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

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

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

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

Which Courts Have Commonly Varied Downward

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

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

The tendency of the 16-level increase to promote unreasonable sentences has led courts to limit the Guideline's application by closely reviewing the particulars of the triggering offense. *See United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. 2005) (vacating a sentence of 41 months, the low end of the Guidelines, because the nature of the underlying offense and the factors of 3553(a) warranted a departure from the Guidelines); *Galvez-Barrios*, 355 F.Supp. 2d at 958 (finding defendant was not a danger to society, despite being convicted of aggravated assault with a firearm, and mitigating circumstances warranted a departure from 41-51 months to 24 months); *United States v. Arellano-Garcia*, 2006 WL 4109665 (D.N.M. July 11, 2006) (varying downward from 46-57 months and imposing a sentence of 18 months based upon nature of underlying attempted burglary offense). As the caselaw demonstrates, it is not uncommon for courts to determine that the 16-level enhancement is unreasonable given the nature of the underlying offense, even when it undeniably involves some level of violence. Indeed, the notes 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.

Now that the Guidelines are advisory, the Guidelines uniform increase in offense levels can be remedied with a downward variance. Mr. CLIENT's case falls well within the realm of cases where the 16-level increase is unreasonable and a departure and/or variance is warranted. First, the double-counting in his Guidelines calculation is unreasonable. Not only does Mr. 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-Barrios*, "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.

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

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

Unfortunately, the casual adoption of the 16-level enhancement has led to very serious consequences. Immigration offenders served, on average, 5.7 months in prison before the Guidelines, and they now serve an average of 16.8 months. *Compare* United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements at 69 tbl.3 (June 18, 1987) *available at* http://www.fd.org/pdf_lib/Supplementary%20Report.pdf (last visited February 22, 2012) *with* United States Sentencing Commission Sourcebook of Federal Sentencing Statistics, Table 13 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table13.pdf (last visited February 22, 2012). Since the adoption of the 16-level increase, criminal justice professionals have called for its amendment to reduce its inexplicable severity toward persons like Mr. CLIENT. At a Sentencing Commission hearing in 2006, a number of federal judges and probation officers expressed concerns that the provision paints with too broad a brush. *See* United States Sentencing Commission, Transcript of Public Hearing (San Diego, Mar. 6, 2006) 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

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

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

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

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

The PSR provides a glimpse into Mr. CLIENT's impoverished and abusive upbringing and the adversity that he faced from a young age. He had to drop out of school at age ten to work to provide even the most minimal amount of food for himself and his family. To escape from this poverty and the abuse of his uncle, he came to the United States. When he got here, he did what he had planned: he worked hard and started a family. Unfortunately, despite his strong 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

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

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

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

The question before this Court is simple: how much time is sufficient but not greater than necessary to sentence Mr. CLIENT for his particular conduct of coming back to the country without permission after having previously been deported? The defendant submits that fifteen 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

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[1]While 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.