the road at high speed. There are some indications that criminals have particularly targeted newer and larger vehicles with U.S. license plates, especially dark-colored SUVs. However, victims' vehicles have included those with both Mexican and American registration and vary in type from late model SUVs and pick-up trucks to old sedans.

If you make frequent visits to border cities, you should vary your route and park in well-lighted, guarded and paid parking lots. Exercise caution when entering or exiting vehicles.

Large firefights between rival TCOs or TCOs and Mexican authorities have taken place in towns and cities in many parts of Mexico, especially in the border region.

Firefights have occurred in broad daylight on streets and in other public venues, such as restaurants and clubs. During some of these incidents, U.S. citizens have been trapped and temporarily prevented from leaving the area. The location and timing of future armed engagements cannot be predicted. You are urged to defer travel to those areas mentioned in this Travel Warning and to exercise extreme caution when traveling throughout the northern border region.

Northern Baja California: Targeted TCO assassinations continue to take place in Northern Baja California, including the city of Tijuana. You should exercise caution in this area, particularly at night. In late 2010, turf battles between criminal groups proliferated and resulted in numerous assassinations in areas of Tijuana frequented by U.S. citizens. Shooting incidents, in which innocent bystanders have been injured, have occurred during daylight hours throughout the city. In one such incident, an American citizen was shot and seriously wounded.

Nogales and Northern Sonora: You are advised to exercise caution in the city of Nogales. Northern Sonora is a key region in the international drug and human trafficking trades, and can be extremely dangerous for travelers. The U.S. Consulate requires that armored vehicles are used for official travel in the consular district of Nogales, including certain areas within the city of Nogales. The region west of Nogales, east of Sonoyta, and from Caborca north, including the towns of Saric, Tubutama and Altar, and the eastern edge of Sonora bordering Chihuahua, are known centers of illegal activity. You should defer non-essential travel to these areas.

You are advised to exercise caution when visiting the coastal town of Puerto Peñasco. In the past year there have been multiple incidents of TCO-related violence, including the shooting of the city's police chief. U.S. citizens visiting Puerto Peñasco are urged to cross the border at Lukeville, AZ, to limit driving through Mexico and to limit travel to main roads during daylight hours.

Ciudad Juarez and Chihuahua: The situation in the state of Chihuahua, specifically Ciudad Juarez, is of special concern. Ciudad Juarez has the highest murder rate in Mexico. Mexican authorities report that more than 3,100 people were killed in Ciudad Juarez in 2010. Three persons associated with the Consulate General were murdered in March, 2010. You should defer non-essential travel to Ciudad Juarez and to the Guadalupe Bravo area southeast of Ciudad Juarez. U.S. citizens should also defer non-essential travel to the northwest quarter of the state of Chihuahua. From the United States, these areas are often reached through the Columbus, NM, and Fabens and Fort Hancock, TX, ports-of-entry. In both areas, U.S. citizens have been victims of narcotics-related violence. There have been incidents of narcotics-related violence in the vicinity of the Copper Canyon in Chihuahua.

Durango, Coahuila and Zacatecas: Between 2006 and 2010, the number of narcotics-related murders in the State of Durango increased dramatically. Several areas in the state have seen sharp increases in violence and remain volatile and unpredictable. U.S. government employees are restricted from traveling to the cities of Durango and Gomez Palacio. You should defer non-essential travel to these cities.

The State of Coahuila has also experienced an increase in violent crimes and narcotics-related murders. U.S. government employees are restricted from traveling to the area known as "La Laguna", including the city of Torreon, and the city of Saltillo within the state. You should defer non-essential travel to this area, as well as to the cities of Piedras Negras and Ciudad Acuña due to frequent incidents of TCO-related violence.

The northwestern portion of the state of Zacatecas has become notably dangerous and insecure. Robberies and carjackings are occurring with increased frequency and both local authorities and residents have reported a surge in observed TCO activity. This area is remote, and local authorities are unable to regularly patrol it or quickly respond to incidents that occur there. The Consulate General in Monterrey restricts travel for U.S. government employees to the city of Fresnillo and the area extending northwest from Fresnillo along Highway 45 (Fresnillo-Sombrete) between Highways 44 and 49. In addition, highway 49 northwards from Fresnillo through Durango and in to Chihuahua is isolated and should be considered dangerous. You should defer non-essential travel to these areas.

Monterrey and Nuevo Leon: The level of violence and insecurity in Monterrey remains elevated. Local police and private patrols do not have the capacity to deter criminal elements or respond effectively to security incidents. As a result of a Department of State assessment of the overall security situation, on September 10, 2010, the Consulate General in Monterrey became a partially unaccompanied post with no minor dependents of U.S. government employees permitted.

TCOs continue to use stolen cars and trucks to create roadblocks or "blockades" on major thoroughfares, preventing the military or police from responding to criminal activity in Monterrey and the surrounding areas. Travelers on the highways between Monterrey and the United States (notably through Nuevo Laredo and Matamoros/Reynosa) have been targeted for robbery that has resulted in violence. They have also been caught in incidents of gunfire between criminals and Mexican law enforcement. In 2010, TCOs kidnapped guests out of reputable hotels in the downtown Monterrey area, blocking off adjoining streets to prevent law enforcement response. TCOs have also regularly attacked local government facilities, prisons and police stations, and engaged in public shootouts with the military and between themselves. Pedestrians and innocent bystanders have been killed in these incidents.

The number of kidnappings and disappearances in Monterrey, and increasingly

throughout Monterrey's consular district, is of particular concern. Both the local and expatriate communities have been victimized and local law enforcement has provided little to no response. In addition, police have been implicated in some of these incidents. Travelers and residents are strongly advised to lower their profile and avoid displaying any evidence of wealth that might draw attention.

Tamaulipas: You should defer non-essential travel to the state of Tamaulipas. In an effort to prevent the military or police from responding to criminal activity, TCOs have set up roadblocks or "blockades" in various parts of Nuevo Laredo in which armed gunmen carjack and rob unsuspecting drivers. These blockades occur without warning and at all times, day and night. The Consulate General prohibits employees from entering the entertainment zone in Nuevo Laredo known as "Boys Town" because of concerns about violent crime in that area. U.S. government employees are currently restricted from travelling on the highway between Nuevo Laredo and Monterrey, as well as on Mexican Highway 2 towards Reynosa or Ciudad Acuña due to security concerns.

Be aware of the risks posed by armed robbery and carjacking on state highways throughout Tamaulipas. In January 2011, a U.S. citizen was murdered in what appears to have been a failed carjacking attempt. While no highway routes through Tamaulipas are considered safe, many of the crimes reported to the U.S. Consulate General in Matamoros took place along the Matamoros-Tampico highway, particularly around San Fernando and the area north of Tampico.¹²

The *Los Angeles Times* has an ongoing series of articles on the drug war, which has archives of its articles, and one can search or filter for articles on the area of the country or other matters being researched.¹³

The *El Paso Times* also regularly reports on the situation.¹⁴ Reporter Daniel Borunda has published a number of stories in the paper, including an interesting report on how the Santísima Muerte is revered by people from many walks of life, not just drug traffickers.¹⁵

iii. mitigation of predicate felony

Frequently, a client's prior felony may have mitigating factors that set it apart from other

¹² http://travel.state.gov/travel/cis_pa_tw/tw/tw_5440.html

¹³ <http://projects.latimes.com/mexico-drug-war/#/its-a-war>

¹⁴ http://www.elpasotimes.com/ci_12033826

¹⁵

http://www.elpasotimes.com/ci_18536732?IADID=Search-www.elpasotimes.com-www.elpasotimes.com

crimes in the same classification. Most common is the crime of violence category, where misdemeanors from states where the maximum sentence for a misdemeanor is over a year, and first degree murders, as well as rapes, kidnappings, and the like, all get the same sixteen level increase.

In *United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. 2005) the court reversed the sentence where, in a § 1326 case, Mr. Trujillo-Terrazas' sentence was substantially enhanced for a very minor prior offense, which qualified as a crime of violence:

The relatively trivial nature of Mr. Trujillo's criminal history is at odds with the substantial 16-level enhancement recommended by the Guidelines for this conduct. The state court assessed restitution of a mere \$ 35.00 for Mr. Trujillo's third degree arson conviction, suggesting a quite minor offense. The Guidelines, however, look only to the conviction itself rather than the actual conduct underlying the conviction. This blunter approach means that the Guidelines do not distinguish between tossing a lighted match through a car window, doing minor damage, and a more substantial crime of violence such as an arson resulting in the complete destruction of a building or vehicle. To punish this prior conduct in the same manner could be seen to run afoul of § 3553(a)(6), which strives to achieve uniform sentences for defendants with similar patterns of conduct.

405 F.3d at 819-20. *See also*,¹⁶ *United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (*en banc*) (district court acted within its discretion when it departed downward in an illegal re-entry case by 3 levels from 77 to 30 months on the grounds (1) that the prior aggravated conviction was only a \$20 heroin sale; and (2) that the delay in bringing the federal charge prejudiced the defendant's opportunity to obtain a sentence concurrent to the state sentence he was already serving); *United States v. Castillo-Casiano*, 198 F.3d 787 (9th Cir. 1999) (district court's failure to consider nature of prior felony plain error); *amended*, 204 F.3d 1257 (9th Cir. 2000); *United States v. Cruz-Guevara*, 209 F.3d 644 (7th Cir. 2000) (D's only prior felony conviction was for "aggravated criminal sexual abuse of a minor," a consensual sex act between D (age 18) and his girlfriend (age 16). He was sentenced to 116 days. The district court granted a 10-level downward departure under Note 5 and the government appealed. The Seventh Circuit disagreed with the government's argument that the extent of the departure was patently unreasonable. The court made a strong argument for the departure under Note 5, but remanded for the district court to link the degree of the departure to the structure of the guidelines); *United States v. Diaz-Diaz*, 135 F.3d 572 (8th Cir. 1998) (court upheld downward departure from 63 to 10 months because 16-level adjustment overstated the seriousness of prior which involved sale of 8.3 grams of marijuana for which D received 22 days jail); *United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321(D. N.M. 2005) (in illegal reentry case where guideline was 57 -71 months, sentence of 15 months imposed because prior conviction though nominally and aggravated felony and crime of violence was relatively trivial misdemeanor of consensually kissing a girl for

¹⁶ This paragraph is an excerpt from Michael Levine's 171 Easy Mitigating Factors compilation #157, see fn 20 - *see what a great resource it is?!*

which probation was imposed); *United States v. Perez-Nunez*, 368 F. Supp.2d 1265 (D.N.M.2005) (in illegal reentry case, where guidelines 57-71 months, 24 months imposed because prior "crime of violence" was third-degree assault arising defendant's throwing of rock at the rear window of another car whose driver had attempted to run him over defendant; the term "crime of violence" is an overly broad catchall category that "subject[s] defendants convicted of everything from murder, rape and sexual abuse of a minor to simple assault, to the same 16 level enhancement in calculating the proper sentencing range...which not produce uniformity but rather "produce[s] a result contrary to the spirit of the Guidelines."); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005) (post *Booker*, where guideline range was 70-87 months court imposed 36 months in part because court would have granted downward departure for over-representation of criminal history in that prior occurred nearly ten years ago); *United States v. Marcos-Lopez*, 2000 WL 744131 (S.D.N.Y. June 9, 2000) (unpub.) (where only prior was sale of \$20, Application Note 5 encourages departure, so proper to depart 8 levels from 16 increase and sentence to 18 months in illegal reentry case. Court noted that the offense "did not rise beyond the level of an attempt and did not involve a large quantity of drugs." D had only one other prior conviction: for "farebeating," apparently a misdemeanor); *United States v. Ortega-Mendoza*, 981 F. Supp. 694 (D.D.C. 1997) (departure downward to 30 months granted where prior aggravated felony involved sale of only .2 grams of cocaine); *United States v. Hinds*, 803 F. Supp. 675 (W.D.N.Y. 1992), *aff'd*, 992 F.2d 321 (2d Cir. 1993) (departure from 51 to 30 months granted because criminal history overstated seriousness of priors).

v. *deterrence*

Many of the cases upholding within guidelines sentences have relied on the need for deterrence. *See, eg., United States v. Lora*, 424 Fed.Appx. 852, 2011 WL 1519114 (11th Cir. 2011) (Not Selected for publication in the Federal Reporter) ("The court found that the earlier [20 month] sentence had not deterred Lora from reentering, and it indicated that a high-end guideline sentence of 21 months' imprisonment was unlikely to do so, either. The court heard argument about Lora's family life and his criminal background. It then sentenced Lora to 36 months' imprisonment, approximately a 71% upward variance from the high end of his guideline range.") It is critical to impart to sentencing courts that deterrence is not the only factor they must consider, and that more does not always mean better.

A recent report from the Sentencing Project evaluated deterrence, and found that the research in the field finds that the *certainty*, rather than the *severity*, of punishment is what serves as a deterrent.¹⁷

While the criminal justice system as a whole provides some deterrent effect, a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits. Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce

¹⁷ Available at www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf

deterrent benefits. This briefing paper provides an overview of criminological research on these relative impacts as a guide to inform future policy consideration.

...

One problem with deterrence theory is that it assumes that human beings are rational actors who consider the consequences of their behavior before deciding to commit a crime; however, this is often not the case.

...

Another problem in assessing deterrence is that in order for sanctions to deter, potential offenders must be aware of sanction risks and consequences before they commit an offense. In this regard, research illustrates that the general public tends to underestimate the severity of sanctions generally imposed. This is not surprising given that members of the public are often unaware of the specifics of sentencing policies. Potential offenders are also unlikely to be aware of modifications to sentencing policies, thus diminishing any deterrent effect.

Id. This last paragraph is particularly true of our illegal reentry clients. In the past, people caught without documents in this country were overwhelmingly simply deported or granted voluntary return. Now, there is a zero tolerance policy and many are learning the very painful lesson that it is in fact a crime to enter without inspection, one that is brutally punished if one was deported subsequent to a felony conviction. It bears repetition: a surprising number of our illegal reentry clients, while understanding that they would not be allowed to cross at a port of entry, do not realize it is a crime to cross without inspection. It always bears asking, because if the client did not know he was committing a crime at all, the severity of the sanction is meaningless.

iv. Avoiding unwarranted disparities

Sometimes the guideline is just plain ridiculous for the offense severity. *See, United States v. Santos-Núñez* 2006 WL 1409106, 6 (S.D.N.Y., May 22, 2006) (unpub.). The court considered the unfair double counting in using a prior conviction both to increase offense severity and criminal history category. “Nowhere but in the illegal re-entry Guidelines is a defendant's offense level increased threefold based solely on a prior conviction....The result of this double-counting produces a Guidelines range that is unreasonable, given the non-violent nature of the instant offense, and the fact that Santos-Nuez has not been charged with any additional crimes since his return to the United States.” *See also, United States v. Ennis* 468 F.Supp. 2d 228 (D. Mass. 2006) While this is a drug case, the court's perspective on the absurd resultant guideline range is equally applicable to the reentry guideline that “makes absolutely no sense” given the circumstances of the case, the characteristics of the defendants, and the purposes of sentencing.

It is sometimes interesting to compare what other criminal conduct places one at a level 20 or 24 offense severity. Below is an excerpt from a sentencing memorandum:

A sentence at level 20 also does not promote equal treatment of similarly situated offenders, a factor courts are required to consider under 18 U.S.C. § 3553(a)(6). Here are some other offenses that merit level 24 (as an original level; 20 with acceptance of responsibility and waiver of appeal) under the guidelines:

Offense	Guidelines section
1 lb cocaine; 220 lbs marijuana	2D1.1
aggravated assault with a firearm, inflicting a permanent or life-threatening injury	2.2
criminal sexual assault of a minor	2A3.4
knowing endangerment from hazardous or toxic substances	2Q1.1
Bank robbery with death threat	2D3.1

In comparison to these offenses, reentry is in an utterly different category. Applying the same level would frustrate the goal of equal treatment under 18 U.S.C. § 3553(a)(6).

You might also distinguish your client from others facing the same charge with traditional mitigation factors such as age, border violence, family ties, age or circumstances of priors, etc.

4. Conclusion

It can be challenging to represent people in § 1326 cases. You may not be able to communicate with them in the absence of an interpreter; they may have utterly unrealistic expectations of our legal system both as far as how it functions and the gravity of their situation. Only by crossing this cultural and communication gap and learning about your client and his story can you present your client's story in a creative, sympathetic, and compelling manner to the judge.

Hypothetical Scenario

Your new § 1326 client, Juan López González, is taken into ICE and then US Marshal custody on March 15, 2006, after finishing a sentence for DWI. He was given three months in jail and three months' probation on this DWI, which was a DWI-2, because just before sentencing, another Mexican immigrant drove into a crowd of Christmas carolers, killing two, the community was in an uproar about the supposed "drunken immigrant" problem, and the courtroom was full of MADD members wearing their MADD t-shirts. His prior DWI was from 1985.

He was deported on January 2, 2005, subsequent to a fifteen-month stint in the county jail, where he was given time served, for possession of methamphetamine, a felony under NMSA § 30-31-23(D). The trial court expressed dismay that this simple case took fifteen months to bring to sentencing; the jail had booked him in under González, and the public defender had him listed as López. He had checked the custody list, saw no Juan López listed, his letter to your client's former home address (taken off his driver's license) was returned, and the public defender assumed he was a fugitive and took no action on the case. When a relative of López finally came to the public defender's office a year after his incarceration, the mistake was discovered. Normally, an offender would be given a few weeks' time for this offense.

López had returned to the United States because his wife, who was still living here, fell ill and was hospitalized, and there was no one to take care of their children. He has a first grade education, and worked as an agricultural laborer from the age 8 on in Mexico.

He is charged under § 1326 with being found in the US on March 15, 2006, after deportation subsequent to commission of an aggravated felony, and without permission.

The PSR finds the offense level to be 24. It finds the criminal history to be IV (0 for 1985 DWI; two for 2006 DWI, three for possession of meth, and two for being under a criminal justice sentence.)

What issues do you see in this scenario??

1 **I. THE EXCESSIVE SEVERITY OF THE 16-LEVEL INCREASE IN THE**
2 **ILLEGAL REENTRY GUIDELINES, U.S.S.G. § 2L1.2(B)(1)(A), WARRANTS A**
3 **REDUCED SENTENCE FROM THE COURT**

4 If the Court concludes that the government has met its burden to establish the 16-level
5 enhancement, which it should not, Mr. CLIENT requests that the Court consider a downward
6 variance under section 3553(a) based on the excessive and unwarranted severity of the
7 Sentencing Guideline itself. *See Kimbrough v. United States*, 128 S. Ct. 558, 575-76 (2007)
8 (holding that a Court may vary from the Guidelines based on policy disagreements with the
9 Guideline itself); *see also, United States v. Henderson*, 649 F.3d 955, 960 (9th Cir. 2011) (same).

10 In immigration cases, the guideline range is often suspect due to the 16-level increase
11 applied under U.S.S.G. § 2L1.2(b)(1)(A), which triples the starting offense level of 8 based upon
12 conduct for which defendants have already been punished. In this case, the 16-level increase
13 leads to a guideline range that is 70-87 months, more than 7 years at the high-end. The excessive
14 nature of this guideline range becomes starkly apparent when comparing it to historical and
15 average sentences in immigration offenses, as well as to average sentences imposed for all
16 federal criminal offenses nationwide. Before the adoption of the Guidelines, the average time
17 served by immigration offenders was 5.7 months. *See* United States Sentencing Commission,
18 *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 69 tbl. 3
19 (June 18, 1987), *available at* <http://www.fedlib.org/pdf/lib/Supplementary%20Report.pdf> (last
20 visited February 22, 2012). In 2010, the average sentence in immigration cases rose to 16.8
21 months, three times higher than before the Guidelines were in place. *See* United States
22 Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 13 (2010),
23 *available at*
24 http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table13.pdf
25 (last visited February 22, 2012).

26 The average sentence for *all* federal offenses in 2010 was 44.3 months. *Id.* From both a
policy perspective and a fairness perspective, it makes sense that a non-violent, non-drug related
offense that is essentially a status crime – *i.e.*, illegal re-entry – would not be punished as
severely as other, more serious crimes. The statistics, however, illustrate that a sentence of 70-
87 months in an immigration case would be an extreme anomaly. It would be approximately
five times the average sentence for immigration offenses and nearly *double* the average sentence
in *all* federal criminal cases.

The severity of the 16-level increase regularly yields guideline ranges for illegal reentry
defendants that are approximately four years longer than they would be under the default base
offense level of 8. *See United States v. Hernandez-Castillo*, 449 F.3d 1127, 1131 (10th Cir.
2006) (Guideline range was 57-71 months, but would have been 6-12 months without the 16-
level enhancement); *United States v. Otero*, 502 F.3d 331, 333, 337 (3rd Cir. 2007) (defendant
sentenced to 60 months due to 16-level enhancement where, had his counsel properly objected,
his guideline range would have been 18-24 months). By generating a base offense level of 24,
the increase grades reentry at the same level as offenses that are far more serious. These include
sex trafficking of children, *see* U.S.S.G. § 2G1.3(a)(4); bombing an airport or mass transit
facility, *see* U.S.S.G. § 2K1.4(a)(1); and robbery with a dangerous weapon causing serious
bodily injury, *see* U.S.S.G. § 2B3.1(a), (b)(3)(B). The base offense level yielded by the 16-level
increase is higher than the levels assigned to the crimes of inciting a prison riot with substantial
risk of death (level 22), *see* U.S.S.G. § 2P1.3, and reckless manslaughter (offense level 18),
see U.S.S.G. § 2A1.4(a)(2)(A).

A. The 16-Level Increase Results in Unjustifiably Severe Sentences From

1 **Which Courts Have Commonly Varied Downward**

2 The unusual severity of § 2L1.2(b)(1)(A) is apparent from the face of the Guidelines.
3 The provision looks to prior convictions for purposes of increasing the base offense level, even
4 though the criminal history provision at U.S.S.G. § 4A1.1 also counts the *same convictions* for
5 enhancing the criminal history category. This “double counting” marks a notable exception to
6 the usual approach of the Guidelines and has been found to warrant downward variances. *United*
7 *States v. Santos*, 406 F. Supp. 2d 320, 327-28 (S.D.N.Y. 2005) (imposing a sentence of 24
8 months when the Guidelines range was 57-71 months and explicitly departing 3 levels
9 downward to offset the double-counting of criminal history); *United States v. Zapata-Trevino*,
10 378 F.Supp. 2d 1321, 1327-28 (D.N.M. 2005) (imposing a sentence of 15 months when
11 Guidelines range was 41-51 months, finding that double counting the defendant’s criminal
12 history was “overly punitive”); *United States v. Galvez-Barrrios*, 355 F.Supp. 2d 958, 963-64
13 (E.D. Wis. 2005) (imposing a sentence of 24 months when the Guideline range was 41-51
14 months, in part because double counting was unreasonable).

9 Even as compared to the few other Chapter 2 Guidelines that double-count prior
10 convictions, the 16-level increase embodied in § 2L1.2(b)(1)(A) is unusual in magnitude. The
11 firearms guideline, for example, takes account of a prior “crime of violence” by increasing the
12 base offense level for felons in possession from 14 to 20, an increase of six levels, which is less-
13 than half of the base offense level. U.S.S.G. § 2K2.1(a)(4)(A), (a)(6). In contrast, the illegal
14 reentry guidelines triple the base offense level, and the same prior “crime of violence” results in
15 a 16 level increase on an immigration offense – ten levels *more* that the exact same prior would
16 enhance the gun offense level. Possessing a gun after a crime of violence seems to be a much
17 more dangerous crime than entering the country illegally, yet the Guidelines reflect the opposite.

14 The tendency of the 16-level increase to promote unreasonable sentences has led courts
15 to limit the Guideline’s application by closely reviewing the particulars of the triggering offense.
16 See *United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. 2005) (vacating a sentence of 41
17 months, the low end of the Guidelines, because the nature of the underlying offense and the
18 factors of 3553(a) warranted a departure from the Guidelines); *Galvez-Barrrios*, 355 F.Supp. 2d
19 at 958 (finding defendant was not a danger to society, despite being convicted of aggravated
20 assault with a firearm, and mitigating circumstances warranted a departure from 41-51 months to
21 24 months); *United States v. Arellano-Garcia*, 2006 WL 4109665 (D.N.M. July 11, 2006)
22 (varying downward from 46-57 months and imposing a sentence of 18 months based upon nature
23 of underlying attempted burglary offense). As the caselaw demonstrates, it is not uncommon for
24 courts to determine that the 16-level enhancement is unreasonable given the nature of the
25 underlying offense, even when it undeniably involves some level of violence. Indeed, the notes
26 to the Guideline explicitly provides that a departure may be warranted where the offense level
overstates the seriousness of a prior conviction, as it does here. U.S.S.G. § 2L1.2, n.7.

22 Now that the Guidelines are advisory, the Guidelines uniform increase in offense levels
23 can be remedied with a downward variance. Mr. CLIENT’s case falls well within the realm of
24 cases where the 16-level increase is unreasonable and a departure and/or variance is warranted.
25 First, the double-counting in his Guidelines calculation is unreasonable. Not only does Mr.
26 CLIENT receive a 16-level increase in his base offense level for his 2007 conviction for assault,
he also receives two criminal history points for that same conviction. As the District Court noted
in *Galvez-Barrrios*, “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.” 355
F.Supp. 2d at 964. Moreover, he already received a sufficient sentence for that conduct by the
state court.

1 **B. The Sentencing Commission Has Not Articulated Any Considered**
2 **Rationale For the 16-Level Increase, Which Has Drawn Criticism**
3 **From Criminal Justice Professionals**

3 An examination of the evolution of § 2L1.2(b)(1)(A) demonstrates its lack of sound
4 policy rationale. It was not based on empirical research concerning deterrent efficacy or any
5 other variable relevant to the purposes of sentencing. *See Perez-Nunez*, 368 F. Supp. 2d at 1268
6 (observing that the Commission “did no study to determine if such sentences were necessary or
7 desirable from any penal theory”) (quoting Robert J. McWhirter & Jon M. Sands, “Does the
8 Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-Entry
9 Cases,” 8 Fed. Sent’g Rep. 275 (Apr. 1, 1996)); *Galvez-Barrios*, 335 F. Supp. 2d at 962 (same).
10 Indeed, the 16-level enhancement seems to have found its way into the Guidelines on the
11 impromptu suggestion of a single commissioner. *See McWhirter & Sands* at 276, quoted in, *e.g.*,
12 *Galvez-Barrios*, 355 F. Supp. 2d at 962.

13 Unfortunately, the casual adoption of the 16-level enhancement has led to very serious
14 consequences. Immigration offenders served, on average, 5.7 months in prison before the
15 Guidelines, and they now serve an average of 16.8 months. *Compare* United States Sentencing
16 Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements
17 at 69 tbl.3 (June 18, 1987) *available at* http://www.fd.org/pdf_lib/Supplementary%20Report.pdf
18 (last visited February 22, 2012) *with* United States Sentencing Commission Sourcebook of
19 Federal Sentencing Statistics, Table 13 (2010), *available at*
20 http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table13.pdf
21 (last visited February 22, 2012). Since the adoption of the 16-level increase, criminal justice
22 professionals have called for its amendment to reduce its inexplicable severity toward persons
23 like Mr. CLIENT. At a Sentencing Commission hearing in 2006, a number of federal judges and
24 probation officers expressed concerns that the provision paints with too broad a brush. *See*
25 United States Sentencing Commission, Transcript of Public Hearing (San Diego, Mar. 6, 2006)
26 at 22-23, 36-39, 45-46, 54-48, 146-147. The witnesses offered examples of disproportionate
sentences caused by the 16-level increase and identified practical considerations calling for
amelioration of its severity, such as many reentry defendants’ difficulty in articulating the nature
of any previous encounters with the criminal justice system. *Id.* at 36-37, 39, 45-46. At least
one commissioner has acknowledged the Guideline’s infirmities and spoken favorably of a
reform proposal submitted by defense attorneys. *Id.* at 22-23, 75.

 The unconsidered and problematic nature of § 2L1.2(b)(1)(A) underscores the urgency of
close attention to Mr. CLIENT’s case. The Guideline drove “the offense level to a point higher
than . . . necessary to do justice in this case.” *Kimbrough v. United States*, 128 S. Ct. 558, 575-
76 (2007) (upholding district court’s four and one-half year downward variance given lack of
sound policy rationale for crack cocaine guideline’s application); *see also, United States v.*
Henderson, 649 F.3d 955, 960 (9th Cir. 2011) (holding that the district court could disagree with
the child pornography guidelines for policy reasons as they are not based on the sort of empirical
data that the Supreme Court has deemed appropriate when attaching the term “reasonable” to a
guidelines-based sentence). The unduly heightened Guidelines range should not distort the
Court’s exercise of discretion in determining the minimally sufficient sentence to promote the
purposes set forth in 18 U.S.C. § 3553(a). To presume the 16-level increase to be reasonable
would be reversible error. *Nelson v. United States*, 129 S.Ct. 890, 892 (2009) (“Our cases do not
allow a sentencing court to presume that a sentence within the applicable Guidelines range is
reasonable.”).

 Here, the arbitrary and unsupported increase in the offense level is particularly apparent

1 when the Court looks at the difference in the guideline range based on the classification of the
2 prior as a misdemeanor or a felony. If this Court determines that the government has not
3 established that Mr. CLIENT's prior is a felony, the adjusted offense level is 10 and the range is
4 21-27 months (even without any reduction in his criminal history category). If, however, *based*
5 *on the exact same conduct and the exact same sentence*, the Court determines the government
6 has met its burden, the Guideline goes up to 70-87 months. This arbitrary difference is also
7 exemplified by the government's willingness to support a sentence at offense level 10 based on
8 the same conduct that it now says should be sentenced at offense level 21. Nothing has changed
9 about the prior conduct, yet the Guideline reflects an exponential increase in the resulting
10 sentence.

11 Taking into account the fact that Mr. CLIENT's criminal history and base offense level
12 are double counted, and that the 16-level increase is widely believed not to promote uniformity
13 in sentencing and was not based on any empirical research, imposing a Guidelines sentence in
14 this case would be unreasonable. The sentence that is sufficient but not greater than necessary in
15 this case is fifteen months.

16 **II. ADDITIONAL FACTORS UNDER § 3553(a) WARRANT A SENTENCE OF** 17 **FIFTEEN MONTHS**

18 Regardless of the Court's determination of the offense level, in consideration of all of the
19 factors under 18 U.S.C. § 3553(a), the Court should conclude that a sentence of fifteen months is
20 appropriate in this case.

21 The PSR provides a glimpse into Mr. CLIENT's impoverished and abusive upbringing
22 and the adversity that he faced from a young age. He had to drop out of school at age ten to
23 work to provide even the most minimal amount of food for himself and his family. To escape
24 from this poverty and the abuse of his uncle, he came to the United States. When he got here, he
25 did what he had planned: he worked hard and started a family. Unfortunately, despite his strong
26 commitment to his family, his addiction to alcohol has had a strong grip on him and he has been
unable to kick his habit. The vast majority of his interaction with the criminal justice system are
the result of this addiction to alcohol. Despite his obvious need for treatment, he has never
received the counseling necessary to end this debilitating addiction.

A sentence of fifteen months imprisonment would be longer than any sentence that Mr.
CLIENT has received in the past. He has never been to prison and his longest previous sentence
was 365 days. ¶¶ 26-32. Mr. CLIENT a returned to this country unlawfully after his removal,
and for that he must be punished. But to argue, as the government does in its Sentencing
Memorandum, that he did not learn his lesson from a 60 day sentence and therefore he should be
sentenced to *70 months* – 35 times higher – flies in the face of the sentencing statute's goal of
"sufficient but not greater than necessary." While an incremental increase in Mr. CLIENT's
punishment is warranted, the exponential increase requested by the government is unduly harsh.
A sentence of fifteen months would be more than *seven times higher* than his last sentence for
illegal reentry. It is a serious consequence that will more than adequately punish Mr. CLIENT
for his particular conduct and will also adequately deter any future wrongful conduct.

Moreover, his deportation from the United States – and separation from his children – is
a certain consequence of this conviction and a significant punishment that cannot be ignored.
Mr. CLIENT is a father above all else. He returned to this country again and again to be with his
children. He now understands that he cannot do that, and that the best way to support his
children is by living lawfully outside of the United States. The Court has a tool to ensure that

1 Mr. CLIENT not illegal reenter this country, which is to place him on one year of supervised
2 release.¹ If Mr. CLIENT returns to this country again, the Court can take action at that time.
3 Now, however, is not the time to impose such a harsh penalty.

4 Mr. CLIENT has fully accepted responsibility and expressed remorse for returning to the
5 United States without permission. While in custody before being charged in this case, he
6 admitted to ICE agents that he was a citizen of Mexico, had been previously deported and
7 returned to this country unlawfully. PSR ¶ 6. No motions or other petitions were filed in this
8 case; instead, as soon as was practicable, Mr. CLIENT admitted his wrongdoing and pleaded
9 guilty to the charged offense. Throughout this proceeding, he has continuously and forthrightly
10 admitted his guilt and accepted responsibility for his actions.

11 Finally, the offense of conviction in this case is illegal re-entry after deportation. While
12 Mr. CLIENT acknowledges the seriousness of his offense and admits that he violated the law in
13 coming back to this country without permission, it is not a violent crime and must be put into
14 context relative to other federal felonies. While there is much focus on Mr. CLIENT's criminal
15 history, there is little discussion of the actual offense conduct that is presently before the Court.
16 Mr. CLIENT is not before the Court to be sentenced on any of his prior convictions, as serious as
17 they may be; instead, he is to be sentenced by this Court for *illegal reentry following*
18 *deportation*. There is nothing that makes his *illegal reentry* more egregious simply because it
19 occurred after a serious conviction; while that makes his criminal history more egregious, it does
20 not make his illegal reentry any worse. Moreover, this is not a situation where the state has not
21 imposed sufficiently harsh sentences for earlier conduct. He has been adequately sentenced for
22 all earlier conduct.

23 The question before this Court is simple: how much time is sufficient but not greater than
24 necessary to sentence Mr. CLIENT for his particular conduct of coming back to the country
25 without permission after having previously been deported? The defendant submits that fifteen
26 months is a sufficient amount of time in custody for this particular offense conduct given Mr.
CLIENT's background. It is a serious consequence that will more than adequately punish Mr.
CLIENT for his particular conduct and will also adequately deter any future wrongful conduct.
Any additional time in custody would be purely for the sake of punishment, and would add
nothing to the other important sentencing goals of section 3553(a).

CONCLUSION

A sentence of fifteen months is a serious consequence that will more than adequately
punish Mr. CLIENT for his particular conduct and will also adequately deter any future
wrongful conduct. Thus, for the reasons stated, in full consideration of his history and
characteristics together with the other goals of sentencing, Mr. CLIENT respectfully requests
that the Court sentence him to fifteen months in custody to be followed by one year of
supervised release.

Dated: February 22, 2012

¹While the Sentencing Guidelines no longer recommend supervised release for a
defendant such as Mr. CLIENT who will be deported from the United States immediately
following his imprisonment, see USSG § 5D1.1(c), here, he is recommending a one year term of
supervised release to give the Court further assurance that he has no intention of returning to this
county.