

## Sample Re-Entry De-Construction

### 1. Advisory Range

The probation department has calculated Mr. Dominica's advisory range at 30 to 37 months of incarceration. The range is based on a total offense level of 17 in criminal history category III. The probation officer derived the offense level from U.S.S.G. § 2L1.2, and the criminal history category is based on Mr. Dominica's prior contact with the criminal justice system. His prior contact serves *both* as the basis for a 12 point increase in his offense level, and his status as a criminal history category III. The combination of these factors under the guidelines provide a clear example of the particularly unreasonable nature of the sentencing guideline for illegal reentry offenses.

### 2. Illegal Reentry Guideline

Congress directed and empowered the Sentencing Commission to develop a sentencing regime for the Federal criminal justice system which promotes the purposes of sentencing under 18 U.S.C. § 3553(a)(2) with certainty and fairness, and reflects the "advancement in knowledge of human behavior as it relates to the criminal justice system". 28 U.S.C. § 991. Congress further directed the Commission to ensure that the sentencing regime develops over time in a manner consistent with promoting § 3553(a)(2) sentencing purposes. 28 U.S.C. § 991(b)(2). The Commission is required to conduct periodic review and study of data showing the effectiveness of particular guidelines in supporting § 3553(a)(2) purposes. *See id.*; 28 U.S.C. § 994(m) & (o).

The Sentencing Commission first promulgated the sentencing guidelines in 1987, and included the illegal reentry guideline. *See* U.S.S.G. § 2L1.2 (1987). The original guideline provided for a base offense level of 6 with a 2 point enhancement if the defendant had a prior similar conviction. *Id.* It also allowed the sentencing court to consider an upward departure based on the defendant's prior criminal record. *Id.* The Sentencing Commission based this initial guideline on past practice and the United States Parole Commission Guidelines. *See* Robert J. McWhirter and Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Reentry Cases*, 8 Fed. Sent R. 275, § II. B. (1996); United States Sentencing Commission, Supplemental Report on the Sentencing

Guidelines, 45 (1987). As stated, a guideline based on past practice and study ought to be accorded greater deference by the sentencing court. *See Kimbrough*, 128 S. Ct. at 570. If subjected to this mandatory guideline regime in 1987, Mr. Dominica would have faced a base sentencing range of 0 to 6 months incarceration.<sup>1</sup>

The Sentencing Commission amended the guideline the next year by increasing the base offense level from 6 to 8, and deleted its application to petty offenses. U.S.S.G. App. C, Amend. 38 (1988). In 1989 the Commission amended the guideline to include a 4 point enhancement for a felony conviction prior to deportation, and still encouraged an upward departure if the defendant's prior convictions were particularly egregious. U.S.S.G. App. C, Amend. 193 (1989). Amendment 193 also provided for the double counting of an alien's prior convictions when calculating the offense level and the criminal history. *Id.* The Commission did not however, provide any explanation for the change within its reasoning for either amendment; that is no support for the change based on the Commission's characteristic institutional role per *Kimbrough*.

In 1990, Congress expanded the meaning of "aggravated felony" in the immigration context to include felony convictions with a 5 year prison sentence and drug trafficking convictions. Immigration Act of 1990; see 8 U.S.C. § 1101(a)(43). In response to the change in the statute, in 1991 the Commission first introduced a 16 point enhancement for prior aggravated felony convictions. U.S.S.G. App. C, Amend. 375 (1991). The Commission stated that the 16 point enhancement replaces the previous recommendation to courts to depart upward when the defendant had a prior aggravated felony. This change essentially transformed a discretionary upward departure to a mandatory enhancement. *Id.*

The Commission next changed the guideline in 1997, expanding the definition of an aggravated felony and also creating a 4 point enhancement if the defendant has various misdemeanors or lesser felonies which serve as the predicate convictions. U.S.S.G. App. C, Amend. 562 (1997). The increase in potential sentences again reflected policy decisions, not study of empirical data by the sentencing Commission.

The Commission further refined the § 2L1.2 enhancements in 2001. It created the

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<sup>1</sup> Offense level of 6, minus 2 levels for acceptance of responsibility, resulting in an offense level of 4 in criminal history category III - 0 to 6 months incarceration.

graduated enhancement we see today; from 4 points to 8, to 12, and to 16 based on the categorically serious nature of the prior conviction. The Commission indicated that it made this change to reflect the departures which courts were granting, especially in border districts, due to the broad definition of aggravated felony under 8 U.S.C. § 1101(a)(43). This change formalized a common departure. No other significant changes have been made.

Acting in its characteristic institutional role, relying on past practice and the parole guidelines, the Commission set the original guideline offense level at 6 with a possible 2 point enhancement. Today, as applied to Mr. Dominica, it is 8 with a 12 point enhancement. The Commission included policy based reasons in every amendment to this guideline. None of the amendment reasons provided addressed any substantive issues regarding the seriousness, effectiveness, or any other practical aspect of the then current reentry guideline. The Commission did not cite any substantive data or study to justify the parabolic increase in potential sentences, and therefore has not acted in its expected institutional role. The vacuum of operational justification should trouble the Court; a crime which had an offense level of 6 in 1987, now carries an offense level of 20 based solely on policy decisions. The Supreme Court has ruled that guidelines based on policy rather than empirical study carry less weight in the sentencing process. *Kimbrough*, 128 S. Ct. at 570. This Court must accord the advisory guideline range here less significance because of its origin.