No._____

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IN THE
SUPREME COURT OF THE UNITED STATES

_____

October Term, 2008

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VICTOR VEGA-CASTILLO,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

_____

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER DISTRICT COURTS HAVE DISCRETION TO CONSIDER PUNISHMENT DISPARITIES AMONG DEFENDANTS GUILTY OF SIMILAR CONDUCT AND WITH SIMILAR CRIMINAL HISTORIES WHEN THE DISPARITIES ARE CAUSED BY THE GOVERNMENT'S "EARLY-DISPOSITION" OR "FAST-TRACK" SENTENCING POLICY, A POLICY DESIGNED TO SERVE THE GOVERNMENT'S PURPORTED ADMINISTRATIVE INTEREST BUT APPLIED SPORADICALLY IN ONLY A SMALL MINORITY OF DISTRICTS AROUND THE COUNTRY

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Victor Vega-Castillo respectfully requests that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the panel (App. 1-16) is reported at 540 F.3d 1235. The opinion denying rehearing and rehearing en banc (App. 17-24) is reported at 548 F.3d 980.

JURISDICTION

The panel filed its opinion on August 19, 2008, and the court denied rehearing and rehearing en banc on November 12, 2008. This Court has jurisdiction under 28 U.S.C.§ 1254(1) and 28 U.S.C. § 2101(c).[1]

STATUTORY AND GUIDELINE PROVISIONS INVOLVED

The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub.L. No. 108-21 § 401(m)(2)(B), 117 Stat. 650, 675 (2003), is set forth at App. 25. Title 18 United States Code § 3553(a)(6), 18 U.S.C. § 3553(a)(6) (codifying Sentencing

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[1]On February 3, 2009, Petitioner filed Application No. 08A682 to extend the time to file a petition for a writ of certiorari from February 10, 2009 to February 24, 2009. It was submitted to Justice Thomas.

Reform Act of 1984, Pub.L. 98-473, Title II, § 212(a)(2), 98 Stat. 1989 (1984)), is set forth at App. 26-27. USSG § 5K1.3 Early Disposition Programs (Policy Statement) is set forth at App. 28.

STATEMENT OF THE CASE

This case raises an important question over which Circuit Courts of Appeals are split: whether a district court has sentencing discretion to consider punishment disparities among defendants guilty of similar conduct and with similar criminal histories, when the disparities are caused by the Government's "early-disposition" or "fast-track" policy designed to serve the Government's purported administrative interest, but are applied sporadically in only a small minority of districts around the country.

1. Petitioner's Arrest, Federal Criminal Prosecution, and Sentencing

On August, 16, 2006, Petitioner's girlfriend called the Tallahassee Police Department to report that Petitioner was an illegal alien with an outstanding warrant from Nebraska. Petitioner used the name Michael Locklear and provided police a false name and several false social security numbers. Police arrested him and discovered he was Victor Vega-Castillo. Tallahassee police contacted the Bureau of Immigration and Customs Enforcement (ICE). ICE's investigation revealed that Petitioner had twice been deported from the United States to Mexico. The first time was on June 24, 1992, when he was deported at Nogales, Arizona, for illegal entry. The second time was on September 18, 1995, when he was deported for illegal entry after being convicted and sentenced to 3 years' imprisonment by the Superior Court of California, Los Angeles County, on April 22, 1993, for sale/transportation of cocaine. There is no record that either the Attorney General or the Secretary

of the Department of Homeland Security consented for Petitioner to reapply for admission to the United States.

A federal grand jury charged Petitioner on December 5, 2006, with illegal reentry in violation of 8 U.S.C. § 1326(a) and (b)(2). Petitioner pleaded guilty pursuant to a plea and cooperation agreement in which the parties agreed to leave sentencing to the district court's discretion in consultation with the guidelines, consistent with statutory minimum and mandatory sentence requirements and considerations set forth in 18 U.S.C. § 3553(a). Petitioner reserved his right to appeal any sentence imposed.

The probation officer applied the 2006 advisory guidelines to calculate Petitioner's guidelines range as 70-87 months' imprisonment. The probation officer did not identify any grounds for departure, and Petitioner made no objections challenging computation of the recommended range. Petitioner did, however, ask the district court to vary below the range based on the unwarranted disparity inherent in "early-disposition" or "fast-track" sentencing, which the Government had not made available to defendants in the Northern District of Florida.

By the time Petitioner was sentenced on April 23, 2007, the Eleventh Circuit had issued two published decisions on point. In United States v. Castro, 455 F.3d 1249 (11th Cir. 2006), the Eleventh Circuit held that the availability of fast-track sentencing policies in only a few districts does not create an unwarranted sentencing disparity that trial courts in non-fast-track districts are obliged to consider under 18 U.S.C. § 3553(a)(6). Castro also held, under plain error review, that the disparity created by this sporadically imposed policy did not violate the equal protection guarantee of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. A few months later, the Eleventh Circuit relied on Castro to reverse a below-guidelines sentence when the district court had considered the

disparity over the Government's objection. The Circuit Court held "it was impermissible for the district court to consider disparities associated with early disposition programs in imposing Arevalo-Juarez's sentence, because such disparities are not 'unwarranted sentencing disparities' for the purposes of § 3553(a)(6)." United States v. Arevalo-Juarez, 464 F.3d 1246, 1251 (11th Cir. 2006).

Petitioner recognized that prior Eleventh Circuit precedent deprived the district court of any discretion to consider that sentencing disparity, but he suggested that the precedent was wrong and should be overruled. The district court adhered to the recommended guidelines range and sentenced Petitioner to 70 months' imprisonment. Petitioner objected to the fact that the district court did "not tak[e] into account the disparity with the fast track districts," saying that its failure contributed to "an unwarranted disparity" in Petitioner's sentencing.

2. Petitioner's Appellate Proceedings Focused on the Analysis in *Kimbrough* and the Emerging Split Among the Circuits

On appeal, Petitioner once again argued that Eleventh Circuit precedent was erroneous, and that a panel of that court had the authority under the circumstances to overrule that precedent. He said the merits of his claim were supported by the just-issued decision in Rita v. United States, 127 S. Ct. 2456 (2007), and the arguments of the parties in the then-pending cases of Kimbrough v. United States, 128 S. Ct. 558 (2007), and United States v. Gall, 128 S. Ct. 586 (2007). Those three cases addressed the level of discretion afforded to district courts in imposing sentence after United States v. Booker, 543 U.S. 220 (2005).

By the time the Eleventh Circuit panel heard oral argument on May 21, 2008, Kimbrough and Gall had been decided, as had United States v. Gomez-Herrera, 523 F.3d 554 (5th Cir. 2008),[2] which

[2] This Court subsequently denied certiorari review. No. 08-5226, 129 S. Ct. 624 (Dec. 1, 2008).

held that Kimbrough did not alter prior Fifth Circuit case law that barred courts from considering disparities caused by fast-track sentencing. Petitioner at oral argument acknowledged that Eleventh Circuit precedent precluded considering disparities caused by fast-track sentencing, but he argued that their rationale had been abrogated by Kimbrough, that the Fifth Circuit was wrong, and that the panel had the authority to overrule its relevant precedent.

One day after oral argument, Respondent filed a written concession, agreeing with Petitioner that Eleventh Circuit precedent "appear[s] to be at odds with Kimbrough."

Petitioner soon thereafter advised the Eleventh Circuit that a circuit split had just arisen because the First Circuit squarely disagreed with the Fifth Circuit and held, as Petitioner argued here, that Kimbrough's analysis abrogated prior panel precedent and compelled a conclusion that trial courts retain discretion to consider disparities arising from fast-track sentencing. United States v. Rodriguez, 527 F.3d 221 (1st Cir. 2008).[3]

A split panel of the Eleventh Circuit affirmed in a per curiam opinion. The majority declined to consider the merits and concluded instead that Kimbrough's holding did not overrule Eleventh Circuit precedent. App. 8-9. Oddly, the majority said "[w]e agree with the Government that Kimbrough did not overrule Castro and its progeny," App. 8, despite the Government's contrary concession. The majority relegated Gomez-Herrera and Rodriguez to a footnote, discussing them only insofar as they addressed Kimbrough and the Circuit Courts' respective applications of the prior precedent rule. App. 3-4 n.3. The effect of the majority opinion was to adhere to its precedent that bars trial courts from considering disparities arising from sporadic fast-track sentencing.

[3]That split has widened, and is discussed in more detail infra pp. 14-22.

Judge Barkett, in dissent, disagreed with the majority on all relevant points. She reached the merits and concluded that the Eleventh Circuit's precedent should be overruled because it was no longer valid in light of Kimbrough. "I believe it to be beyond peradventure that Kimbrough has completely undermined the rationale of our prior cases." App. 11 (Barkett, J., dissenting). The dissent credited the Government's concession to that effect. App. 11. The dissent agreed with the First Circuit's holding "that after Kimbrough, 'consideration of fast-track disparity is not categorically barred as a sentence-evaluating datum within the overall ambit of 18 U.S.C. § 3553(a).'" App. 14-15 (quoting Rodriguez, 527 F.3d at 229). The dissent said the majority's footnoted attempt to distinguish Rodriguez "is misleading," App. 15 n.5, and it disagreed with the Fifth Circuit's Gomez-Herrera decision, App. 14-15 & n.4.

Petitioner timely sought panel rehearing and rehearing en banc. Petitioner noted both the split within the panel and the split among the Circuit Courts of Appeals. He argued that the majority's rule was not compelled by Congress or any fair-minded sense of justice, and it undermined the reasoning of this Court's federal sentencing decisions, to which deference is owed. He asked the Eleventh Circuit to restore some sense of equal treatment and justice to federal criminal sentencing.

The Eleventh Circuit summarily denied panel rehearing and rehearing en banc. App. 18. Judge Carnes – not a member of the original panel – wrote separately to concur in the denial of rehearing en banc. Judge Carnes recognized that Kimbrough's reasoning may have called into question the reasoning of the Eleventh Circuit's earlier decisions, noting it "has at least put a few post-mortem twitches in it that might justify a fresh look." App. 21. But, he said, this was not the right fact pattern to warrant a fresh look because, in Judge Carnes' view, Petitioner "likely would not have been eligible for, or offered a chance at, early disposition credit even if he had been apprehended

and sentenced in a district with such a program" because of his criminal history record, which included two deportations, a conviction for selling crack, and two violent crime convictions, at least one of which was a felony. App. 21. Judge Carnes also opined that because Petitioner had not affirmatively offered to waive his rights to appeal and to seek post-conviction relief, "he is not similarly situated to any of the defendants who received the departure in other districts." App. 23.

REASONS FOR ISSUING THE WRIT

In a series of recent decisions, this Court has removed undue restrictions on a district court's discretion to impose a sentence that is sufficient, but not greater than necessary, for each individual. It took the United States Sentencing Commission's handcuffs off the district judges, making the guidelines advisory instead of mandatory. United States v. Booker, 543 U.S. 220 (2005). It prohibited district courts from presuming a sentence within the guidelines range is reasonable, while permitting appellate courts to engage in that presumption if the courts appealed from had made individualized determinations about the facts and circumstances of the offense and the offender, as required by Congress. United States v. Gall, 552 U.S. ___, 128 S. Ct. 586 (2007); Rita v. United States, 551 U.S. 338 (2007); see also United States v. Nelson, No. 08-5657, 2009 WL 160585 (U.S. Jan. 26, 2009) (per curiam). It held that unless a Sentencing Commission's guideline had been based on empirical data and national experience in a manner that exemplifies the Commission's exercise of its characteristic institutional role, a guideline may be categorically rejected by a sentencing court. Kimbrough v. United States, 522 U.S. ___, 128 S. Ct. 558 (2007); see also Spears v. United States, No. 08-5721, 2009 WL 129044 (U.S. Jan. 21, 2009) (per curiam).

Through these decisions, this Court has reinforced the foundation of justice in criminal law by holding that sentencing is most reliably left in the hands of trial judges so long as they consider all factors Congress deems relevant without being bound by guidelines or any other factors that do not bear on the individual case and the individual defendant. The case under review reveals a crack in that foundation. Once again some appellate courts are tying the hands of sentencing judges, this time barring them from considering punishment disparities caused by the sporadic exercise of the Government's purported administrative interest in a small minority of districts around the country.

The perpetuation of this policy to restrict district court discretion is at odds with the statutory framework and principles that underlie the American criminal justice system. This case presents an appropriate vehicle, at an appropriate time, to resolve the split and restore uniform sentencing practices throughout the land consistent with this Court's teaching.

I. THIS COURT SHOULD RESOLVE THE SPLIT OVER WHETHER SENTENCING COURTS HAVE DISCRETION TO CONSIDER DISPARITIES CAUSED BY SOME DISTRICTS' USE OF "FAST-TRACK" SENTENCING PROGRAMS FOR ILLEGAL REENTRY DEFENDANTS.

The Courts of Appeals that have confronted this issue to date are divided on whether district judges have discretion to consider the disparities between illegal reentry defendants in fast-track and non-fast-track jurisdictions. Discretion is barred in six Circuits. One Circuit clearly authorizes discretion. In other Circuits, discretion may or may not be tolerated; the law does not appear to be settled. Some cases are decided on grounds of reasonableness. Others are decided on the basis of the interplay between a Congressional directive to the Sentencing Commission in the PROTECT Act, Pub. L. No. 108-21 § 401(m)(2)(B), 117 Stat. 650, 675 (2003), and a portion of the Sentencing Reform Act of 1984, Pub.L. 98-473, Title II, § 212(a)(2), 98 Stat. 1989 (1984) (codified at 18 U.S.C. § 3553(a)(6)). This burgeoning conflict implicates a core principle of this Court's jurisprudence, and cannot be resolved without this Court's intervention. Before addressing the disparities and the conflict, however, Petitioner finds it necessary to briefly describe the origin and scope of the programs at issue.

A. The Origin and Scope of "Early-Disposition" or "Fast-track" Sentencing.

"Early-disposition" or "fast-track" sentencing originated in federal district courts in the southwestern United States in the 1990s to deal with the large number of illegal reentry and other

immigration cases pending in those districts. Some districts offered a reduction of 3 offense levels under the guidelines for acceptance of responsibility. Some districts used charge bargaining to cap sentences at 24 to 48 months by allowing defendants to plead to less punitive offenses. Others offered a flat reduction of 1-3 three levels for entering into a fast-track plea, or a scaled reduction from the guideline sentence based on the seriousness of the prior conviction. See App. 5-6; Jane L. McClellan and Jon M. Sands, Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences, 38 Ariz. St. L.J. 517, 518-26 (2006).

In 2003, Congress instructed the Sentencing Commission to "promulgate . . . a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21 § 401(m)(2)(B), 117 Stat. 650, 675 (2003). The Sentencing Commission responded by creating USSG § 5K3.1, which provides that "upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides." See generally United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines (in response to section 401(m) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21) (October 2003) (hereinafter Sentencing Commission's Report to Congress).

Pursuant to the PROTECT Act, the Attorney General set forth "required criteria" for prosecutors to seek fast-track authorization. They were to be

> based on the premise that a defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants and has demonstrated an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in U.S.S.G. § 3E1.1. These programs are properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases. Such programs are not to be used simply to avoid the ordinary application of the Guidelines to a particular class of cases.

App. 30 (Memorandum from Attorney General John Ashcroft Setting Forth Justice Department's "Fast-Track" Policies, 16 Fed. Sent. R. 134, 135 (Sept. 22, 2003)). The Attorney General further imposed, as minimal requirements, that defendants enter into written plea agreements waiving both appellate and post-conviction rights, except on the issue of ineffective assistance of counsel. Id; see also App. 33- 39 (Attorney General's Memo Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003), http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm) (last visited Feb. 9, 2009).

The Department of Justice initially authorized early-disposition programs in 15 of the nations's 94 districts (sometimes limited to a particular division). Not all were located on international land borders. Also, the authorization was offense-specific within each respective district or division, and not all were limited to alien cases. For example, the Central, Eastern and Northern Districts of California were authorized to fast track cases of illegal reentry after deportation, whereas the District of New Mexico was authorized to fast track those cases as well as cases of transportation or harboring of aliens and "drug backpacking." App. 40-42 (Department of Justice Memorandum re: Authorization of Early Disposition Programs (Oct. 29, 2004)).

The list of authorized districts and classes of cases has been revised over the years. In February 2008 (the latest information Petitioner was able to locate), the Attorney General authorized fast-tracking cases in 20 districts, which, again, includes some non-border states and some non-alien cases. Only 16 of these 20 districts have authorized fast-track programs for those conviction of illegal reentry after deportation – about 17 percent of the nation's 94 districts. App. 43-45 (Department of Justice Memorandum re: Reauthorization of Early Disposition Programs (Feb. 1, 2008)).

Within the State of Florida, the Northern District, where Petitioner's case arose, presently has no fast-track program. Only the Middle District has a fast-track program for illegal reentry after deportation. The Southern District has a fast-track program reserved just for cases involving aliens using false or fraudulent immigration documents. App. 43-45.

These authorized programs include both guideline departures that the Sentencing Commission was instructed to make available, as well as charge bargaining. See, e.g., App. 29-31, 34-38, 50-51. In fact, "there are a significant number of districts with early disposition programs that operate outside the bounds of the PROTECT Act and § 5K3.1." United States v. Medrano-Duran, 386 F. Supp. 2d 943 (E.D. Ill. 2005). Continuing re-authorization of each of those programs "depend[s] on demonstrable results establishing that the authorized early disposition program is permitting the prosecution of a significantly larger number of defendants than occurred in the absence of the early disposition program or than would occur if the program were discontinued." App. 45.

Some commentators have noted that it is difficult to understand why some districts have fast-track programs while others do not. See McClellan and Sands, supra, at 531. The Sentencing Commission has observed that reliable data documenting the impact of these programs is hard to find. App. 48-49. Data that are available raise questions about whether the disparities created by fast-track

programs are justified by high caseloads of illegal reentry defendants in fast-track districts. For example, in FY 2007, 77 persons received prison sentences for immigration offenses[4] in the District of Nebraska – a fast-track district – comprising 11.77% of all prison sentences imposed in that district. In contrast, 80 persons received prison sentences for immigration offenses in the Northern District of Florida – a non-fast-track district – comprising 20.94% of all prison sentences imposed in that district. See United States Sentencing Commission, 2007 Sourcebook of Fed. Sentencing Statistics, pp. 183, 216 (hereinafter Sourcebook).

Nothing in the Department of Justice authorization memos indicates that any attention was paid to the disparities that arise between similarly situated defendants in non-fast-track districts and those in authorized fast-track districts. However, the disparities were noticed, disapprovingly, by the Sentencing Commission. "This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly-situated offenders." App. 53 (Sentencing Commission's Report to Congress, supra, p.67).

This is an exceptionally important issue that may affect thousands of immigration defendants each year. Government-sponsored fast-track departures under USSG § 5K3.1 were issued in 3,789 of the 15,805 cases – 24% – in which the primary offense was an immigration crime scored under Chapter 2 Part L of the guidelines. See Sourcebook, supra, at Table 28. Roughly the same ratio applies even when narrowing down immigration offenses to Petitioner's crime, illegal reentry. See

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[4]The Sentencing Commission uses "immigration cases" as an umbrella covering both the crime in this case – illegal reentry – as well as "trafficking in U.S. passports; trafficking in entry documents; failure to surrender naturalization certificate; fraudulently acquiring U.S. passports; smuggling, etc.; unlawful alien; [and] fraudulently acquiring entry documents." Sourcebook, supra, at App. A p.158. Circuit-by-circuit statistics do no appear to break out illegal reentry from other immigration cases.

id. (2,833 of 10,877 persons sentenced under USSG § 2L1.2 – 26% – got departures under USSG § 5K3.1). And these figures do not take into account the various forms of charge bargaining in which the Government engages.

The data suggest that the vast majority of defendants in illegal reentry cases may be sentenced more harshly than other similarly situated persons solely because prosecutors asserted their purported administrative interest in a minority of districts. The policy as implemented by the Sentencing Commission and the Department of Justice has effectively trumped both society's interest in treating defendants equally, and the Sentencing Commission's principal goal of seeking "uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders." USSG § 1A.1, intro. to cmt., pt. A, ¶ 2 (The Basic Approach).

B. Six Circuits Hold that District Court Judges Do Not Have Discretion to Consider Fast-Track Disparities in Sentencing Illegal Reentry Defendants.

(1) The Fifth, Ninth, and Eleventh Circuits have held that district judges are barred from considering fast-track disparities in sentencing illegal reentry defendants despite this Court's analysis in Kimbrough.

The Eleventh Circuit held that this Court's analysis in Kimbrough v. United States, 522 U.S. 128 S. Ct. 558 (2007), giving district courts discretion to categorically reject the crack-powder cocaine sentencing disparity, has no bearing on whether district judges should likewise have discretion to ameliorate the sentencing disparity arising from fast-track sentencing. Kimbrough, the Court of Appeals said, stands for at most the proposition that a district court may "vary from the advisory Guidelines based on a disagreement with a Guideline, even where Sentencing Commission policy judgment, not Congressional direction, underlies the Guideline at issue, and even where that

policy judgment did not arise from the Commission's exercise of its characteristic institutional role." App 9. Because fast-track disparities did not fit within that field, Kimbrough did not affect the Eleventh Circuit's prior precedent, which prevented district judges from considering fast-track disparity. Accordingly, the Court declined to reconsider its fast-track decisions under the prior-precedent rule. App 9.

The Fifth Circuit squarely rejected Kimbrough's application to fast-track disparities. United States v. Gomez-Herrera, 523 F.3d 554 (5th Cir. 2008). First, the court wrote, "Kimbrough, which concerned a district court's ability to sentence in disagreement with Guideline policy, does not control this case, which concerns a district court's ability to sentence in disagreement with Congressional policy." Id. at 559. Second, "because any disparity that results from fast-track programs is intended by Congress, it is not 'unwarranted' within the meaning of § 3553(a)(6)," id. at 562, and therefore could not be considered by district courts to reduce sentences. Third, the court reasoned that sentencing courts cannot consider fast-track disparities because the "decision to offer a fast track plea offer is no different from the Attorney General's prosecutorial discretion regarding whether to prosecute, what charge to file, whether to offer a plea agreement, etc." Id. at 561.

The Ninth Circuit applied the same reasoning as the Fifth Circuit, holding that "[w]hile Kimbrough permits a district court to consider its policy disagreements with the Guidelines, it does not authorize a district judge to take into account his disagreements with congressional policy." United States v. Gonzalez-Zotelo, No. 08-50010, 2009 WL 37144, *4 (9th Cir. Jan. 8, 2009). Like the Eleventh Circuit, the Ninth Circuit held that Kimbrough did not sufficiently abrogate the Circuit's fast-track sentencing precedent to justify reevaluation of those decisions. Id. at *3.

(2) The Fourth and Eighth Circuits have held that district courts may not consider disparities created by fast-track programs in sentencing illegal reentry defendants, though those courts have not reconsidered this precedent in light of Kimbrough.

Before Kimbrough, the Fourth Circuit held that sentencing courts did not have discretion to deviate from the guidelines based on the fast-track disparity, explaining that "[t]here is no reason to believe that Congress intended that sentencing disparities between defendants who benefitted from prosecutorial discretion and those who did not could be 'unwarranted' within the meaning of § 3553(a)(6)." United States v. Perez-Pena, 453 F.3d 236, 244 (4th Cir.), cert. denied, 549 U.S. 1013 (2006). After Kimbrough was decided, the Fourth Circuit issued two unpublished decisions that did not mention Kimbrough but upheld guidelines sentences where the courts did not consider the fast-track disparity. United States v. Soto-Larios, No. 07-4521, 280 Fed. Appx. 287, 2008 WL 2262436 (4th Cir. June 3, 2008) (unpublished); United States v. Barrera-Renteria, No. 07-4503, 262 Fed. Appx. 541, 2008 WL 234325 (4th Cir. Jan. 29, 2008) (unpublished), cert. denied, 128 S. Ct. 2526 (2008).

The Eighth Circuit also held, pre-Kimbrough, that district courts may not reduce sentences based on fast-track disparity. United States v. Gonzalez-Alvarado, 477 F.3d 648 (8th Cir. 2007) (reversing a below-guidelines sentence that was based on the fast-track disparity), abrogation in part on other grounds recognized, United States v. Bain, 537 F.3d 876 (8th Cir. 2008); see also United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006) (holding that a district court's failure to consider fast-track disparity does not make a sentence unreasonable). The Eighth Circuit has not reconsidered this precedent in light of Kimbrough.

(3) The Seventh Circuit has held that district courts may not consider disparities created by fast-track programs in sentencing illegal reentry defendants, but it recognizes that Kimbrough may require that holding to change.

Prior to Kimbrough, the Seventh Circuit held that district courts were not allowed to consider fast-track disparities. United States v. Galicia-Cardenas, 443 F.3d 553 (7th Cir. 2006). Subsequently, however, the Seventh Circuit acknowledged that Kimbrough "has rekindled debate about whether the absence of a fast-track program can be a factor in the choice of sentence." United States v. Valadez-Martinez, No. 08-2093, 295 Fed. Appx. 832, 2008 WL 4471373 (7th Cir. Oct. 3, 2008) (unpublished). But the Seventh Circuit did not reach that issue in that decision. Id.

C. In Contrast, the First Circuit Has Held That Sentencing Judges Have Discretion to Consider Fast-Track Disparities in Non-Fast-Track Districts.

The First Circuit discarded its own contrary prior precedent and held that sentencing judges have discretion to consider disparities created by the Department of Justice's selective implementation of fast-track programs in the wake of Kimbrough. United States v. Rodriguez, 527 F.3d 221 (1st Cir. 2008). It noted important parallels between fast-track sentencing and the crack-powder cocaine disparity. "[B]oth [have] been both blessed by Congress and openly criticized by the Sentencing Commission," id. at 227, and neither "'exemplif[es] the [Sentencing] Commission's exercise of its characteristic institutional role.'" Id. (quoting Kimbrough, 128 S. Ct. at 575).

The First Circuit expressly disagreed with the Fifth Circuit's Gomez-Herrera decision. The court also observed that Kimbrough enlarged "a sentencing court's capacity to factor into the sentencing calculus its policy disagreements with the guidelines," id. at 227, whereas the rule followed by the Fifth Circuit constrained judicial discretion. Kimbrough "suggests that a sentencing judge should engage in a more holistic inquiry" into the § 3553(a) factors, considering all of them together, id. at 228, whereas the Fifth Circuit's policy does the opposite. Finally, the First Circuit

rejected the Government's arguments that fast-track disparities were mandated by Congress in the PROTECT Act, thereby making them "warranted" disparities:

> While the Kimbrough Court acknowledged that a sentencing court can be constrained by express congressional directives, such as statutory mandatory maximum and minimum prison terms, 128 S. Ct. at 571-72, the PROTECT Act-as the Fifth Circuit would have to concede-contains no such express imperative. The Act, by its terms, neither forbids nor discourages the use of a particular sentencing rationale, and it says nothing about a district court's discretion to deviate from the guidelines based on fast-track disparity. The statute simply authorizes the Sentencing Commission to issue a policy statement and, in the wake of Kimbrough, such a directive, whether or not suggestive, is "not decisive as to what may constitute a permissible ground for a variant sentence." Martin, 520 F.3d at 93.
>
> By the same token, the PROTECT Act's authorization for the selective deployment of fast-track programs bears scant resemblance to a congressional directive instituting statutory minimum and maximum sentences. Although the latter directive necessarily cabins a sentencing court's discretion, the former authorization says nothing about the court's capacity to craft a variant sentence within the maximum and minimum limits.
>
> Refined to bare essence, the government is urging us to read into the PROTECT Act an implicit restriction on a district court's sentencing discretion. But that can be done, as Gomez-Herrera illustrates, only by heavy reliance on inference and implication about congressional intent-a practice that runs directly contrary to the Court's newly glossed approach. See Kimbrough, 128 S. Ct. at 570-74 (declining, despite Congress's implicit acquiescence in, or even its endorsement of, the 100-to-1 crack/powder ratio, to treat that ratio as beyond the reach of section 3553(a)). In refusing to read a bar on policy disagreements into either Congress's original formulation of the 100-to-1 crack/powder ratio in the Anti-Drug Abuse Act or its later rejection of the Sentencing Commission's attempted softening of the ratio, id. at 570-73, Kimbrough made pellucid that when Congress exercises its power to bar district courts from using a particular sentencing rationale, it does so by the use of unequivocal terminology.

Id. at 229-30.

D. Courts in the Tenth and Sixth Circuits Have Varied or Departed to Make Up For Fast-Track Disparities, Though Sentence Reductions Are Not Required.

District courts in the Tenth Circuit, both before and after Kimbrough, departed or varied from the guidelines for defendants who had not entered fast-track plea agreements as the Attorney General

required, intending to make up for the disparate benefit enjoyed by other like-situated defendants who had entered fast-track pleas. The defendant appealed, and the Tenth Circuit affirmed, saying the sentences were reasonable. United States v. Herrera-Gonzalez, No. 08-2044, 2008 WL 5328448, *3 (10th Cir. Dec. 22, 2008) (unpublished) (noting that the district court viewed its generous downward variance as "justified by the need to minimize the disparity between similarly situated defendants, and to properly reflect the seriousness of his crime"); United States v. Chavez-Diaz, 444 F.3d 1223 (10th Cir. 2006) ("the district court correctly calculated Chavez-Diaz's advisory guideline range, and, relying on 18 U.S.C. § 3553(a)(6), departed downward so that Chavez-Diaz's sentence would conform with other similarly situated defendants in the District of New Mexico"). See also United States v. Rodriguez-Romero, No. CR 06-2576, 2008 WL 2323511, *6 (D.N.M. Jan. 29, 2008) (unpublished) ("The Court believes that similarly situated defendants would have been eligible for participating in a fast-track plea agreement and that a variance is needed to avoid introducing a disparity among similarly situated defendants").

The Sixth Circuit also has affirmed a sentence in which the district court took fast-track disparities into account. In United States v. Ossa-Gallegos, 453 F.3d 371, 375 (6th Cir.), rev'd in part on unrelated grounds, 491 F.3d 537 (6th Cir. 2007) (en banc), the district court did not entirely eliminate the disparity between a defendant's sentence and the sentences of defendants with similar criminal histories in fast-track jurisdictions, but it reduced his offense level by 2 levels to reduce the fast-track disparity even though the defendant had not entered a plea waiving his right to challenge his conviction. On the defendant's appeal, the Sixth Circuit affirmed, finding the length of the reduced sentence reasonable.

While a fast-track departure to make up for disparate treatment in illegal reentry cases might be permissible in the Sixth Circuit, Ossa-Gallegos, it is not required by 18 U.S.C. § 3553(a)(6), United States v. Hernandez-Fierros, 453 F.3d 309 (6th Cir. 2006). The Court reasoned that this may be a tolerable sentencing disparity under 18 U.S.C. § 3553(a) for differently situated defendants, like those who cooperate with investigators. The Court also noted that the district court had indeed considered the fast-track departure but may have rejected it on the merits due to the defendant's criminal history. Id. at 313-14. Since this Court decided Kimbrough, the Sixth Circuit has cited Hernandez-Fierros twice in affirming decisions that denied fast-track departures. In United States v. Martinez-Bahena, 2008 WL 3977580 (6th Cir. Aug. 26, 2008) (unpublished), the decision appears to have been based on the defendant's record, not the unavailability of fast-track-type consideration. In United States v. Carballo-Arguelles, No. 06-2174, 267 Fed. Appx. 416, 2008 WL 538566 (6th Cir. Feb. 27, 2008) (unpublished), the Court again fell short of holding it unlawful for a court to make up for disparity among similarly situated defendants. Instead, the Court held that no disparity exists among differently situated defendants, and curing unwarranted disparities is only one factor for the district court to consider in arriving at a sentence that is sufficient, but not greater than necessary. Id. at *3. The Sixth Circuit has yet to address whether, in light of Kimbrough, district courts retain discretion to reduce sentences based on the fast-track disparity.

E. The Third Circuit Has Held the Lack of Fast-Track Sentencing Does Not Make a Sentence Unreasonable, But *Kimbrough* May Require Reconsideration.

Prior to Kimbrough, the Third Circuit held that a district court's refusal to adjust a sentence to compensate for the absence of a fast-track program does not make a sentence unreasonable. United States v. Vargas, 477 F.3d 94, 98 (3rd Cir.), cert. denied, 128 S. Ct. 199 (2007). The Court further

held that a fast-track disparity is not an "unwarranted" disparity within the meaning of 18 U.S.C. § 3553(a)(6). The Court did not, however, go so far as to say it would reverse any sentence in which a district court sought to ameliorate the disparity. The Third Circuit later clarified that a sentencing judge may consider fast-track disparity when considering all § 3553(a) factors. United States v. Watson, No. 07-2899, 284 Fed. Appx. 964, 2008 WL 2656281, *2 (3rd Cir. Jul. 8, 2008) (unpublished) ("Because we conclude that the District Court understood its authority to impose a sentence below the guideline range based on fast-track disparity, we will affirm the judgment of the District Court.").

The Third Circuit recently recognized that "Kimbrough has prompted reconsideration of the role fast-track programs may play in sentencing court's § 3553(a)(6) analysis, and whether disparities resulting from the fast-track sentencing scheme may now be considered 'unwarranted' under § 3553(a)(6)." United States v. Columna-Romero, No. 07-4279, 2008 WL 5422697, at *3 (3rd Cir. Dec. 30, 2008) (unpublished). But the Third Circuit did not reach that issue in that decision. Id.

F. The Second Circuit Has Not Decided Whether District Courts Have Discretion to Reduce Illegal Reentry Defendants' Sentences Based on Fast-Track Disparities.

In United States v. Mejia, 461 F.3d 158, 164 (2nd Cir. 2006), the Second Circuit held it would not find a sentence unreasonable for failing to compensate for fast-track disparities. However, United States v. Hendry, 522 F.3d 239, 241 (2nd Cir. 2008), recognized that Mejia was limited because it said nothing about whether a district judge retained discretion to take such disparities into account. "[T]he question of 'whether the district court has the authority to impose a non-Guidelines sentence in response to the fast-track sentencing disparity if it deems such a reduced sentence to be warranted'

was still an open one." Id. (quoting United States v. Liriano-Blanco, 510 F.3d 168, 172 (2nd Cir. 2007)).

In conclusion, there exists national discord among the various Courts of Appeals as to whether, and how, district courts retain discretion to consider disparities caused by the sporadic implementation of fast-track or early disposition sentencing programs. This Court should take this opportunity to harmonize the law.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENT AND CONGRESS'S INTENT IN THE SENTENCING REFORM ACT, 18 U.S.C. § 3553(a)(6), TO AVOID UNWARRANTED DISPARITIES.

This Court in Kimbrough required courts to cautiously and correctly ascertain whether a policy represented to be that of Congress is in fact Congress's policy. Kimbrough rejected the Government's position that Congress's mandatory minimum sentencing scheme, based on a 100:1 crack/ powder cocaine ratio, had established Congress's intent to apply that 100:1 disparity across the board. "[W]e decline to read any implicit directive into that congressional silence." 128 S. Ct. at 571. The Court further held that the Sentencing Commission need not infer such intent in drawing up the guidelines.

The same logic applies here to the portion of the PROTECT Act in question. In the PROTECT Act Congress did nothing more than instruct the Sentencing Commission to "promulgate . . . a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." Pub. L. No. 108-21 § 401(m)(2)(B), 117 Stat. 650, 675 (2003). The First Circuit's decision in United States v. Rodriguez, 527 F.3d 221, 229-30 (1st Cir.

2008), quoted supra, p.18, persuasively debunked the notion that Congress in the PROTECT Act made all fast-track sentencing disparities congressionally "warranted."

The PROTECT Act merely instructed the Commission to authorize downward departures when United States Attorneys make fast-track plea agreements. It did not, for example, direct the Sentencing Commission to reduce sentences for illegal reentry defendants in any specific districts, nor did it instruct the Commission to authorize a downward departure *only* when the government files a fast-track motion. It did not state that any and all disparities created by the operation of the guideline were appropriate. It neither prohibited district courts from granting reductions in districts without fast-track programs to equalize disparities created by fast track programs, nor required courts in non-fast-track jurisdictions to mete out higher sentences than courts in fast-track jurisdictions. "The Act, by its terms, neither forbids nor discourages the use of a particular sentencing rationale, and it says nothing about a district court's discretion to deviate from the guidelines based on fast-track disparity." Rodriguez, 527 F.3d at 229. Congress has not "warranted" all fast-track disparities, and therefore sentencing judges are not barred from considering such disparities under § 3553(a)(6).

Moreover, the PROTECT Act does not mention charge-bargaining fast-track programs, so those programs are not compelled by congressional policy. As of 2005, the Department of Justice operated charge-bargaining fast-track programs in five districts. See United States v. Medrano-Duran, 386 F. Supp. 2d 943, 946 (N.D. Ill. 2005) ("In at least five of the fast track districts (the Northern, Central, and Southern Districts of California, the District of Oregon, and the Western District of Washington), persons charged with illegal reentry under 8 U.S.C. § 1326 are permitted to plead guilty to two counts of improper entry under 8 U.S.C. § 1325. The effect is to limit the sentence to thirty

months' imprisonment: the first offense under § 1325 carries a six month maximum prison sentence, and the second offense carries a twenty-four month maximum.").

Congress's overarching sentencing policy embraced in the Sentencing Reform Act appears to be at odds with the narrow view taken by the six circuits that bar district courts from exercising discretion to remedy the disparity. Pivotal to the adoption of the Sentencing Reform Act was Congress's aim to reduce unwarranted sentencing disparities so as to produce individualized sentences that were sufficient, but no greater than necessary. A Senate Report, which this Court has found "helpful" in understanding the Sentencing Reform Act, see Mistretta v. United States. 488 U.S. 361, 366 (1989), explained:

> The key word in discussing unwarranted sentence disparities is "unwarranted." The committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records. The commission is, in fact, required to consider a number of factors in promulgating sentencing guidelines to determine what impact on the guidelines, if any, would be warranted by differences among defendants with respect to those factors. As discussed in the introduction of this report, the committee believes that the sentencing guidelines system will enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy.

S.Rep. No. 98-225 (1983), U.S. Code Cong. & Admin. News 1984, p. 3344 (Report). It is difficult to reconcile this overarching sentencing philosophy with the view taken by some of the Courts of Appeals with regard to fast-track sentencing disparities.

A second analysis in Kimbrough comes in to play in this case. The Court made clear that a guideline is suspect and may be categorically rejected by a sentencing court if it is not the product of empirical data and national experience exemplifying the Sentencing Commission's exercise of its

characteristic institutional role. 128 S. Ct. at 574-75; see also Spears v. United States, No. 08-5721, 2009 WL 129044 (U.S. Jan. 21, 2009) (per curiam).

Here, too, the Sentencing Commission did not act in its characteristic institutional role in promulgating USSG § 5K3.1, all too narrowly following Congress's directive without also empirically studying and accounting for, in the guidelines, the consequences of its action. The Sentencing Commission's report implied that the Commission was rushed into satisfying Congress's emergency amendment but was unable to analyze the problem in the time allowed. "The Commission worked diligently to implement the directive, but its efforts in this area are ongoing and will extend beyond the 180 day time period established by the PROTECT Act." Sentencing Commission's Report to Congress, supra, at 21. Yet the Sentencing Commission did recognize the problem its emergency response to Congress had created, saying the "geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly-situated offenders." App. 53 (Sentencing Commission's Report to Congress, supra, at 67).

Under the rationale of Kimbrough and Spears, district courts should be free to categorically reject the Sentencing Commission's policy statement articulated in USSG § 5K3.1, "even in a mine-run case." Kimbrough, 128 S. Ct. at 574-75. Sentencing courts should have discretion to consider disparities resulting from the Government's selective implementation of fast-track programs for illegal reentry defendants. Congress has never mandated such disparities, and they result from precisely the sort of ad hoc guideline this Court confronted in Kimbrough. This Court should review the case below to reconcile its precedent with the divergent views taken by the Circuit Courts of Appeal in fast-track sentencing disputes.

III. CRIMINAL HISTORY, INCLUDING A CRIME OF VIOLENCE, DOES NOT DISQUALIFY OFFENDERS FROM FAST-TRACK SENTENCING.

In concurring in the denial of rehearing en banc, Judge Carnes appears to suggest that he thinks this case would not be worthy of review because it is unlikely Petitioner would have been eligible for, or offered, a fast-track sentence reduction because of his criminal history record, which included two deportations, a conviction for selling crack, and two violent crime convictions, at least one of which was a felony. App. 21. Judge Carnes thereby implies, without citing support, that prior convictions for crimes of violence and prior deportations that do not result in criminal penalties bar defendants from receiving fast-track reductions. That is not accurate.

None of the Department of Justice memoranda authorizing fast-track departures categorically eliminates illegal-reentry defendants because of their backgrounds. The furthest the Attorney General went was to prevent United States Attorneys from creating a case-specific fast-track program for crimes of violence (such as a fast-track program for bank robbery cases). App. 30. Illegal reentry is, of course, not a crime of violence. Likewise, nothing in the memoranda bars fast-track relief for defendants who have previously been deported.

Defendants with prior convictions for crimes of violence have been deemed eligible for fast track reductions. For example, a fast-track memorandum issued by the U.S. Attorney for the District of Oregon (a non-border district), explicitly authorizes "a 30-month period of incarceration" for defendants who receive 16-level enhancements under the illegal reentry guideline based on convictions for "crimes of violence[,] serious drug trafficking convictions[,] and firearms offenses." App. 54 (Memorandum from Michael W. Mosman, U.S. Attorney for the District of Oregon, Fast-Track Prosecution of Illegal Reentry Offenses (June 28, 2001)). See also App. 56-70 (Plea

Agreement for Defendant Rosendo Mora Ramirez, United States v. Mora Ramirez, No. 08-00622 (C.D.Cal. Sept. 22, 2008), available at https://ecf.cacd.uscourts.gov/doc1/03112937939) (agreeing to 4-level fast-track reduction and low-end guideline recommendation for a defendant with a prior conviction for assault with a deadly weapon)); App 71-79 (Plea Agreement for Defendant Manuel Quesada-Padilla, United States v. Quesada-Padilla, No. 07-CR-0230 (E.D.Cal. Apr. 25, 2008), available at https://ecf.caed.uscourts.gov/doc1/03312428886) (Government in the Eastern District of California authorized a fast-track plea and agreed to a four-level downward departure and a low-end sentence to an illegal re-entry defendant in Criminal History Category VI who had a prior conviction for a felony crime of violence); App. 80-87 (Plea Agreement for Defendant Gabino Barrera-Lopez, United States v. Barrera-Lopez, No. 08-3068M (D.Ariz. Mag. July 2, 2008), available at https://ecf.azd.uscourts.gov/doc1/02513168862) (U.S. Attorney's Office in District of Arizona granted a fast-track plea agreement and a 4-level reduction for defendant stipulating hie has no more than 17 criminal history points, including a prior conviction for attempted aggravated assault, a crime of violence).

Moreover, the First Circuit in Rodriguez held that a district court has discretion to consider ameliorating the fast-track disparity with respect to a defendant who had been previously convicted of a crime of violence for assaulting a federal officer. Rodriguez, 527 F.3d at 223.

Judge Carnes also opined that because Petitioner had not affirmatively offered to waive his rights to appeal and to seek post-conviction relief, "he is not similarly situated to any of the defendants who received the departure in other districts." App. 23. But, as Judge Kennelly has pointed out, "it hardly makes sense to penalize [a defendant] for failing to meet the requirements of a program that was never available to him." United States v. Medrano-Duran, 386 F. Supp. 2d 943,

948 (E.D. Ill. 2005). Defendants in fast-track districts are granted benefits in exchange for suffering detriments; defendants in the Northern District of Florida are not offered such benefits, and therefore cannot be expected to voluntarily incur the concomitant detriment. Moreover, plea offers and plea agreements in the Northern District of Florida are wholly controlled by the Government. In fact, the U.S. Attorney's Office in this district engages in the practice of not negotiating pleas if the result would be to lower the accused's guideline range. Petitioner is not now, nor has ever been, in a position to make the concessions Judge Carnes would have liked him to make to become similarly situated to others whom the Department of Justice offers reasonable fast-track plea offers.

Petitioner cannot aver that if this Court issued the writ and ultimately remanded for resentencing, he would convince the district court to entirely eliminate the disparity between his sentence and the sentences of defendants with similar criminal histories in fast-track jurisdictions. However, he is entitled at least to try to convince the court to ameliorate the disparity. There are no statutory or administrative bars that exclude him. Only the Eleventh Circuit's holding stands in his way. His case is a good vehicle for this Court's review of fast-track sentencing disparities.

CONCLUSION

For the reasons stated above, this Court should issue the writ.

Respectfully submitted,

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