IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v. **CASE NO. XXXX**

LUIS MARTINEZ

Defendant.
_____/

SENTENCING MEMORANDUM

Defendant, Luis Martinez, files this sentencing memorandum and requests this Court to impose a sentence below the 15 to 21 months established by the advisory sentencing guidelines. He requests, as well, that the Court not impose a period of supervised relase. He makes his request for a below-guidelines sentence because of three circumstances that individually and collectively render the existing range "greater than necessary" to achieve the goals of sentencing established by Congress. 18 U.S.C. § 3553(a). Those circumstances are (1) Mr. Martinez' cultural assimilation (2) the sentencing disparity between districts with "fast track" procedures for illegal reentry cases and those that do not; and (3) the sentencing disparity between districts with "charge-bargaining" procedures for illegal reentry cases and those that do not. He requests that the Court not impose a period of supervised release on the basis of the most recent recommendations of the United States Sentencing Commission.

Cultural Assimilation

On November 1, 2010, the United States Sentencing Commission added commentary to USSG § 2L12, which recognizes that cultural assimilation may provide a basis for a downward

departure from the guideline range. USSG App. C, Amend. 740.[1] The new language reads as follows:

> There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.
>
> In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, and (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

USSG § 2L1.1, comment. (n. 8).

There are several reasons why consideration is due an individual who has become assimilated into the culture of the United States. In United States v. Reyes-Campos, 293 F. Supp. 2d 1252, 1258 - 1259 (M.D. Ala. 2004), citing United States v. Lipman, 133 F.3d 726 (9th Cir. 1998), the court recognized "two ways in which a defendant's cultural assimilation to the United States could 'speak to his offense and to his character'" :

> The court wrote that "cultural assimilation may be relevant. . . if a district court finds that a defendant's unusual cultural ties to the United States - - rather than ordinary

[1] In Paragraph 75 of the Presentence Report, the Probation Officer has stated that the defense objects to the absence of any mention of a departure on the basis of cultural assimilation, and mentions that three circuits have held that cultural assimilation may support a departure. There was at one point some question about whether cultural assimilation would support a departure, but the commentary added as a result of Amendment 740 has conclusively resolved the issue.

> economic incentives - - provided the motivation for the defendant's illegal reentry." *Id*. Cultural assimilation may also be relevant to the character of a defendant. . . in so far as his culpability might be lessened if his motives were familial or cultural rather than economic." *Id.*

United States v. Reyes-Campos, 293 F. Supp. 2d at 1256. Then, too, in weighing the extent of the punishment to be imposed, courts have recognized that deportation is an especially harsh penalty. *See* Padilla v. Kentucky, 130 S.Ct. 1473, 1481 (2010) ("We have long recognized that deportation is a particularly severe 'penalty' . . ."). That is even more true when the individual being deported has been assimilated into the culture of the United States and has no connection with the country to which he or she is being deported.

All three considerations - motivation for committing the offense, character, and what amounts to an especially harsh collateral penalty - apply in this case. Mr. Martinez came to the United States when he was eight years old. PSR ¶ 45. He grew up and was educated in the United States. PSR ¶ 51. Nearly all of his family, including his three young children, live in the United States. PSR ¶¶ 46-47. The commentary lists seven circumstances that the Court should consider, and all of them apply to Mr. Martinez. As stated, he was eight years old when he came to the United States. As he is now 25 years old, he has been in the United States for the last seventeen years. During that time he attended school within the United States and has been outside the United States only briefly when he was deported. With children in the United States, with his mother present, and all but one of his siblings, he has extensive familial ties. Given the length of time he has been in the United States, his cultural ties are strong, as well. Other than his brother who was deported a year ago, Mr. Martinez does not have any relatives with whom he is familiar outside the United States. While Mr. Martinez is not without a prior criminal history, other than his efforts to avoid detection

and his illegal entry offense, his last offense was a 2004 DUI conviction when he was eighteen years of age. Furthermore, he has not, since his most recent return to the United States, "engaged in additional criminal activity after illegally reentering the United States." USSG § 2L1.2, comment. (n. 1(7)).

Disparity Due to Fast-Track Programs

In 2003, Congress directed the United States 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 based on the 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 (PROTECT Act), Pub. L. No. 108-21, §401(mc0(2)(B), 117 Stat. 675. In accord with that directive, the Sentencing Commission promulgated USSG § 5K3.1, which authorizes a downward departure of "not more than 4 levels."

Had Mr. Martinez been arrested in one of the fast-track districts, it seems likely he would have received somewhere between a 2 to 4 level reduction in the offense level or as little as a 6 month sentence. *See* generally Exhibits 1 and 2.[2] It is a disparity that the Sentencing Commission has recognized to be inconsistent with Congress's goal of sentencing uniformity. *See* United States Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003) ("Defendants sentenced in districts without authorized early disposition programs, however, can be expected to receive longer sentences than similarly-situated defendants

[2]"Exhibit 1" is a District by District Count of Fast Track Policy and Procedures, reprinted in 21 Fed. Sent. Rptr. 229, 339-348 (June 2009). "Exhibit 2" is a Memoranda Reporting Revisions to the Illegal Reentry Fast Track program in the Central District of California, *reprinted* in 21 Fed. Sent Rep. 349 (June 2009).

in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.")[3]

Mr. Martinez recognizes that this Court is bound by existing Eleventh Circuit Court of Appeals precedent and that the Eleventh Circuit has held that trial courts lack the authority to impose a below-guidelines sentence on the basis of fast-track disparity. *See* United States v. Castro, 455 F.3d 1249 (11th Cir. 2006); United States v. Arevalo-Juarez, 464 F.3d 1246 (11th Cir. 2006); and United States v. Vega-Castillo, 540 F.3d 1235 (11th Cir. 2007). There has, though, been debate within the Court. *See* Vega-Castillo. 540 F.3d at 1239 (Barkett, J. dissenting). Then, too, Judge Carnes, in the opinion denying the motion for rehearing en banc in Vega-Castillo , seemed to acknowledge that closer review of the issue might be warranted in a more appropriate case. United States v. Vega-Castillo, 548 F.3d 980, 981 (11th Cir. 2008).[4] Notably, other district have concluded that trial courts do have the authority to impose a below-guideline sentence on the basis of fast-track disparity. *See, e.g.,* United States v. Rodriguez, 527 F.3d 221, 229 (1st Cir. 2008); United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3rd Cir. 2009); and United States v. Camacho-Arellano, 614 F. 3d 244, 250 - 251 (6th Cir. 2010).

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[3]The report is available at http://www.ussc.gov/departrpt03/departrpt03.pdf.

[4]One of Judge Carnes's concerns was that Mr. Vega-Castillo had not complied with one of the prerequisites of the fast-track program, that of entering into an agreement waiving certain rights. 548 F.3d at 982. The Government, here, has not offered Mr. Martinez an opportunity to participate in the fast-track program, but he is more than willing to enter into the sort of agreement cited by Judge Carnes in exchange for the benefits of the fast-track procedures.

Disparity Due to Charge-Bargaining Programs

There is, in addition to the fast-track program, a charge-bargaining process that results in reduced sentences for defendants who are prosecuted for the offense of unlawful reentry. These programs operate outside the Guidelines and the benefit to defendants often exceeds what would ordinarily be considered:

> Based on the parties' submissions, there are a significant number of districts with early disposition programs that operate outside the bounds of the PROTECT Act and § 5K3.1. The government's submission reflects that there are two distinct types of fast track programs: those which, consistent with § 5K3.1 and the Congressional directive, rely on downward departures of up to four levels, and those which rely on charge-bargaining, in other words, where the defendant is permitted to plead guilty to a reduced charge.
>
> The fast track districts that rely on charge-bargaining use methodologies that permit far greater sentence reductions that contemplated by Congress' directive in the PROTECT Act and the Sentencing Commission's policy statement in § 5K3.1. 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.
>
> Charge-bargaining in these districts can, in many cases, result in a sentence reduction that significantly exceeds that which the defendant would receive if he were limited to the four-level maximum departure authorized by Congress in the PROTECT Act and by the Sentencing Commission in § 5K3.1. This can be illustrated by reference to Medrano-Duran's case. Medrano-Duran's criminal history category is IV, and his total offense level is twenty-one, yielding a range under the Guidelines of fifty-seven to seventy-one months. A one-level downward departure as provided in the departure-based early disposition program of some divisions of the Western District of Texas would reduce his range to fifty-one to sixty-three months. A two-level downward departure, as provided in the departure-based fast track programs in the Districts of New Mexico, Nebraska, and Idaho, as well as the Southern District of Texas and some divisions of the District of Arizona, would reduce his range to forty-six to fifty-seven months. A three-level downward departure, as provided in the

> program in effect in other divisions of the District of Arizona, would reduce his range to forty-one to fifty-one months. A four-level downward departure, as provided in the departure-based fast track programs in the Eastern District of California and the District of North Dakota, would reduce his range to thirty-seven to forty-six months. Each of these programs falls within the scope of Congress' mandate and the Sentencing Commission's policy statement. But in the charge-bargaining districts referenced earlier, Medrano-Duran's sentence would be thirty months - seven to sixteen months lower than the most lenient of the programs that can be said to carry the Congressional imprimatur.

United States v. Medrano-Duran, 386 F.Supp.2d 943, 946-947 (N.D. Ill. 2005). *See also* Exhibit 1, at pp. 2 - 5.

The disparities created by these charge-bargaining programs are not the result of Congressional policy and Mr. Martinez knows of no case that prohibits district courts from considering such a disparity in arriving at a sentence. Thus, while existing Eleventh Circuit precedent may bar this Court from imposing a below-guidelines sentence based upon disparities in sentencing created by the fast-track program, that precedent does not prevent this Court from recognizing the disparity created by charge-bargaining and providing a remedy.

Supervised Release

On May 1st of this year, the United States Sentencing Commission submitted to Congress a series of amendments to the Sentencing Guidelines that, absent congressional action, will take effect on November 1, 2011. *See* United States Sentencing Commission, *Amendments to the Sentencing Guidelines.*[5] One of the proposed amendments modifies the existing rule regarding the imposition of supervised release and specifically provides that sentencing courts "ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the

[5]Available at: http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20110428_RF_Amendments_Final.pdf

defendant is a deportable alien who likely will be deported after imprisonment." USSG §5D1.1(c) (proposed). *See* United States Sentencing Commission, *supra,* at 83. The Commission has made the proposal based on its acknowledgment of what has been obvious for some time - nearly all noncitizen defendants are deported when convicted of a federal offense and that existing law provides for a new prosecution if the individual returns:

> Non-citizens now are approximately half of the overall population of federal offenders, see 2010 Sourcebook of Federal Sentencing Statistics, Table 9 (showing that 47.5% of federal offenders in fiscal year 2010 were non-citizens), and supervised release is imposed in more than 91 percent of cases in which the defendant is a non-citizen, see Federal Offenders Sentenced to Supervised Release at 60. The Commission determined that such a high rate of imposition of supervised release for non-citizen offenders is unnecessary because "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010); see also id. at 1478 ("[D]eportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."). Furthermore, such offenders likely would face prosecution for a new offense under the federal immigration laws if they were to return illegally to the United States.

United States Sentencing Commission, *supra*, at 82.

While the proposed amendment is not yet in effect, there is no statutory requirement that the Court impose supervised release, and the Court, even if it imposes a sentence of a year or more, has the authority to vary from the existing requirement of USSG §5D1.1. *See* United States v. Booker, 543 U.S. 220 (2005). Indeed, the logic of the proposal is just as compelling now as it will be in November. In this instance, Mr. Martinez will be deported and, should he return, the Government has he authority to prosecute him.

Conclusion

Mr. Martinez came to the United States as an eight year old boy and has grown up in this country. His children and the rest of his family live in the United States, and he has few, if any, ties

in Mexico. Because his motivation in illegally reentering the United States was based on his cultural and familial ties to the United States and because deportation will, for him, be an especially harsh penalty, he is deserving of consideration for his cultural assimilation.

Through its explicit approval of lower sentences and fast-track and charge-bargaining districts, the Government acknowledges that reduced sentences for illegal reentry serve all the §3553(2) purposes of punishment. If a sentence of 6 months would serve those purposes in Arizona or Idaho, it would also do so in the Northern District of Florida. Indeed, if fast-track or charge-bargaining sentences sufficiently deter reentry and adequately protect the public in those districts where the offense occurs most frequently, there is little justification for higher sentences in districts where the crime is committed less frequently. Simply put, Mr. Martinez does not deserve to spend additional months in prison because he happened to be arrested in the Northern District of Florida rather than in Nebraska, California, or Oregon.

He, therefore, respectfully requests this Court to impose a sentence below the guideline range of 15 to 21 months and to forego the imposition of a period of supervised release.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was delivered by electronic delivery to Ms. Winifred Acosta Nesmith, Assistant United States Attorney, this 10th day of June, 2011.

Respectfully submitted,

s/Randolph P. Murrell
Randolph P. Murrell
Federal Public Defender
Fla. Bar. No. 220256
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
(850) 942-8818

The real name of the defendant has been replaced with a fictional name for purposes of privacy.

Exhibit 1: Fast-Track Dispositions District-By-District

21 Fed. Sent. R. 339

Federal Sentencing Reporter1053-9867

PRIMARY MATERIAL: **Fast-Track Dispositions District-By-District** Relating to Illegal Reentry Cases

21 Fed. Sent. R. 339

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APPENDIX A

FAST-TRACK DISPOSITIONS DISTRICT-BY-DISTRICT RELATING TO ILLEGAL REENTRY CASES n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 As submitted for fiscal year 2005.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -**DISTRICT OF ARIZONA:**

Tucson Division

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of 8 U.S.C. § 1326, the Tucson Division of the District of Arizona employs a departure-based program.

The defendant typically pleads guilty to one count of violating Title 8. United States Code, Section 1326, and the Government generally agrees to a reduction pursuant to U.S.S.G. § 5K3.1. The amount of the reduction depends on the defendant's criminal history and on whether or not he/she was on supervised release at the time of his/her offense. If the

defendant's offense level under U.S.S.G. § 2L1.2 is level 24, 20, or 16 (meaning, essentially, that the defendant has a prior aggravated felony of some type), the defendant receives a three-level reduction. If the defendant's offense level under § 2L1.2 is level 12 or 8, the defendant receives a four-level reduction if his/her Criminal History Category is not greater than IV. and a three level reduction if his/her Criminal History Category is V or VI.

If the defendant is on supervised release, the amount of the reduction is decreased one level. That is, if a defendant's offense level is 24.20. or 16, and he/she was on supervised release, he/she gets a two-level reduction. If the defendant's offense level is 12 or 8, he/she gets a three-level reduction if his/her Criminal History Category is not greater than IV, and a two-level reduction if his/her Criminal History Category is V or VI. In these cases, the Government also pursues the supervised release violation, if it is pending in the District of Arizona. In the supervised release revocations, the Government agrees that the term of imprisonment on the revocation shall not exceed the midpoint of the applicable range determined pursuant to U.S.S.G. § 7B1.4.

Phoenix and Yuma Divisions

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of Title 8, United States Code. Section 1326, the Phoenix and Yuma Divisions of the District of Arizona employ a departure-based program.

The defendant typically pleads guilty to one count of violating Title 8, United States Code, Section 1326(b)(2), and the Government generally agrees to a reduction pursuant to U.S.S.G. § 5K3.1. The amount of the reduction depends on the defendant's criminal history and on whether or not he/she was on supervised release at the time of his/her offense. If the defendant's offense level under U.S.S.G. § 2L1.2 is level 24, he/she receives a four-level reduction (only three-level if on supervised release). If the defendant's offense level is 20, he/she receives a two-level departure (only one-level if on supervised release). If the defendant's offense level is 16, he/she receives a one-level reduction (no reduction, only low-end recommendation if on supervised release).

CENTRAL DISTRICT OF CALIFORNIA

For defendants who have committed the offense of illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the Central District of California employs a "fast-track" charge-bargain program.

Under that program, the Government sometimes agrees to forego prosecution under Title 8, United States Code, Section 1326 and to permit such offenders to enter guilty pleas to two counts of Title 8, United States Code, Section 1325 ("fast-track cases") or one count of Title 8, United States Code, Section 1325 ("super-fast-track cases"). The defendant must waive preparation of a full presentence report and accept immediate sentencing to the statutory maximum of 30 months' imprisonment in fast-track cases or 6 months' imprisonment in super-fast-track cases. The decision whether to enable a Section 1326-eligible defendant to plead guilty to either one or two Section 1325 counts, or instead to prosecute the offender under Section 1326, is largely dependent on the severity and age of the offender's earlier crimes, on the sentences received for those crimes, on the offender's Criminal History Category, and on whether the offender has been convicted under Section 1326 in the past. As a general matter, the determination whether earlier convictions are sufficiently severe to warrant prosecution under Section 1326 rather than Section 1325, or for two Section 1325 counts rather than one, is linked to the distinctions between various offenses described in U.S.S.G. § 2L1.2(b)(1).

EASTERN DISTRICT OF CALIFORNIA

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the Eastern District of California employs a departure-based program. 13

The Government typically agrees to pursue only one count of Title 8, United States Code, Section 1326; to dismiss all other counts (usually this is the sole count of the indictment so dismissal is not applicable); to recommend a three-level reduction in total offense level for acceptance of responsibility and a four-level reduction in offense level pursuant to § 5K3.1; and to stipulate to a sentence within the applicable Sentencing Guidelines range.

NORTHERN DISTRICT OF CALIFORNIA

For defendants eligible for fast-track disposition who have committed the offense of illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the Northern District of California employs a charge-bargain program.

The Government generally agrees to file an information alleging two counts of Title 8, United States Code, Section 1325, and agrees not to bring additional charges arising from the conduct that supports the Title 8, United States Code, Section 1325 charges. The defendant enters pleas of guilty to two counts of Title 8, United States Code, Section 1325. The defendant agrees in the binding plea agreement to a 30-month prison sentence (the statutory maximum sentence for two counts of Title 8, United States Code, Section 1325 running consecutively) followed by a term of supervised release. The defendant must be able to make a factual basis for the guilty pleas to violating Title 8, United States Code, Section 1325.

SOUTHERN DISTRICT OF CALIFORNIA

For defendants eligible for fast-track disposition who have committed the offense of illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the Southern District of California employs a charge-bargain program.

The Government typically agrees to prosecute the defendant under Title 8, United States Code, Section 1325 (or some alternative charge, e.g., Title 18, United States Code, Sections 911, 1001, or 1546) and not seek an indictment under Title 8, United States Code, Section 1326. The District employs a "two-tier" charge-bargain for defendants with a +16 aggravated felony conviction under U.S.S.G. § 2L1.2. Assuming a total offense level of 21 (8 + 16 - 3), this system provides a 30-month offer for defendants in Criminal History Category (CHC) I, II, III and IV, and a 48-month offer for defendants in CHC V and VI. The 30-month sentence is based on guilty pleas to two counts of violating 8 Title 8, United States Code, Section 1325 (two felony counts to run consecutively--if they have a prior Section 1325 misdemeanor conviction--or one misdemeanor count and one felony count with the felony count to run consecutively to the misdemeanor count). The 48-month sentence is based on guilty pleas to two or three counts of violating Title 8, United States Code, Section 1325 (two felony counts to run consecutively--if they have a prior Section 1325 misdemeanor conviction--or one misdemeanor count and two felony counts with the felony counts to run consecutively and the misdemeanor count to run concurrently).

Certain defendants whose prior record yields a Sentencing Guidelines range of less than 30 months are permitted to plead to Title 18, United States Code, Sections 911, 1001, or 1546 if they agree to the fast-track requirements. In addition, "coyote' or "recidivist" deported aliens. who have no prior criminal history but who have extensive immigration contacts, are prosecuted under Title 8, United States Code, Section 1326 with a zero to 6 month Sentencing Guidelines range and a joint recommendation for a 60-day sentence. The defendant must be able to make a factual basis for the guilty pleas to violating Title 8, United States Code, Section 1325.

DISTRICT OF IDAHO

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the District of Idaho employs a departure-based program.

Where a defendant has a Criminal History Category of not greater than IV or has three or fewer deportations, the Government agrees to recommend a two-level downward departure from the Sentencing Guidelines range that the district court finds to be applicable pursuant to U.S.S.G. § 5K3.1.

DISTRICT OF NEBRASKA

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the District of Nebraska employs a departure-based program.

The defendant enters a plea of guilty to one count of Title 8, United States Code. Section 1326. The Government agrees to recommend a two-level downward departure from the Sentencing Guidelines range that the court finds to be applicable pursuant to U.S.S.G. § 5K3.1.

DISTRICT OF NEW MEXICO

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the District of New Mexico employs a departure-based program.

If the defendant has a prior felony conviction that is: (1) a drug trafficking offense for which the sentence imposed exceeded 13 months; (2) a firearms offense; (3) a human trafficking offense; or (4) an alien smuggling offense committed for profit, the Government extends a fast-track plea that is a Fed. R. Crim. P. 11 (c)(1)(C) offer to a total offense level of 19. Which represents a two-level downward departure from an adjusted offense level of 21. If the illegal alien defendant has a felony narcotics conviction, but was sentenced to less than 13 months, the Government extends a fast-track plea offer that is a Rule 11 (c)(1)(C) offer to a total offense level of 15, which represents a two-level departure from an adjusted offense level of 17. For all other aggravated felonies, as defined by Tide 8, United States Code, Section 1101(a)(43), the fast-track plea offer is a Rule 11 (c)(1)(C) offer to an offense level of 12, which represents a one-level downward departure from an adjusted offense level of 13. All other non-aggravated felonies are offered a fast-track plea offer to a Rule 11 (c)(1)(C) offense level of 9, which represents a one-level downward departure from an adjusted offense level of 10. The ultimate sentencing range is determined by reference to the defendant's actual Criminal History Category as determined by the district court after the preparation of a Presentence Report.

DISTRICT OF NORTH DAKOTA

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the District of North Dakota employs a departure-based program.

The defendant enters a plea of guilty to one count of Title 8, United States Code. Section 1326. The Government agrees to recommend an additional four-level reduction in the total offense level pursuant to U.S.S.G. § 5K3.1, regardless of the extent of any enhancement, but with no further recommendation as to a sentence within the applicable Sentencing Guidelines range.

DISTRICT OF OREGON

For defendants eligible for fast-track disposition who have committed the offense of illegal entry after deportation in violation of Title 8, United States Code, Section 1326. The District of Oregon employs a charge-bargain program.

Illegal reentry sentencing is governed by U.S.S.G. § 2L1.2. This section sets a base offense

level of 8, with specific offense characteristic enhancements determined by the defendant's criminal history: (A) 16 levels if the defendant has a prior conviction for a serious drug offense or a crime of violence; (B) 12 levels for less serious drug crimes; and (C) 8 levels for all other aggravated felonies. Defendants are required to plead guilty to either one or two counts of illegal entry without inspection, in violation of Title 8, United States Code, Section 1325. The first conviction of that charge carries a maximum penalty of six months' imprisonment, and the second carries a maximum term of 24 months. Defendants who would be subject to category "A" enhancements are required to agree to a 30 month sentence, the statutory maximum for two Section 1325 counts run consecutively. Defendants in the "B" category also plead guilty to two counts, but their sentences are to rtm concurrently, resulting in a 24 month sentence. Finally, the least serious offenders, those in the "C" category, are permitted to plead guilty to a single Section 1325 charge, and receive a six-month sentence. Defendants must be able to make a factual basis for their guilty pleas to violating Title 8, United States Code, Section 1325.

SOUTHERN DISTRICT OF TEXAS

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the Southern District of Texas employs a departure-based program.

The defendant enters a plea of guilty to violating Title 8, United States Code. Section 1326. The Government recommends a two-level reduction in offense level pursuant to § 5K3.1 for an early plea and a two-level reduction in total offense level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a).

WESTERN DISTRICT OF TEXAS

For defendants eligible for fast-track disposition and charged with illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the Pecos, Del Rio, and El Paso Divisions of the Western District of Texas employ a departure-based program.

The fast-track adjustments do not apply in the San Antonio, Austin, Waco and Midland Divisions. The defendant enters a plea of guilty to violating Title 8, United States Code. Section 1326. The Government agrees to recommend a one-level reduction in offense level pursuant to § 5K3.1 for an early plea and a two-level reduction in total offense level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a).

WESTERN DISTRICT OF WASHINGTON

For defendants eligible for fast-track disposition who have committed the offense of illegal entry after deportation in violation of Title 8, United States Code, Section 1326 and who have a Criminal History Category (CHC) of II through V, the Western District of Washington employs a charge-bargain program.

Instead of being prosecuted for a violation of Title 8, United States Code, Section 1326. the defendant is offered a plea to two counts of violating Title 8, United States Code. Section 1325(a)(2) (eluding examination at entry). If the 16-level enhancement under U.S.S.G. § 2L1.2(b) (1)(A) is applicable, the defendant will plead to a two-count Section 1325(a)(2) Information and will stipulate to a sentence (consecutive) of 30 months. If the 16-level is not applicable, the defendant will plead to a two-count Section 1325(a)(2) Information with a sentence (concurrent) of 24 months.

If the defendant qualifies for fast-track disposition, but has a Criminal History Category of VI, the Western District of Washington employs a departure-based program. The Government will recommend a two-level reduction--if the total offense level is based on U.S.S.G. § 2L1.2 (b)(1)(A)--and a sentence at the low end of the applicable Sentencing Guidelines range. The defendant must be able to make a factual basis for his/her guilty pleas to violating Title 8, United States Code, Section 1325.

Source: Legal > Secondary Legal > Law Reviews & Journals > Individual Law Reviews & Journals > D - F > **Federal Sentencing Reporter**
Terms: **fast track dispositions district-by-district** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, November 18, 2009 - 1:41 PM EST

Exhibit 2: Memorandum Reporting Revisions to the Illegal Reentry Fast-Track Program in the Central District of California

21 Fed. Sent. R. 349

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TEXT:

Subj:

Revisions to Illegal Reentry Fast Track Program

Date:

March 20, 2006

To

From:

Hon. Alicemarie H. Stotler
Chief Judge, United States District Court
Central District California

George Cardona
Chief Assistant United States Attorney

Hon. Ralph Zarefsky
Chief Magistrate Judge, United States District Court
Central District California

cc: Sherri R. Carter, District Court Executive
Dean Gits, Acting Public Defender
Debra Yang, United States Attorney

I write to confirm that, for a variety of reasons, this office has revised its fast-track program

for defendants chargeable with violations of 8 U.S.C. § 1326 (previously deported aliens found to be illegally present in the United States).

As you know, pursuant to our prior fast-track program, defendants were divided into three tiers based on their histories of criminal convictions and deportations:

(1) certain defendants (non-fast-track defendants) were simply indicted on a felony charge under 8 U.S.C. § 1326;

(2) certain other defendants (fast-track defendants) were offered the opportunity to plead to an information charging two counts of violating 8 U.S.C. § 1325 (illegal reentry), in most instances one count a misdemeanor carrying a maximum of 6 months and the second count a felony carrying a maximum of 24 months, with an agreed-upon sentence of 30 months, the statutory maximum; and,

(3) certain other defendants (super fast-track defendants) were offered the opportunity to plead to an information charging a single misdemeanor violation of 8 U.S.C. § 1325, with an agreed-upon sentence of 6 months, the statutory maximum.

We have now modified our fast-track program to eliminate the general division of defendants into tiers. Pursuant to our current revised fast-track program, we will be offering to most defendants chargeable with violations of 8 U.S.C. § 1326 the opportunity to enter into a fast-track plea agreement under which: (a) defendant agrees to plead to a single felony § 1326 count: (b) we agree to a 3-level reduction for acceptance of responsibility and a 4-level departure under U.S.S.G. § 5K3.1 for speedy acceptance of our fast-track offer; (c) both parties agree that the plea agreement is binding, calling for a low end sentence at the stipulated offense level and the criminal history category to be determined by the court post-plea; (d) both parties agree not to make any departure or Booker variance arguments, even as to criminal history category; (e) both parties agree to a waiver of presentence investigation and preparation of a PSR as to everything other than criminal history; and (f) both parties waive appeal as to everything other than the court's post-plea determination of criminal history category.

As this suggests, the revised fast-track program does away with super fast track pleas to misdemeanors. It also requires that cases be set for sentencing after entry of the guilty plea to enable the preparation of a criminal history PSR. Under our prior fast-track program, a number of judges were already ordering such reports prepared. In addition, we have discussed the preparation of such reports with the probation office, which has advised that it believes these reports can be prepared in 7 weeks. In addition to the criminal history PSR prepared by the probation office, we anticipate that in connection with sentencing we will continue to file a "Status Report" to provide the court with additional information needed to sentence in accordance with the plea agreement. Finally, we will continue to file with each fast-track information the "blue sheet" notice that advises the clerk's office that the case is a fast-track case.

You may already have seen some cases resolved under the new fast-track program as we have begun to put it into effect. The new program is now fully in effect, and you should now see the majority of § 1326 cases being handled under this new program. As with our old fast-track program, I anticipate that there may need to be adjustments in both the program and in procedures relating to the program as we move forward and see how it works. I am available to answer questions about the program and to address any suggestions or concerns you may have with regard to how it will work.

Sentencing Reporter
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