# A DISTANCE OF MILES CAN MAKE A DIFFERENCE OF YEARS: AMELIORATING COMPARATIVELY HARSH SENTENCES FOR ILLEGAL REENTRY IMMIGRATION DEFENDANTS AFTER *UNITED STATES V. REYES-HERNANDEZ*, 624 F.3D 405 (7TH CIR. 2010)

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## I. INTRODUCTION

Immigration law reform has recently received unprecedented attention across the nation. The Department of Homeland Security estimates that as of January 2009, there were 10.8 million unauthorized immigrants residing in the United States.[1] Of that number, 6,650,000 (62%) were from Mexico.[2] Since 1992 that number has tripled. Immigration and Naturalization Service estimated that the number of unauthorized immigrants was 3.4 million in October 1992 and 5.0 million in 1996.[3] Congress has responded to this growth and the growing concerns of citizens by increased law enforcement resources. As a result, federal prosecutorial resources have been drained, especially in districts bordering Mexico. In response, select districts authorized the implementation of "fast-track" programs. These programs offered reduced sentences to defendants in exchange for a quick guilty plea and the waiver of certain procedural rights.

While fast-track programs provided desperately needed relief for prosecutors in those select districts, illegal reentry[4] defendants prosecuted

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1. U.S. DEP'T OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 (Jan. 2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.
2. ESTIMATES OF UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, *supra* note 1.
3. U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/Ill_Report_1211.pdf.
4. Illegal reentry defendants are charged under 8 U.S.C. § 1326(a). Under this statute, the reentry of a previously deported alien is illegal, and in pertinent part states pertains to "any alien who—(1) has been denied admission, excluded, deported, or removed or has departed the United States

in non-fast-track districts faced comparatively harsh sentences simply because they had the misfortune of being arrested in a district that did not implement a fast-track program. For instance, an illegal reentry defendant arrested in Oregon may receive a thirty-month sentence under the District of Oregon's fast-track program,[5] while that same defendant, if arrested in Arkansas, may face a Guidelines range of seventy-seven to ninety-six months.[6] One of the main goals of the Sentencing Guidelines is to reduce unwarranted sentence disparities; however, "it is difficult to imagine a sentencing disparity less warranted than one which depends upon the accident of the judicial district in which the defendant happens to be arrested."[7]

The courts have struggled with the need to address prosecutorial needs and the desire to reduce sentencing disparities. In *Reyes-Hernandez*, the Seventh Circuit, a circuit containing no fast-track districts, addressed the inequity created by the placement of fast-track sentencing in only certain districts.[8] Ultimately, the Seventh Circuit concluded that sentencing courts may consider the disparities created by the absence of a fast-track program when sentencing an illegal reentry defendant.[9] Prior to this decision, sentencing judges in the Seventh Circuit had very little leeway to ameliorate the harsh sentences illegal reentry defendants received in their districts.[10] The Seventh Circuit's opinion in *United States v. Reyes-Hernandez* overturned circuit precedent and is the latest circuit to weigh in on the fast-track debate since recent developments in federal sentencing law.[11] The result is a circuit split.

Section II of this Note will provide a history of fast-track programs, and the recent line of Supreme Court decisions which have given courts the authority to vary from the Guidelines in non-fast-track districts. Next, Section III will analyze the facts and holdings of the Seventh Circuit's decision in *Reyes-Hernandez*. Finally, Section IV will discuss why the Seventh Circuit was correct in allowing judges to consider the resulting sentencing disparities, but will also discuss how the court could have given sentencing courts more leeway in adjusting sentences based on that disparity.

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while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States." 8 U.S.C. § 1326(a) (2006).

5. *See* Alison Siegler, *Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT'G. REP. 299, 299 (2009).
6. *See* United States v. Alvarado-Rivas, Crim. No. 2:09-CV-02089-RTD, 2009 WL 3158214, at *1 (W.D. Ark. 2009).
7. United States v. Bonnet-Grullon, 53 F. Supp. 2d 430, 435 (S.D.N.Y. 1999), *aff'd*, 212 F.3d 692 (2d Cir. 2000).
8. United States v. Reyes-Hernandez, 624 F.3d 405 (7th Cir. 2010).
9. *Id*. at 417.
10. *See* United State v. Galicia-Cardenas, 443 F.3d 553 (7th Cir. 2006).
11. Reyes-Hernandez, 624 F.3d at 413-14, 419.

## II. LEGAL BACKGROUND

In order to understand *Reyes-Hernandez*, it is important to understand the history of fast-track sentencing, the background of the Guidelines, the legislation directing the Sentencing Commission to implement fast-track programs, and recent cases leading up to *Reyes-Hernandez*. First, this casenote will lay out the history of both departure-based and charge-bargaining fast-track programs, and explain the differences between these two programs.

### A. History of Fast-Track Programs

In response to the huge influx of unauthorized immigrants, the federal government intensified its focus on the border through Operation Gatekeeper in 1994, doubling the amount of border patrol agents along the most heavily trafficked stretch of land between the United States and Mexico.[12] At the same time, the newly enacted 1994 Crime Bill (the Bill) provided for enhanced penalties for illegal reentry.[13] For instance, the Bill created enhanced penalties for once-deported unauthorized immigrants who illegally reentered or attempted to reenter the United States if they had already been convicted of a felony.[14] Combined, increased law enforcement efforts and enhanced penalties resulted in the capture of more unauthorized immigrants who were then eligible for much longer sentences.

Congress's attempts to thwart illegal immigration presented an overwhelming caseload for many federal prosecutors, especially those along the southwestern border.[15] The ever-increasing focus on prosecuting immigration crimes is evident in the increase in federal immigration prosecutions. Approximately 3,170 individuals were sentenced for immigration offenses between October 1, 1994, and September 30, 1995, representing 8.3% of total federal sentences across the nation.[16] In 2009, however, immigration prosecutions across the nation totaled 25,927, representing 32% of total offenses prosecuted.[17] Ultimately, prosecution of immigration offenses exceeded prosecutions for any other offense in 2009;

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12. Alan D. Bersin and Judith S. Feigin, *Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 299-300 (1998).
13. *Id*. at 300.
14. *Id*.
15. *See id.* at 286-87.
16. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT & CIRCUIT FOR FISCAL YEAR 1995: 1ST CIRCUIT 1-2 (1995), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/1995/first95.pdf.
17. U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2009, NINTH CIRCUIT 7 (2009), *available at* http://www.ussc.gov/judpack/2009/9c09.pdf.

however, districts along the border experienced an even greater increase in the number of immigration offenses handled.[18] In the Southern District of California in 2009, 61.6% of the caseload consisted of immigration offenses.[19] Contrast this to the period of October 1, 1994, through September 30, 1995, when a total of 38,114 sentences were imposed, 3,160 (8.3%) of which were immigration offenses.[20]

In order to manage these prosecutions, U.S. Attorneys' offices in certain districts began offering lower sentences to defendants who would plead guilty and waive certain appellate rights. This was accomplished through charging the defendant with a lesser crime ("charge-bargaining"),[21] or through the recommendation of a below-Guidelines sentence pursuant to a plea agreement ("departure-based"). These methods became known as "fast-track" sentencing.

In order to receive the benefits of departure-based programs, a defendant must generally agree to the factual basis, agree not to file any 12(b)(3) motions, waive right to appeal, and waive the right to file for a writ of habeas corpus.[22] The government, in exchange, agrees to recommend a departure of not more than four levels as set out by Section 5K3.1.[23] Departure-based programs ultimately received Congressional imprimatur under the PROTECT Act.[24]

In districts employing "charge-bargaining" programs, defendants are permitted to plead guilty in exchange for a lesser charge.[25] For instance, a defendant initially charged with illegal reentry is allowed to plead guilty to two counts of improper entry, which limits the sentence to thirty months.[26] Charge-bargaining programs often result in a shorter sentence than a defendant would have received even in a departure-based district.[27] U.S.

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18. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2009, NINTH CIRCUIT, *supra* note 17.
19. U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2009, SOUTHERN DISTRICT OF CALIFORNIA 7 (2009), *available at* http://www.ussc.gov/judpack/2009/cas09.pdf.
20. FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT & CIRCUIT FOR FISCAL YEAR 1995: 1ST CIRCUIT, *supra* note 16, at 1-2.
21. In charge-bargaining programs, the Government normally charges the defendant with 8 U.S.C. § 1325 (improper entry) instead of 8 U.S.C. § 1326 (illegal reentry). *See* Siegler, *supra* note 5, at 299 n.4. Section 1325 is a lesser offense calling for a lower sentencing range. 8 U.S.C. § 1325 (2006).
22. United States v. Arrelucea-Zamudio, 581 F.3d 142, 145-46 (3d Cir. 2009).
23. *Id*. at 146.
24. Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650 (2003).
25. United States v. Medrano-Duran, 386 F. Supp. 2d 943, 946 (N.D. Ill. 2005).
26. *Id*.
27. *Id*. at 947 (observing that departure-based programs, depending on the district sentenced in, yield sentences ranging from a one-level departure (resulting in sentencing range of fifty-one to sixty-three months) to a four-level departure (resulting in a sentencing range of thirty-seven to forty-six months; however, the same defendant sentenced in a charge-bargaining district would be eligible for a sentence of "thirty months—seven to sixteen months lower than the most lenient" departure-based program).

Attorneys continue to employ charge-bargain programs in several districts (including the Central, Northern and Southern Districts of California, the District of Oregon, and the Western District of Washington).[28] As this Note will set forth next, Congress sanctioned departure-based fast-track programs, but it never sanctioned charge-bargaining programs.[29] Then, this Note will discuss the purposes of the Sentencing Guidelines and how both types of fast-track programs do not serve the Guidelines' goals.

## B. PROTECT Act

The Sentencing Guidelines that are currently used in sentencing federal defendants were created pursuant to the Sentencing Reform Act of 1984.[30] Congress had two main purposes in enacting the Sentencing Reform Act—"honesty in sentencing"[31] and the reduction of sentencing disparities.[32] The concerns regarding disparities arose from statistical studies, which Congress relied on to show that sentences greatly varied depending on the district in which the defendant was convicted. For instance, female bank robbers often served approximately six months less than male bank robbers, and black bank robbers convicted in the South generally served thirteen months more than other bank robbers.[33] Accordingly, Congress charged the Sentencing Commission with creating Guidelines to alleviate these disparities. Pursuant to the Sentencing Commission's "characteristic institutional role," the Sentencing Commission normally implements Guidelines based on its assessment of empirical data and national experience; however, the fast-track Guideline at issue was promulgated upon a directive from Congress.

The fast-track Guideline was Congress's formal adoption of the departure-based fast-track programs already existing in several districts. Under Section 401(m)(2)(B) of the 2003 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), Congress instructed the Sentencing Commission to issue "a policy statement authorizing a downward departure of not more than [four] 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."[34] Accordingly, the Sentencing Commission issued

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28. *Id*. at 946.
29. *See* Siegler, *supra* note 5, at 302.
30. Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1987.
31. Stephen J. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).
32. Breyer, *supra* note 31, at 4.
33. *Id*. at 5.
34. Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

Section 5K3.1, directing that "[u]pon motion of the Government, the court may depart downward not more than [four] 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."[35] Additionally, the Office of the Attorney General issued a memorandum setting forth the criteria to obtain approval from its office for both departure-based fast-track programs pursuant to Section 5K3.1 and charge-bargaining programs, which were not indicated in the PROTECT Act.[36]

Defendants who were sentenced in non-fast-track districts argued their notably longer sentences were unfair simply because they happened to be apprehended in a district not employing a fast-track program.[37] Further, not adjusting the defendant's sentence to reflect the sentences of similarly situated defendants in fast-track districts resulted in unwarranted sentencing disparities.[38] Prior to the Court's recent cases changing the mandatory application of the Guidelines, every circuit to consider the fast-track argument rejected it on the grounds that the disparity in sentences for illegal reentry was not unwarranted because Congress had recognized the disparities that would result when it sanctioned the use of fast-track programs in the PROTECT Act.[39] However, circuits began to question the validity of this holding subsequent to the Court's rulings in *United States v. Booker* and *United States v. Kimbrough*.

### C. Recent Changes in Application of the Sentencing Guidelines

Until recently, Sentencing Guidelines were mandatory and left the court with little discretion in deviating from Section 5K3.1 or any other Guideline. In *Booker*, after determining that the mandatory nature of the Guidelines violated the defendant's Sixth Amendment right to jury trial, the

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35. U.S. SENTENCING COMM'N., U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2010).
36. Memorandum from Attorney General John Ashcroft, *Department Principles for Implementing an Expedited Disposition or 'Fast-Track' Prosecution Program in a District* (Sept 22, 2003), *reprinted in* 21 FED. SENT. REP. 318, 319 (June 2009).
37. United States v. Reyes-Hernandez, 624 F.3d 405, 420-21 (7th Cir. 2010).
38. Thomas E. Gorman, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. 479, 499 (2010).
39. United States v. Martinez-Martinez, 442 F.3d 539, 542 (2006). *See also* United States v. Andujar-Arias, 507 F.3d 734, 742 (1st Cir. 2007); United States v. Mejia, 461 F.3d 158, 163 (2d Cir. 2006); United States v. Vargas, 477 F.3d 94, 98 (3d Cir. 2007); United States v. Perez-Pena, 453 F.3d 236, 243 (4th Cir. 2006); United States v. Aguirre-Villa, 460 F.3d 681, 683 (5th Cir. 2006); United States v. Hernandez-Fierros, 453 F.3d 309, 314 (6th Cir. 2006); United States v. Sebastian, 436 F.3d 913, 916 (8th Cir. 2006); United States v. Marcial-Santiago, 447 F.3d 715, 718 (9th Cir. 2006); United States v. Martinez-Trujillo, 468 F.3d 1266, 1268 (10th Cir. 2006); United States v. Castro, 455 F.3d 1249, 1252 (11th Cir. 2006).

Supreme Court deemed the Sentencing Guidelines "effectively advisory."[40] The Court held that the sentencing courts must consider the applicable Guidelines range, but can "tailor the sentence" by considering the factors under 18 U.S.C. 3553(a).[41]

Section 3553(a) is an important aspect of the fast-track debate. The first part of this statute is what is often referred to as the "parsimony clause," and commands the sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the [following] purposes:" reflection of "the seriousness of the offense, to promote respect for the law, and to provide just punishment," deterrence, protection of the public, and rehabilitation.[42] Further, the statute requires the court to consider the "nature and circumstances of the offense and the history and characteristics of the defendant," "the kinds of sentences available," "sentencing range," "any pertinent policy statement," and "the need to provide restitution to any victims."[43] Finally, most important to the fast-track debate, the statute requires the court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[44] Subsequent to *Booker's* holding that the Guidelines are discretionary, and the cases discussed in the following paragraphs, sentencing judges must pay more attention to these factors in Section 3553(a).

The Supreme Court gave even more direction in the application of the Guidelines and the Section 3553(a) factors in *United States v. Gall*.[45] The Court reaffirmed the discretionary application of the Guidelines, and further delineated the procedure to be used by the district court in crafting a sentence.[46] The district court must calculate the applicable Guidelines range, consider arguments from the parties concerning the appropriate sentence, and then look at the Section 3553(a) factors to determine the appropriate sentence.[47] In assessing the Section 3553(a) factors, the judge "may not presume that the Guidelines range is reasonable."[48] If the sentencing judge does impose a sentence outside of the Guidelines, she must explain the reasons for departing from the Guidelines "to allow for

40. United States v. Booker, 543 U.S. 220, 244 (2005).
41. *Id*. at 245.
42. 18 U.S.C. § 3553(a) (2006).
43. 18 U.S.C. § 3553(a)(1), (3)-(5), (7).
44. 18 U.S.C. § 3553(a)(6).
45. United States v. Gall, 552 U.S. 38 (2007).
46. *Id*. at 49-50.
47. *Id*.
48. *Id*. at 50.

meaningful appellate review and to promote the perception of fair sentencing."[49]

Next, in *Kimbrough v. United States*, the Court held that a sentencing court may "conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve Section 3553(a)'s purposes, even in a mine-run case."[50] *Kimbrough* further held that the courts should not read any "implicit directive . . . into congressional silence."[51] Additionally, the Court found it relevant that the crack/cocaine Guidelines were not created by the Commission pursuant to its "characteristic institutional role."[52] The Commission normally employs an empirical approach in formulating Guidelines.[53] However, the crack/cocaine Guidelines did not use the Commission's data concerning past sentences, but instead used the 100-1 ratio set forth by Congress in the Anti-Drug Abuse Act of 1986.[54] Accordingly, *Kimbrough* "has rekindled debate about whether the absence of a fast-track program can be a factor in the choice of sentence"[55] under the 3553(a) factors.[56]

The Supreme Court further clarified *Kimbrough*'s ruling in *Spears*, stating that "the point of *Kimbrough*" was that sentencing courts could vary from the Guidelines "based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."[57] Specifically, *Spears* held that the sentencing court could vary from the 100-1 crack/cocaine ratio and replace that ratio with its own 20-1 ratio.[58] Later, in *Vazquez v. United States*, the Court vacated an Eleventh Circuit decision in light of the Solicitor General's position[59] that Congressional directives to the Sentencing Commission were not binding on sentencing courts.[60] Accordingly, due to this line of cases giving sentencing courts much wider discretion in varying from the Guidelines, the Circuits have looked at the fast-track argument anew.

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49. *Id*.
50. Kimbrough v. United States, 552 U.S. 85, 110 (2007).
51. *Id*. at 87.
52. *Id*. at 89.
53. *Id*. at 109.
54. *Id*. at 95-96.
55. United States v. Valadez-Martinez, 295 F. App'x 832, 835 (7th Cir. 2008).
56. Under 3553(a)(6), the court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . ." 18 U.S.C. § 3553(a)(6) (2006).
57. Spears v. United States, 555 U.S. 261, 264 (2009) (emphasis added).
58. *Id*. at 265-66.
59. Vazquez v. United States, 130 S. Ct. 1135, 1135 (2010).
60. *See* Brief for the United States at 9, Vazquez v. United States, 130 S. Ct. 1135 (2010) (No. 09-5370).

D. Fast-track after *Kimbrough*

The circuits are split as to whether courts can consider the fast-track disparity argument among the sentencing factors. As a result of *Kimbrough*, four circuits have accepted the argument, allowing district courts to consider the fast-track disparity at sentencing.[61] However, three circuits have rejected this argument.[62] The main difference in the circuits lies in their reading of *Kimbrough*.[63] The circuits rejecting the argument have focused on the point that *Kimbrough* only allows for a variance based on policy disagreement with the *Guidelines*, and have understood the fast-track argument to be based on a disagreement with *congressional* policy.[64] The various Circuits' reasoning for rejecting the fast-track argument is set forth below.

The Fifth, Eleventh, and Ninth Circuits found the fast-track argument unpersuasive. Finding that *Kimbrough* had not overruled circuit precedent, the Fifth Circuit reasoned that the fast-track disparity concerned a disagreement with *congressional* policy, while *Kimbrough* only gave judges discretion to sentence according to disagreement with the Sentencing Commission's policy.[65] The Eleventh Circuit also reaffirmed precedent in *Vega-Castillo*; however, the Circuit went on to hold that the disparity was not unwarranted because of Congress's *implicit* approval through its directive in the PROTECT Act authorizing the implementation of departure-based fast-track programs.[66] Similarly, the Ninth Circuit found that it could not overrule precedent. Its decision turned as well on the idea that the PROTECT Act approved the resulting disparities.[67]

The First, Third, and Sixth Circuits came to different conclusions. The First Circuit considered the question in *United States v. Rodriguez*, finding that the fast-track disparity was comparable to the crack/cocaine

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61. United States v. Rodriguez, 527 F.3d 221, 231 (1st Cir. 2008); United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3d Cir. 2009); United States v. Camacho-Arellano, 614 F.3d 244, (6th Cir. 2010); United States v. Reyes-Hernandez, 624 F.3d 405, 417 (7th Cir. 2010).
62. United States v. Gomez-Herrera, 523 F.3d 554, 563 (5th Cir. 2008); United States v. Gonzalez-Zotelo, 556 F.3d 736, 740 (9th Cir. 2009); United States v. Vega-Castillo, 540 F.3d 1235, 1238-39 (11th Cir. 2008).
63. *Camacho-Arellano*, 614 F.3d at 249.
64. *Id.* at 249 (citing *Gomez-Herrera*, 523 F.3d at 559); *See also Gonzalez-Zotelo*, 556 F.3d at 740-41 ("While *Kimbrough* permits a district court to consider its policy disagreements with the guidelines, it does not authorize a district judge . . . to vary from the guidelines based on disagreements with congressional policy."); *Vega-Castillo*, 540 F.3d at 1239 (acknowledging that sentencing courts may vary from the Guidelines resulting from a "Sentencing Commission policy judgment," but not Guidelines created pursuant to "Congressional direction").
65. *Gomez-Herrera*, 523 F.3d at 559.
66. *Vega-Castillo*, 540 F.3d at 1238.
67. *Gonzalez-Zotelo*, 556 F.3d at 740.

disparity in *Kimbrough*.[68] The court also noted that the defendant had based his argument on the parsimony clause of Section 3553(a), as well as the specific provisions of Section 3553(a)(6).[69] Further, the First Circuit found that the fast-track Guidelines did not exemplify the Commission's "characteristic institutional role." Acknowledging that *Kimbrough* directed that courts not read "implicit directive into congressional silence," the court found that the PROTECT Act did not contain an express directive which would prohibit the court from considering the fast-track disparity among sentencing factors.[70]

Similarly, the Third Circuit held that the PROTECT Act did not explicitly forbid a sentencing court from varying from the Guidelines and noted that Congress has failed to amend the statute to limit the sentencing court's discretion.[71] Most recently, the Sixth Circuit joined the fast-track debate, holding that a sentencing court could vary from the Guidelines based on a fast-track argument.[72] The court agreed with the First and Third Circuits that the ability to vary from the Guidelines based on policy disagreements, as held *Kimbrough* and *Spears*, went beyond the crack/cocaine policy disagreement.[73]

E. Seventh Circuit Precedent Prior to *Kimbrough*

Similar to the other circuits that had addressed the fast-track argument subsequent to *Kimbrough*, the Seventh Circuit precedent prior to *Kimbrough* rejected the fast-track argument. In *Martinez-Martinez* the Seventh Circuit concluded that Congress had explicitly approved the discrepancies caused by fast-track programs, and thus the resulting disparities were not unreasonable.[74] Similarly, in *Galicia-Cardenas* the court found that a sentence containing a downward departure based on the fast-track disparity was not reasonable.[75] The Seventh Circuit noted that Congress *explicitly* realized that fast-track program created through the PROTECT Act would result in discrepancies.[76]

However, more recently in *United States v. Corner*, the Seventh Circuit overturned its previous ruling that a sentencing court was not free to disagree with the career offender Guideline because the resulting disparity

68. United States v. Rodriguez, 527 F.3d 221, 227 (1st Cir. 2008).
69. *Id*. at 223.
70. *Id.* at 229.
71. United States v. Arrelucea-Zamudio, 581 F.3d 142, 150 (3d Cir. 2009).
72. United States v. Camacho-Arellano, 614 F.3d 244, 251 (6th Cir. 2010).
73. *Id*. at 250.
74. United States v. Martinez-Martinez, 442 F.3d 539, 542 (7th Cir. 2006).
75. United States v. Galicia-Cardenas, 443 F.3d 553, 555 (7th Cir. 2006).
76. *Id*. at 555.

was the "result of a legislative act." *Corner* noted that directives to the Sentencing Commission are not sufficient to satisfy *Kimbrough's* requirement that Congress "direct sentencing practices in express terms,"[77] and that the Guidelines' sentencing ranges are not binding on the sentencing court.[78] Accordingly, the Supreme Court's ruling in *Kimbrough*, and the Seventh Circuit's holding in *Corner*, set the court up to reconsider its precedent in the fast-track arena when it decided *United States v. Reyes-Hernandez*.

## IV. EXPOSITION OF *UNITED STATES V. REYES-HERNANDEZ*

*Reyes-Hernandez* presents the issue of whether a district court may reduce a defendant's sentence based on the sentencing disparity between fast-track and non-fast-track jurisdictions. The Seventh Circuit held that the sentencing disparity was unwarranted and that the district court erred by not considering the disparity when sentencing Reyes-Hernandez and Sanchez-Gonzalez, overruling Circuit precedent in *Martinez-Martinez* and *Galicia-Cardenas*.[79] This Note will next delineate the facts involved in *Reyes-Hernandez.*

### A. Statements of Facts

On appeal, the cases of Jaime Reyes-Hernandez and Pedro Sanchez-Gonzalez were consolidated. Both cases are factually similar, as this Note will set forth. Reyes-Hernandez, the defendant in the first case on appeal, is from Mexico.[80] In 1998, he was convicted of robbery and removed to Mexico after serving his four-year sentence.[81] In 2005, he was removed a second time after returning to the United States.[82] Again in 2008, he was back in the United States and was arrested for illegal reentry.[83]

Pedro Sanchez-Gonzalez is a citizen of Mexico as well, and first came to the United States in 1980 with his family to find work in California.[84] At the age of thirteen, his family returned to Mexico.[85] Sanchez-Gonzalez, however, remained in the United States.[86] He eventually became

77. United States v. Corner, 598 F.3d 411, 415 (7th Cir. 2010).
78. *Id*. at 415-16.
79. United States v. Reyes-Hernandez, 624 F.3d 405, 407-08 (7th Cir. 2010).
80. *Id*. at 408.
81. *Id*.
82. *Id*.
83. *Id*.
84. Brief for Appellant Pedro Sanchez-Gonzalez, United States v. Reyes-Hernandez, 624 F.3d 405 (2010), No. 09-1249, 2009 WL 2158954.
85. *Id*.
86. *Id*.

romantically involved with Lao and had four children with her.[87] Subsequently, in 2004, Sanchez-Gonzalez was convicted of domestic battery and removed from the United States.[88] Unfortunately, Lao had a drug problem and the state took the four children from her.[89] Sanchez-Gonzalez, fearing the children would be adopted into different families, returned to the United States to find his children.[90] After finding Lao and returning her to Chicago for drug treatment, authorities arrested Sanchez-Gonzalez on March 23, 2005, for theft and a domestic incident.[91] Next, this Note will discuss the procedural history of both defendants' cases prior to reaching the Seventh Circuit.

B. Procedural History

The Government charged Reyes-Hernandez with illegal reentry after being removed, in violation of 18 U.S.C. 1326(a) and (b)(2). His Guidelines range was forty-one to fifty-one months based on an offense level of twenty-one and a criminal history category of II.[92] Reyes-Hernandez requested the court consider the absence of a fast-track program in the district and that the disparities created by that absence could be considered pursuant to *Kimbrough*.[93] Accordingly, requesting a four-level departure from his offense level of twenty-one, he requested the court sentence him to twenty-four months.[94] The district court judge, in considering the Section 3553(a) factors and the fast-track argument, announced "the Seventh Circuit has addressed and rejected this very argument."[95] Accordingly, the judge felt bound to find the disparity was not unreasonable. The judge sentenced Reyes-Hernandez to forty-one months, representing the low end of the Guideline range.[96]

The Government similarly charged Sanchez-Gonzalez with illegal reentry after deportation, a violation of 8 U.S.C. 1326(a) and (b)(2), to which he pled guilty, pursuant to a plea declaration.[97] His Guideline range was seventy-seven to ninety-six months, based on an offense level of twenty-one and a criminal history category of VI.[98] He argued that a

87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id*.
92. United States v. Reyes-Hernandez, 624 F.3d 405, 408 (7th Cir. 2010).
93. *Id*.
94. *Id*.
95. *Id.*
96. *Id*.
97. *Id*.
98. *Id*.

Guidelines sentence would create an unwarranted disparity pursuant to 18 U.S.C. 3553(a)(6), and requested a below-Guidelines range of fifty-one months.[99] Further, he argued that the court had authority under the parsimony clause in Section 3553(a) to consider the disparities created by the existence of fast-track programs when making a sentencing decision.[100] The district court judge, in his opinion, felt that he was bound by Seventh Circuit precedent as set forth in *Galicia-Cardenas* and *Martinez-Martinez*, and could not consider the fast-track argument.[101] The judge did note, however, that "as a matter of policy . . . it is unjust to permit sentencing disparities based on the fortuity of the judicial district in which a defendant in an illegal reentry case is charged."[102] Ultimately, receiving a low-range Guidelines sentence, Sanchez-Gonzalez was sentenced to seventy-seven months imprisonment.[103] Next, both defendants appealed these decisions to the Seventh Circuit, and their cases were consolidated.

C. Holding and Reasoning of the Seventh Circuit.

The Seventh Circuit ultimately determined that, in light of *Kimbrough*, *Gall*, *Spears*, *Vasquez*, and *Corner*, the sentencing court may consider the fast-track argument under the Section 3553(a) factors, and accordingly, overruled Seventh Circuit precedent to that extent.[104] The court first acknowledged the Government's argument that it could not overrule prior precedent, which held that Section 5K3.1 should be treated like a statute, because it was the result of explicit approval of Congress of fast-track sentencing.[105] The court noted that, in light of *Vazquez*'s holding that directives to the sentencing commission are not binding, Section 5K3.1 was not the equivalent of a statute.[106] Next, the court found that the sentencing commission acted outside its characteristic institutional role in implementing Section 5K3.1 pursuant to Congressional directive, rather than considering empirical data.[107] Thus, pursuant to *Kimbrough*, the courts should give less deference to the fast-track Guideline, because it resulted from the Commission acting outside that characteristic institutional role.[108]

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99. *Id*.
100. *Id*.
101. *Id*.
102. *Id*. at 409.
103. *Id*.
104. *Id*. at 418.
105. *Id*.
106. *Id*.
107. *Id*.
108. *Id*.

The court found it more significant that the PROTECT Act did not even address the discretion of sentencing court judges in non-fast-track districts.[109] Citing to *Corner*, the court found that if Congress had wish to prohibit judges from disagreeing with Section 5K3.1, it could have done so in "unequivocal terminology."[110] Since Congress neither directed the Sentencing Commission to link the Guideline with statutory ranges, nor explicitly addressed sentencing in non-fast-track districts, the court found that it must follow *Kimbrough*'s command that it "decline to read any implicit directive into congressional silence."[111] Accordingly, the court overruled *Galicia-Cardenas* to the extent that it held a sentencing court could not reduce a sentenced based on the fast-track disparity argument.[112]

The court next discussed under which part of Section 3553(a) the sentencing court should consider the fast-track argument. The court noted that the appellants did not constrain their argument to Section 3553(a)(6), which requires the court to consider the "need to avoid unwarranted sentence disparities."[113] Rather, appellants argued that the fast-track argument should instead be considered in the overall Section 3553(a) analyses.[114] Further, the court cited to the Third Circuit's decision in *Arrelucea-Zamudio*, where that court held that the fast-track consideration should not be limited to Section 3553(a)(6), but rather the judge should "consider a variance under the *totality* of the [Section] 3553(a) factors (rather than one factor in isolation) . . . [and] a variance would be reasonable in an appropriate case."[115] Thus, the Third Circuit reasoned, similar to the crack/cocaine in *Kimbrough*, the sentencing court could "*consider* the disparate treatment of immigration defendants that is created by fast-track programs in determining whether a Guidelines sentence is greater than necessary," under the parsimony principle.[116]

Considering that the fast-track argument alone is not justification to depart from the Guidelines, the burden of proving eligibility for a fast-track sentence, and the judge's discretion, the court found the decision's impact to be "underwhelming."[117] The court emphasized that the *Reyes-Hernandez* decision merely allows the sentencing judge to consider the disparity created by fast-track programs under its holistic review of the

109. *Id*. at 418-19.
110. *Id*. at 418.
111. *Id*.
112. *Id*. at 419.
113. *Id*.
114. *Id*.
115. *Id*. (quoting United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3d Cir. 2009)).
116. *Id*. at 420 (quoting *Arrelucea-Zamudio*, 581 F.3d at 149).
117. *Id*. at 420.

Section 3553(a) factors, and that a departure based solely on the disparity may very well be considered unreasonable.[118]

The court found it unnecessary to address appellant's argument concerning the presence of charge-bargaining programs, but did address the Government's separation of powers argument.[119] The Government argued that the placement of fast-track programs was an exercise of prosecutorial discretion, and any disparity created was simply a by-product of the executive's valid exercise of that discretion.[120] The court, however, reasoned that even in a fast-track district, the ultimate authority to grant a fast-track departure motion lies with the sentencing judge.[121] Accordingly, varying from the fast-track Guideline based on the existence of the fast-track program, whether the court lies in a fast-track district or not, and whether presented by the prosecution or the defense, is "unquestionably [a] judicial function."[122] "These programs merely highlight the appropriate balance between prosecutorial and judicial discretion; they do not define bright lines of separation."[123]

As a final caution, the court notes that district courts do not have complete sentencing discretion as a result of its ruling in *Reyes-Hernandez*, because decisions are subject to appellate court review for both procedural and substantive reasonableness.[124] Further, the court reminded sentencing courts that they are not precluded from considering the Sentencing Commission's policy statement concerning the effect of undermining the effectiveness of fast-track programs when making its sentencing decision in the Section 3553(a) analyses.[125] Finally, the Seventh Circuit vacated the sentences of Reyes-Hernandez and Sanchez-Gonzalez and remanded the cases to their respective district courts for re-sentencing in light of its opinion.[126]

## V. ANALYSIS

This case presents an interesting issue concerning the ability of sentencing courts to vary from the fast-track Guideline to achieve the Sentencing Guidelines' overall purpose of reducing sentencing disparities. First, this case is similar to the crack-cocaine debate, in which the Supreme

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118. *Id*.
119. *Id*.
120. *Id*.
121. *Id*. (citing United States v. Rodriguez, 527 F.3d 221, 230 (1st Cir. 2008)).
122. *Id*. (citing *Rodriguez*, 527 F.3d at 230).
123. *Id*. at 422.
124. *Id*.
125. *Id*.
126. *Id*.

Court held that a sentencing judge could disagree with Guidelines policy and sentence a defendant below the Guidelines.[127] Accordingly, the Seventh Circuit ruled correctly in overturning circuit precedent to allow sentences judges this discretion. However, the Seventh Circuit misapplied the Court's decision in *Kimbrough* and *Spears* when it warned district courts that a variance from the Guidelines based solely on a disparity with fast-track districts may be unreasonable. This section will discuss why the Seventh Circuit's holding in *Reyes-Hernandez* is correct, and how the court erred in assuming that a below-Guidelines sentence based solely on a sentencing disparity may be misinterpreted by sentencing courts.

### A. The *Reyes-Hernandez* Court Correctly Concluded Sentencing Courts Could Vary From the Fast-Track Guideline Based on the Fast-Track Disparity

Based on the Supreme Court's recent case law, the Seventh Circuit properly reconsidered and overturned circuit precedent. In fact, the fast-track argument is highly analogous to the crack-cocaine argument in *Kimbrough*.

#### *1. The Sentencing Commission Acted Outside its Characteristic Institutional Role*

In regard to both the crack-cocaine and fast-track Guidelines, the Sentencing Commission was acting outside of its characteristic institutional role in implementing them.[128] The Commission's institutional role is important because it is able to make sentencing recommendations based on "empirical data and national experience, guided by a professional staff with appropriate expertise."[129] *Kimbrough* said that sentencing courts should afford less deference to Guidelines produced by the Commission when it is not acting in this characteristic institutional role.[130] The *Kimbrough* court noted that the Commission created the crack-cocaine Guidelines by looking to the sentencing scheme provided by the Anti-Drug Abuse Act 1986 Act, and did not evaluate empirical data or look to national experience in establishing those Guidelines.[131]

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127. *See* Spears v. United States, 555 U.S 261, 264 (2009).
128. United States v. Huffstatler, 561 F.3d 694, 697 n.1 (7th Cir. 2009) (noting that the fast-track Guideline is "another section of the guidelines that does not reflect the Commission's exercise of its 'characteristic institutional role'").
129. United States v. Kimbrough, 552 U.S. 85, 109 (2007) (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).
130. *Kimbrough*, 552 U.S. at 109.
131. *Id*.

The fast-track Guidelines at Section 5K3.1 were not the product of the evaluation of empirical data and national experience, since it was created by a directive from Congress to the Sentencing Commission set forth in the PROTECT Act. In implementing Section 5K3.1, the Commission did not evaluate illegal reentry sentences in each district, did not consider data to determine which districts were best-suited for such a program, and did not consult experts concerning the Guidelines. Rather, the Commission criticized the Guideline, telling Congress that it would result in unwarranted disparities, and noting that this was not consistent with the Sentencing Guidelines' goal of reducing such disparities.[132] Similarly, the Commission criticized the crack-cocaine Guidelines, noting that they produced excessively harsh sentences inconsistent with the goals of Section 3553(a).[133] Thus, pursuant to *Kimbrough*, since Section 5K3.1 was not created pursuant to the Commission's characteristic role, it would not be an abuse of discretion for a sentencing court to sentence below the Guidelines under the Section 3553(a) factors.

*2. Congress Gave No Explicit Directive to Sentencing Court in the PROTECT Act*

Further, Congress did not give an explicit directive to sentencing courts in the PROTECT Act that would prevent them from varying from the Guideline in an attempt to prevent sentencing disparities. In *Kimbrough*, the Government argued that Congress had implicitly approved the crack-cocaine Guidelines, and that the rejection of a proposed 1-to-1 ratio amendment provided further evidence of Congress's approval.[134] The Court rejected this argument noting that the 1986 Act did not prescribe particular Guidelines, and the court "decline[d] to read any implicit directive into the congressional silence."[135]

Here, the Government argues that Congress authorized sentencing disparities when it gave a directive to the Sentencing Commission to implement the fast-track Guideline, making the disparity unwarranted. However, the PROTECT Act does not contain any language constraining a sentencing court's ability to consider fast-track disparity; pursuant to *Kimbrough*, the court must not "read any implicit directive into the congressional silence."[136]

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132. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 66-67 (Oct. 2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf.
133. *Kimbrough*, 552 U.S. at 110.
134. *Id*. at 103.
135. *Id*.
136. *Id*. at 87.

*3. The Court Correctly Found No Violation of Separation of Powers*

The court correctly determined that consideration of the fast-track argument by district courts would not violate separation of powers. The Government argued that consideration of the fast-track disparity would constitute a violation of the separation of powers.[137] Since prosecutors in fast-track districts alone made the determination whether to offer a reduced fast-track sentence to the defendant, and then present a motion to the court, the government argues that fast-track sentencing is a matter of prosecutorial discretion.

Other circuits have addressed a separation of powers argument with regard to fast-track sentencing. The First Circuit rejected a separation of powers argument, stating that the decision to actually implement a fast-track program in a particular district may lie with the executive, but the decision to accept a fast-track plea lies within the judicial branch's discretion.[138] The Tenth Circuit, in affirming a district court's decision to reject a fast-track plea agreement, differentiated between a plea agreement pursuant to a fast-track program and charge bargaining.[139] That court noted that sentencing is a judicial function, thus the rejection of a plea agreement was within the discretion of the district court.[140] Deciding whether or how to charge a defendant, however, is primarily prosecutorial.[141] Accordingly, interference with a determination of charge-bargaining may raise separation of powers concerns.

Here, defendants were merely asking the court to consider the disparities in sentencing created by the absence of fast-track programs in some districts. The defendants were not asking the court to interfere with the decision to charge, or asking that the court implement a fast-track program in the district. Since sentencing is clearly a judicial function, the consideration of fast-track disparities among the Section 3553(a) factors does not implicate an encroachment on the executive's power. As the court noted, it "merely highlight[s] the appropriate balance" between the two branches.[142]

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137. United States v. Reyes-Hernandez, 624 F.3d 405, 421 (7th Cir. 2010).
138. United States v. Rodriguez, 527 F.3d 221, 230 (1st Cir. 2008).
139. United States v. Macias-Gonzalez, 219 F. App'x. 814, 817 (10th Cir. 2007).
140. *Id*. at 814.
141. *Id*.
142. *Reyes-Hernandez*, 624 F.3d at 422.

B. The Court Incorrectly Suggested that a Sentencing Court Could Not Vary from the Guidelines Based Solely on the Fast-Track Argument

The *Reyes-Hernandez* court correctly concluded that sentencing courts have authority to vary from the guidelines after considering the fast-track argument in the Section 3553(a) factors. It erred, however, in suggesting that a "departure from the guidelines premised solely on a fast-track disparity may still be unreasonable."[143] "To withstand scrutiny, a departure should result from a holistic and meaningful review of all relevant [Section] 3553(a) factors." [144] However, in *Spears*, the Court clarified that *Kimbrough*'s point was "a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." [145]

In fact, the Seventh Circuit's suggestion that a variance based solely on the fast-track disparity would be unreasonable is exactly the type of argument that the Supreme Court rejected in *Spears*. The Eighth Circuit relied on the portion of *Kimbrough* which discussed that the district court "appropriately" relied on the parsimony clause of Section 3553(a) in granting a variance, and accordingly did not create its own powder to crack-cocaine ratio.[146] The Eighth Circuit read this portion of *Kimbrough* to mean that the district court could not establish a ratio of its own, and accordingly ruled the district court erred in substituting its own 20:1 ratio for the Guidelines' 100:1 ratio.

In *Spears*, the Supreme Court rejected the Eighth Circuit's reasoning stating that "[a] sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity."[147] In clarifying *Kimbrough*, the court held that "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement."[148] *Spears* went on to conclude that a sentencing court could vary from the Guidelines even in "a mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range."[149]

Accordingly, it follows, that a sentencing court can sentence an illegal reentry defendant in a non-fast-track district, even though she otherwise has

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143. *Id*. at 421.
144. *Id*.
145. Spears v. United States, 555 U.S. 261, 264 (2009).
146. *Id*. (citing United States v. Kimbrough, 552 U.S. 85, 109 (2007)).
147. *Spears*, 555 U.S. at 265.
148. *Id*. at 265-66.
149. *Id*. at 267.

no particular circumstances to justify a below-Guidelines sentence, to a sentence below the Guidelines solely on the basis of the difference in sentencing that a similarly-situated defendant would have received in a fast-track district. Since sentencing judges have the discretion to reject the illegal reentry Guideline based on a policy disagreement with the Guideline, the court has the power to substitute a new sentencing range that corrects the disparity, pursuant to *Kimbrough*. Moreover, according to *Spears*, the sentencing judge has the ability to adjust an illegal reentry sentence even when there are no other circumstances deserving of a variance for that particular defendant.

### C. Guideline Immigration Sentences are Generally "Greater Than Necessary"

*Kimbrough* found the sentencing court could vary from the crack-cocaine Guideline simply on the basis that the Guidelines sentence is too harsh, without going into an analysis under Section 3553(a)(6) as to whether the disparity is unwarranted. In *Kimbrough*, the sentencing court did not err where it considered the "nature and circumstances" of the crime, the "history and characteristics" of the defendant, and the unwarranted disparity between crack and powder cocaine sentencing.[150] The Court, however, ultimately justified its decision to sentence four years below the Guidelines by relying on Section 3553(a)'s overarching parsimony principle to impose a sentence "not greater than necessary" to do justice.[151] Accordingly, it would not be unreasonable for a sentencing court, considering only the parsimony clause, to come to the same conclusion as a sentencing court considering unwarranted disparities under Section 3553(a)(6).

Immigration sentences are also considered excessive under the Sentencing Guidelines, even by those who typically support the Sentencing Guidelines.[152] The severe increase in immigration sentences occurred after the introduction of the 1994 Crime Bill, which imposed enhanced sentences for immigration offenses. Prior to that time, many unauthorized immigrants were not even prosecuted in the Southern District of California.[153] Unauthorized immigrants were rarely charged with a felony.[154] When they were prosecuted, they normally pleaded guilty to illegal reentry, a

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150. *Kimbrough*, 552 U.S. at 111.

151. *Id*.

152. *See* Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1019 (2004) (expressing his view that immigration sentences are too high).

153. Bersin & Feigin, *supra* note 12, at 287.

154. *Id*.

misdemeanor with a maximum sentence of six months' imprisonment.[155] For instance, in the Southern District of California, the court normally sentenced illegal reentry defendants to a sentence of fifteen days for the first offense, and escalating with each offense until the six-month maximum was reached.[156] Presently, however, defendants charged with improper entry are subject to a statutory maximum of six months for the first offense, and two years for subsequent offenses.[157] Increasingly, the same defendant charged with misdemeanors prior to the 1994 Crime Bill are now charged with illegal reentry, under which the statutory maximum sentences range from two years to twenty years, depending on the specific circumstances.[158]

It is hard to imagine the reasonableness of a sentencing scheme that imposes a maximum six-month sentence on a defendant one year, then the next year imposes on that same defendant the possibility of a maximum twenty-year sentence. As the sentencing courts under *Kimbrough* determined that the 100:1 crack-cocaine ratio of sentencing was simply unreasonable and disagreed with Guidelines policy, so too can sentencing courts determine that illegal reentry sentences are unreasonable. Thus, just as the court determined in the context of crack-cocaine sentencing in *Kimbrough* and *Spears*, the sentencing court in illegal reentry cases should be able to sentence below the Guidelines based solely on the parsimony clause, without reference to the need to avoid unwarranted sentences.

D. The Future of Illegal Reentry Sentencing in the Seventh Circuit

While the Seventh Circuit opened the door for district courts to sentence defendants below the illegal reentry Guidelines, there are still several obstacles before receiving such a variance under *Reyes-Hernandez*. First, defendants in the Seventh Circuit will have to demonstrate to the judge that they would have been eligible for participation in a fast-track program, if they had been arrested in a district implementing such a program.[159] Next, even if proving eligibility, defendants must demonstrate the reduced sentence for which they would have been eligible in a fast-track district. Considering that fast-track reductions vary significantly, the defendant should provide the sentencing court with the various sentences she would have been eligible for in each district.[160]

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155. *Id*.
156. *Id*.
157. 8 U.S.C. § 1325 (2006).
158. 8 U.S.C. § 1326.
159. United States v. Reyes-Hernandez, 624 F.3d 405, 420 (7th Cir. 2010).
160. *See* Siegler, *supra* note 5, at 305 (delineating the various sentences the same defendant would receive if sentenced in each of the fast-track districts).

Even after demonstrating fast-track eligibility and the disparity created among the districts, the sentencing judge only has to *consider* the fast-track disparity among the other Section 3553(a) factors pursuant to *Reyes-Hernandez*.[161] For instance, the sentencing judge may determine that the "nature and circumstances of the offense and the history and characteristics of the defendant"[162] outweigh the need to compensate for the fast-track disparity, and then sentence the defendant with the Guidelines. Ultimately, the decision to vary is left to the judge's discretion, and is only unreasonable if she refuses to consider the disparity.[163]

In 2011, *United States v. Ramirez* further clarified the evidentiary showing a defendant must make to require a judge to consider a request for a variance based on a fast track disparity.[164] The defendant must show that she or he is similarly situated to defendants in fast-track districts.[165]

> That means that the defendant must promptly plead guilty, agree to the factual basis proffered by the government, and execute an enforceable waiver of specific rights before or during the plea colloquy. It also means that the defendant must establish that he would be eligible to receive a fast-track sentence in at least one district offering the program and submit the likely imprisonment range in that district. Unless and until the defendant meets these preconditions, his "disparity" argument is illusory and may be passed over in silence.[166]

The court advises defendants to provide information concerning eligibility for various fast-track programs, likely terms of imprisonment she or he would likely receive in those fast-track programs, and programs for which she or he would likely not qualify.[167] In response, the government may argue that the defendant would not be eligible for a reduction in those districts and may point out other districts in which the defendant would not be eligible for fast-track programs.[168]

Other Section 3553(a) factors, however, can easily outweigh the need to avoid a sentencing disparity. Even though the Supreme Court has made clear in *Spears* that courts can vary even when a defendant does not possess any other characteristics deserving of a variance, illegal reentry defendants

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161. *Reyes-Hernandez*, 624 F.3d at 420.
162. 18 U.S.C. § 3553(a)(1) (2006).
163. *Reyes-Hernandez*, 624 F.3d at 420 ("'[N]o judge is *required* to sentence at a variance with a Guideline' even if 'at liberty to do so.'") (quoting United States v. Corner, 598 F.3d 411, 416 (7th Cir. 2010))).
164. Nos. 09–3932, 10–2190, 10–2689, 2011 WL 6450620 (7th Cir. July 20, 2011).
165. *Id*. at *1.
166. *Id*.
167. *Id*.
168. *Id*. at *9.

still face an uphill battle in convincing a sentencing judge to sentence below the Guidelines to remedy the fast-track disparity after *Reyes-Hernandez*.

## VI. CONCLUSION

In concluding that a sentencing court may consider the disparities created by fast-track sentencing among the Section 3553(a) factors, the Seventh Circuit correctly acknowledged the discretion that sentencing judges have in varying from the Guidelines to avoid unwarranted sentencing disparities. Also, separation of powers concerns were not at issue because the discretion to grant fast-track departure ultimately lies with the sentencing court alone, thus not infringing on prosecutorial discretion. However, while the court correctly ruled that the sentencing judge may consider the disparities, its suggestion that a variance based solely on the fast-track disparity argument may be unreasonable was inconsistent with the Supreme Court's recent cases. Overall, *Reyes-Hernandez* gives sentencing courts room to ameliorate harsh immigration sentences for some defendants, while they are still bound to enforce unnecessarily harsh sentences for other defendants.