

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

UNITED STATES OF AMERICA

v.

CASE NO. XXXXXX

RAFAEL GONZALEZ

Defendant.

_____ /

DEFENDANT’S SENTENCING MEMORANDUM

Defendant, Rafael Gonzalez, has lived some 16 years of his 35 years in the United States. For more than a decade, he has worked regularly. One particular prior conviction, an October 1992 sale of a small quantity of crack cocaine, has dramatically increased his score under the advisory Sentencing Guidelines. In the more than 14 years that have passed since the offense, Mr. Gonzalez has significantly changed his life for the better, overcoming his addiction to drugs and abandoning what was a self-destructive life-style. Given the circumstances, the impact of that one offense overstates the seriousness of his offense. Furthermore, given the lower sentences imposed for immigration offenses in “fast-track” districts, a sentence within the advisory Guidelines range would result in an unwarranted disparity between Mr. Gonzalez and similarly situated defendants. Even without consideration of the disparity that arises because of the lesser sentences awarded in fast-track districts, a sentence significantly less than the 70-97 months suggested by the advisory Sentencing Guidelines would be “sufficient, but not greater than necessary,” to comply with the goals of sentencing set forth in 18 U.S.C. § 3553(a)(2). 18 U.S.C. § 3553(a).

Mr. Gonzalez came to the United States when he was twenty years old. His father had been murdered some 15 years earlier in a car-jacking incident that had occurred in Mexico. (PSR § 52). For some 6 years before he came to the United States, he had been living on his own with friends or relatives. His mother had been in the United States since the mid-1980's and was working for the meat packing industry in Omaha, Nebraska. His two brothers, Jorge and Manuel, had already come to the United States and were living in the Los Angeles area. When Mr. Gonzalez joined his brothers, he spoke little English and depended upon his brothers. They, unfortunately, were involved with a gang, the "18th Street Gang," and involved, as well, with illegal drugs. It wasn't long before Mr. Gonzalez became involved with heroin and cocaine, which led to his addiction to both drugs. In 1991, the one brother, Jorge, left and moved to Nebraska. That same year, his other brother, Manuel, was killed in gang-related violence. Between 1990 and 1992, Mr. Vega's conduct resulted in many arrests and a number of convictions.

In October of 1992, Mr. Gonzalez committed the offense that has had such a significant impact on his Guidelines scoring, selling an undercover officer a small quantity of crack cocaine. (PSR ¶29). As related by the Presentence Report, the Court sentenced Mr. Vega to a period of time in jail, followed by 3 years of probation. Released from custody, though, Mr. Vega continued to use cocaine and heroin and violated his probation, resulting in a sentence in August of 1994 of three years of imprisonment. *Id.*

While serving his prison sentence, Mr. Vega took English language courses, and between those courses and what he had learned before going to prison, emerged a more proficient English speaker. He left prison, too, intent on changing his ways. The prison sentence coupled with the death

of his brother led him to resolve himself to end his drug use and to become a more responsible person.

His record since his release from prison shows he has met with some success. While far short of what it should be, Mr. Vega's legal problems over the last eleven-and-a-half years have been limited to misdemeanor offenses: a domestic battery and obstructing charge in 2001; some driving offenses, which include, at least one DUI; and the state offense that led to the charges before this court, possession of false identification documents and a possession of marijuana charge.

18 U.S.C. 3553(a)

The mandate of 18 U.S.C. § 3553(a) is, of course, for the court to “impose a sentence sufficient, but not greater than necessary, to comply” with the purposes of sentencing set forth in paragraph 2 of that same statute. In United States v. Hunt, 459 F.3d 1180, 1182 (11th Cir. 2006), the court summarized the factors that a sentencing court must consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established [. . .by the Sentencing Commission];
- (5) any pertinent [Sentencing Commission] policy statement . . .;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

In Mr. Gonzalez's case, it is the "circumstances of the offense" that justifies a sentence less than that suggested by the advisory Sentencing Guidelines. A lesser sentence, too, is justified to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Role of the Advisory Sentencing Guidelines

As recognized in Hunt, there has been a continuing debate among the courts as to how much weight should be given to one of the listed factors, the Sentencing Guidelines. 459 F.3d at 1183-1184. The decision in Hunt, however, has resolved the debate for the Eleventh Circuit. In the decision, the court rejected "any across-the-board prescription regarding the appropriate deference to give the guidelines." 459 F.3d at 1184. Rather, a "district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." 459 F.3d at 1185. Thus, as recognized by Judge Tjoflat in United States v. Glover, 431 F.3d 744, 752-753 (11th Cir. 2005), in some cases the Guidelines may have little persuasive force in light of some of the other § 3553(a) factors:

Although "judges must still consider the sentencing range contained in the Guidelines, . . . that range is now nothing more than a suggestion that may or may not be persuasive . . . when weighed against the numerous other considerations listed in [§ 3553(a)]." *Id.* at 787 (Stevens, J., dissenting). Indeed, as one district judge has already observed,

the remedial majority in Booker [] direct[s] courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore. For example, under § 3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, his education and vocational skills, his mental and emotional condition, his physical condition including drug or alcohol dependence, his employment record, his family ties and

responsibilities, his socio-economic status, his civic and military contributions, and his lack of guidance as a youth. The guidelines' prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant.

United States v. Ranum, 353 F. Supp.2d 984, 986 (E.D.Wis.2005) (citations omitted). Thus, mitigating circumstances and substantive policy arguments that were formerly irrelevant in all but the most unusual cases are now potentially relevant in every case.

Then, too, a sentence imposed outside of the Guidelines' scheme does not require extraordinary circumstances:

Before Booker, we recognized that district courts were required to sentence within the guideline range except in unusual cases, United States v. Johnson, 347 F.3d 635, 640 (7th Cir. 2003), and anything but a loose comparison to pre-Booker departure cases would vitiate the post-Booker discretion that sentencing courts enjoy. All that is necessary now to sustain a sentence above the guideline range is "an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant." Dean, 414 F.3d at 729.

United States v. Castro-Juarez, 425 F.3d 430, 436 (7th Cir. 2005).¹

¹*See also*: United States v. Cull, 446 F.Supp.2d 961, 966 (D. Wis. 2006):

There have been suggestions in some recent appellate decisions that a district court may not vary from the guidelines unless it finds some factor unusual or unique to the defendant warranting the variance. It is difficult to see the basis for such a rule -- which sounds very much like the old departure standard -- in Booker or § 3553(a). Moreover, such a rule improperly elevates the guidelines above the other factors set forth in § 3553(a). In essence, it makes the guidelines the objective measure of the sentence, and disallows any other sentence unless the court is able to explain why the guideline sentence is wrong. The district courts' limited departure authority did not save the guidelines in Booker, see 543 U.S. at 234-35, and if appellate restriction of sentencing discretion continues such that the new system begins to resemble the old, another disruption may be in the offing.

(internal citations omitted).

USSG § 2L1.2 and the Circumstances of the Offense

The Guideline applicable to Mr. Gonzalez's case, USSG § 2L1.2, is unique in that, in cases such as Mr. Gonzalez's, the offense level can be significantly affected by the individual's criminal history:

Although § 1326 offenses must be taken seriously, the guidelines establish the offense level for such crimes in an unusual way. The guidelines in chapter two typically establish offense levels based on a defendant's relevant conduct, not on his prior record. This makes sense because the criminal history chapter of the guidelines separately scores a defendant's prior record. However, § 2L1.2, which governs § 1326 cases, gives heavy weight to a defendant's prior convictions in establishing his offense level.

United States v. Galvez-Barrios, 355 F.Supp. 2d 958, 961 (D. Wis. 2005).

Clearly, the theory is that the seriousness of the reentry offense is due, to a great extent, upon the nature of the offense that preceded the initial deportation. Section 2L1.2 provides for an increasing offense level based upon the purported seriousness of that preceding offense. Sixteen offense levels are added to the Base Offense Level of 8, if, as in Mr. Vega's case, the conviction is for "a drug trafficking offense for which the sentence imposed exceeded 13 months." § L1.2(b)(1)(A). That subsection includes a number of other categories of offenses: "(ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense." As the purported seriousness declines, the adjustment falls to 12, then 8, and, then, finally 4 for "any other felony" or "three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses." § L1.2(b)(1)(D) and (E).

The seriousness of Mr. Vega's offense that took place more than 14 years ago has been diminished by, if nothing else, the passage of time and his abandonment of his destructive life-style. Significantly, too, though, the sale of a small quantity of drugs to an undercover police officer by

an addict trying to support his habit is, by most any standard, something less than a major offense. Even when the Sentencing Guidelines were mandatory, there was little logic in imposing essentially the same sentence upon those like Mr. Vega as upon those who had previously been convicted of trafficking in thousands of dollars worth of controlled substances, serious firearm offenses, large-scale child pornography cases; national security or terrorism offenses; or prior significant immigration offenses - human trafficking or alien smuggling. Nonetheless, a sort of false equality imposed in the name of uniformity was the end result in cases such as Mr. Vega's. In a different context, that of career offenders, one district judge recognized that such a false equality runs afoul of the goals of sentencing:

Treating offenders who are not equally culpable the same is a false equality, not at all consistent with the admonition "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).

United States v. Ennis, 468 F.Supp.2d 228, 235 (D. Mass. 2006).

Since, the decision in United States v. Booker, 543 U.S. 220 (2005), though, "District Courts cannot just add up figures and pick a number within a narrow range," United States v. Ranum, 353 F.Supp.2d 984, 987 (E.D. Wisc. 2005). Indeed, judges cannot assume that a given provision of the Guidelines "advances the purposes of sentencing spelled out in 18 U.S.C. § 3553(a)" United States v. Ennis, 468 F. Supp. 2d at 230. The failure to consider the applicable circumstances of 18 U.S.C. § 3553(a) is "not simply unfair; it may well be unconstitutional." *Id.*

Mr. Vega recognizes that he will be deported once he completes his sentence, and he is resigned to living outside the United States. He concedes, too, that a sentence of a number of years

in prison is justified by the circumstances of his case. A sentence, however, of less than 70 to 87 months will reflect the goals of sentencing set forth in § 3553(a)(2).²

Thus, the advisory Guidelines range overstates the gravity of Mr. Gonzalez's offense. It does so because the factor that largely determines the gravity of the offense, the nature of the offense that preceded the deportation, amounted to the sale of a small quantity of cocaine to an undercover officer over 14 years ago by an addict trying to support his habit. In that the same advisory range applies when the preceding offense involved, for example, recent large scale drug trafficking, consideration of "the circumstances of the offense" justifies a sentence significantly less than the nearly 6 to more than 7 years called for by the advisory Guidelines range.

Early Disposition Programs

Section 5K3.1 of the Guidelines provides:

Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

These "fast-track" programs take a variety of forms. In an article published last summer, the Federal Public Defender for Arizona and one of the assistants published an overview of the programs:

Based on data available at this time, the following districts have fast-track or early disposition programs available for illegal reentry after deportation cases: District of Arizona; all districts of California; District of Idaho; District of Nebraska; District of New Mexico; District of North Dakota; District of

²If Mr. Vega's 1992 drug offense was scored as a "felony drug trafficking offense for which the sentence imposed was 13 months or less" USSG § 2L1.2(b)(1)(B), there would have been a 12 level increase rather than the 16, which, with a Criminal History Category of V, would have produced a range of 46-57 months. If the 1992 drug offense were scored as simply "an aggravated felony," the 8 level increase in the offense level would have produced a range of 30-37 months. Scored as "any other felony," his 1992 drug offense would have resulted in a 4 level increase with the resulting range of 21-27 months.

Oregon; some divisions in the Southern District of Texas; some divisions in the Western District of Texas; and the Western District of Washington.

One type of fast-track program is the charge bargain. For example, in the Southern District of California, defendants charged with illegal reentry after deportation who have a prior aggravated felony conviction but less serious criminal histories, are offered a thirty-month deal where they plead guilty to two counts of illegal entry, in violation of 8 U.S.C. 1325. For the first count, they receive a sentence of six months, and on the second count, they receive a sentence of twenty-four months, with the sentences ordered to run consecutively for a total of thirty months of imprisonment. For defendants with more serious criminal histories, which are generally level twenty-four offenders, a forty-eight month deal is offered where the defendant pleads to three counts of 1325, and the stipulation is that defendant will be sentenced to six months on the first count of 1325, and the maximum of twenty-four months on the second and third counts to run consecutively, with the six-month sentence to run concurrently. In this district, like many others, defendants with particularly serious prior violent convictions may not be offered any fast-track plea at all, although the vast majority are fast-track eligible.

The Central District of California also employs the charge-bargaining system, with the same thirty-month deal as described for the Southern District of California. Some defendants with minimal criminal histories are offered a "super fast-track" deal where they plead to only one count of 1325 and receive a sentence of six months. The Central District, unlike the Southern District, does not appear to have the "forty-eight-month" deal for illegal reentries with serious criminal histories. It appears that the Central District of California simply declines to offer any fast-track for certain defendants. The Northern District of California and the Western District of Washington also have the charge-bargaining system and the thirty-month deal.

One notable fact about these charge-bargains is that they do not show up, for statistical purposes, as downward departures or even as early disposition programs, because rather than receiving a reduction from the guideline system, the defendant is pleading to a lesser charge and receiving the maximum sentence for that lesser charge.

The other districts who have fast-track in illegal reentry cases employ departures pursuant to U.S.S.G. 5K3.1. In the Phoenix and Yuma divisions of the District of Arizona, the level twenty-four offenders receive a four-level reduction for fast-track; level twenty offenders receive a three-level reduction; and level sixteen offenders receive a one-level reduction. These reductions are in addition to the standard adjustment for acceptance of responsibility. In the

Tucson Division of the District of Arizona, all defendants charged with illegal reentry who have an aggravated felony receive a three-level reduction for fast-track in addition to acceptance of responsibility. In the District of Nebraska and the District of New Mexico, illegal reentry defendants receive only a two-level reduction pursuant to U.S.S.G. 5K3.1 for fast-track. Only the Brownsville and McAllen Divisions of the Southern District of Texas have fast-track for illegal reentry, and in those divisions the defendants receive a two-level reduction pursuant to U.S.S.G. 5K3.1. In the Western District of Texas, only the Del Rio Division has a fast-track for illegal reentry, and it is only a one-level reduction pursuant to U.S.S.G. 5K3.1. In the District of Idaho, a defendant charged with illegal reentry may receive a two-level reduction for fast-track pursuant to 5K3.1, provided certain other criteria are met regarding criminal history and number of prior deportations. Lastly, the District of North Dakota offers a fast-track plea providing a four-level reduction pursuant to 5K3.1.

In most of these districts, it is necessary for the defendant to waive indictment and plead to an information; to waive the preliminary hearing and detention hearing; to agree to not file any motions for additional downward departures; to waive the right to appeal; and to enter into the plea on an expedited basis to take advantage of the offer. Defendants who are on supervised release at the time they reenter the United States are generally offered less favorable deals.

Jane L. McClellan and Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 Ariz. St. L.J. 517, 528-531 (2006).

Of course, there is not a fast-track program, here, in the Northern District of Florida.³

³It isn't clear why some districts have a fast-track program and some do not:

It is difficult to understand why some districts have fast-track programs while others do not. The Southern and Western Districts of Texas, the District of Arizona, the Southern, Central and Eastern Districts of California, the District of New Mexico, the Southern District of Florida, the District of Nevada, and the District of Utah - in roughly that order - handle 75% of all immigration cases that result in convictions in the United States. 65 Not all of these districts have fast-track. Judge Cassell noted in Perez-Chavez that the U.S. Attorney for the District of Utah asked the Attorney General to allow a fast-track program for illegal reentry cases in Utah, but the request was denied. The reasons for the application and for the denial are not public record. Utah handles a significant number of immigration cases as does Nevada and certain districts in Florida

If there was one and it was administered as is done in the Phoenix and Yuma divisions of Arizona or as it is apparently administered in North Dakota, Mr. Gonzalez would be a candidate for a 4 level reduction, which would have the effect of reducing his Guidelines range from the calculated 70 to 87 months to a range of 46 to 57 months.⁴ Had he been found in the Southern District of California and been the beneficiary of the charge bargaining that takes place there, he would in all likelihood receive a sentence of 48 months.⁵

The net effect of the fast-track program is that the length of the sentence is often dependent upon where the individual is arrested, a factor obviously missing from the relevant factors set forth in 18 U.S.C. § 3553(a). As one judge explained it, “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.” 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). Pursuant to their duty to avoid unwarranted sentencing disparities under 18 U.S.C. § 3553(a)(6), a number of district courts have reduced sentences in immigration cases. *See, e.g., United States v. Santos*, 406 F.Supp.2d 320 (S.D.N.Y.

and New York, but none of those districts have fast-track. The Districts of North Dakota and Nebraska, on the other hand, handle a very small number of immigration cases and have fast-track.

McClellan and Sands, at 531.

⁴Offense level 17 with a Criminal History Category V.

⁵The most recent statistics from the Sentencing Commission show that nationwide there were fast track departures in 23.3% of the cases in fiscal year 2006. Assuming the sort of charge bargaining described above the real departure rate would be higher. Nonetheless, adding in the other below-range sentences resulting from traditional departure analysis or based on Booker along with “other government sponsored departures,” results in below-range sentences in over a third of all immigration cases (35.5%). *U.S. Sentencing Commission Final Quarterly Data Report*, Table 3 (March 16, 2007), available at www.ussc.gov.

2005) (and citing unreported cases); United States v. Medrano-Duran, 386 F.Supp.2d 943, 946-948 (N.D. Ill. 2005); United States v. Ramirez-Ramirez, 365 F.Supp.2d 728, 731-732 (E.D. Va. 2005); United States v. Galvez-Barros, 355 F.Supp.2d at 963. For the same reason, Mr. Gonzalez contends a lesser sentence is warranted in his case.

He recognizes, however, that the Eleventh Circuit Court of Appeals has concluded that the disparity created by fast-track programs does not justify a sentence below that suggested by the advisory Guidelines.⁶ He recognizes, too, this Court's obligation to follow existing precedent. Nonetheless, he contends the Eleventh Circuit Court of Appeals had decided the issue erroneously and maintains that the failure to consider disparity that results from the chance of where the individual happens to be arrested is to ignore the requirement of §3553(a)(6).

Conclusion

Mr. Vega contends that the overstatement of the seriousness of his offense, by itself, justifies a lesser sentence in his case. *Additionally*, he contends that a lesser sentence is necessary to avoid the unwarranted disparity created by the fast-track program. He, therefore, requests this Court to

⁶*See* United States v. Castro, 455 F.3d 1249, 1252-1253 (11th Cir. 2006):

Any disparity created by section 5K3.1 does not fall within the scope of section 3553(a)(6). When Congress directed the Sentencing Commission to allow the departure for only participating districts, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 § 401(m)(2)(B), 117 Stat. 650, 675 (2003), Congress implicitly determined that the disparity was warranted. *See* United States v. Sebastian, 436 F.3d 913, 915-16 (8th Cir. 2006). Anaya-Castro's interpretation of section 3553(a)(6) conflicts with the decision of Congress to limit the availability of the departure to participating districts, *id.*, and erroneously elevates one factor above all others, *see* Morales-Chaires, 430 F.3d at 1131.

impose a sentence less than the 60 to 87 months described in paragraph 68 of the Presentence Report.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded by electronic delivery to the office of Assistant United States Attorney, Robert Davis, this 10th day of April, 2007.

Respectfully submitted,

s/Randolph P. Murrell

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Because of privacy considerations, the name of the defendant and his brothers are fictitious.