CHARGING, PLEA AND EARLY DISPOSITION POLICIES

TESTIMONY OF
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BEFORE THE UNITED STATES SENTENCING COMMISSION

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INTRODUCTION

Judge Murphy and Commissioners: I thank the United States Sentencing Commission for the opportunity to appear before you once again on behalf of the Department of Justice. My testimony will respond to your request for the Department's views on early disposition programs and their impact on federal sentencing policy and practice. It will also address more broadly the Department's view on charging policy, because we recognize, as you do, the impact such policy can have on federal sentencing.

Early disposition – or so-called "fast track" programs – developed in the mid-1990s in response to a dramatic increase in the number of immigration cases handled by federal prosecutors on the southwest border. The programs were designed to process these cases through the federal criminal justice system as quickly as possible – and thus enhance public safety and minimize the burden on the courts, prosecutors, defense counsel, the U.S. Marshals Service, and others – while at the same time insuring that defendants were given a fair opportunity to contest charges they believed unfounded.

It is undeniable that fast track programs have allowed the federal courts to handle significant increases in prosecutions of criminal aliens who have entered the United States illegally after deportation, as well as other types of high-volume cases. We believe these programs have had a major impact in the communities where they exist, reducing crime and increasing public safety, particularly along the southwest border. These programs have enjoyed strong support in law enforcement, the judiciary, and the public at large.

Nonetheless, we recognize that there is reason for some concern about these programs, both in terms of their expansion beyond immigration and the other types of cases that create an extraordinary burden on the southwest border, and also in relation to sentencing disparities that result from them. To address these concerns and in accordance with both the letter and the spirit of the PROTECT Act, the Attorney General has recently issued two new policies to all federal prosecutors on charging criminal offenses, disposition of charges, sentencing, and expedited disposition programs. We believe these policies will go a long way towards addressing the legitimate concerns surrounding fast track programs. I will discuss the policies in more detail below. First, though, I think it useful to lay out for the Commission the early disposition programs that we have in the District of Arizona, the reasons for their development, and what they have accomplished.

EARLY DISPOSITION PROGRAMS IN THE DISTRICT OF ARIZONA

Both the Tucson and Phoenix Divisions of my office currently have fast track programs to enable prosecution of cases that otherwise would be declined because of limited prosecutorial resources, both on the state and federal levels. Over the past decade, prosecutorial and judicial

resources have simply not kept pace with the increased federal law enforcement efforts along the border with Mexico.

1. Background and Reasons for the Development of Fast Track Programs

The border between Arizona and Mexico is, for the most part, sparsely populated desert terrain. In many areas, the border between the two countries consists of a two-strand barbed wire fence. To enhance security along the border, in the mid-1990s, the government began substantially increasing the number of Border Patrol agents in the area. For example, between 1995 and 2002, the number of agents in the Border Patrol's Tucson Sector alone increased **229%**, from 561 agents to 1,844 agents. This increase in agents, not surprisingly, led to a substantial increase in arrests. In fiscal year 2002 for example, Border Patrol agents in the Tucson area arrested **333,648** aliens illegally in the United States. As a result of improved computerized fingerprinting technology, the Border Patrol is now also able to determine, in a timely manner, the immigration and criminal records of many of the individuals apprehended.

Given that the entire federal system handles approximately sixty thousand guidelines cases per year, and our district approximately three thousand, we obviously cannot prosecute every individual arrested. As a result, under our current guidelines for prosecutions pursuant to 8 U.S.C. § 1326 (illegal re-entry subsequent to deportation), for example, a defendant generally must have a prior serious criminal conviction, or a significant history of immigration apprehensions and removals, before prosecution is authorized. [Of course, when I speak of our office's prosecution guidelines, these are not set in stone, and exceptions can be made. I do not mean to imply, much less advertise, that certain types of cases or circumstances will give a criminal a "free pass" in the State of Arizona. However,

given the volume of potential cases, and the need to give our line prosecutors and their supervisors some parameters in which to exercise their charging discretion on a daily basis, we must make some generalizations and draw some default lines.

Even applying these criteria, the Tucson Division of my office has seen a very large increase in both immigration and drug cases. (In addition to apprehending aliens illegally in the United States, Border Patrol agents also apprehend a significant number of drug smugglers.) Between 1997 and 2002, the number of felony cases prosecuted by the Tucson Division increased **118%**, from 1,080 cases to 2,356 cases. Last year alone – from 2001 to 2002 – the number of felony cases increased **21.9%**, from 1,932 to 2,356.

To deal with this increased caseload, the office explored several options. First, we attempted to get an increase in resources to handle the caseload in our normal course of business. Despite some success, the increase in resources did not nearly keep pace with the increase in cases. Second, the office explored local prosecution for some of the offenses, but we quickly determined that local prosecutors themselves lacked sufficient resources to take on additional drug cases generated by federal agents. Third, the office considered accepting fewer cases for prosecution. Naturally, setting stricter criteria for initiating prosecution results in a larger number of ostensibly viable cases being declined. We concluded, however, that it was not appropriate, or in the best interest of the communities we serve, to decline viable drug cases or immigration cases involving defendants with serious prior convictions or extensive histories of immigration violations. It would be irresponsible and a dereliction of our duty to decline large numbers of cases that are uniquely federal and often involve

persons who have repeatedly broken the law or otherwise are a demonstrated danger to the community.

We therefore tried to find ways to more efficiently prosecute the large number of cases we receive. Since 1997, we have used fast track programs of various types to address this problem. With these programs, our office is able prosecute more cases, and provide more protection to the community, than otherwise would be possible. Do these defendants receive more lenient treatment than they perhaps would in a non-border district for the same crimes? Yes. However, we believe that the extraordinary number of immigration and drug smuggling cases in our district, coupled with the duty faced by every prosecutor to concentrate limited resources on the most dangerous and recidivist criminals, create an exceptional circumstance that warrants a targeted, well-defined, and limited program.

2. Description of Some Of Our Current Fast Track Programs

Currently, we have fast track programs covering (1) illegal re-entry after deportation offenses (8 U.S.C. § 1326); (2) alien smuggling (8 U.S.C. § 1324); (3) offenses involving under 100 kilograms of marijuana (21 U.S.C. § 841); and (4) other drug cases (21 U.S.C. § 841). Although the details of each program vary, they are all designed to encourage a defendant to plead guilty before significant prosecutorial resources are expended on the case. (These programs have not been modified yet in response to the PROTECT Act and the new Attorney General policy.) For simplicity's sake, I will describe the programs that we have in place in our Tucson Division.

A. Illegal Re-entry Fast Track

This fast track program covers all prosecutions brought pursuant to 8 U.S.C. § 1326. The only exception is that the Assistant United States Attorney assigned to a case may elect not to make the fast track plea offer if the defendant's prior criminal history is too severe. (The standard fast track plea offer contains a clause allowing the government to withdraw from the plea if it turns out that the defendant has 18 or more criminal history points under the Sentencing Guidelines.)

To qualify for the fast track plea offer, the defendant must (1) agree to plead guilty within 15 days of arraignment and (2) agree to waive the right to appeal. In exchange, the government agrees to a reduction in the defendant's sentencing range. The amount of the reduction depends on the defendant's offense level, as set forth below:

Offense level under USSG §2L1.2	Fast Track Reduction
24	4 levels
20	2 levels
16	1 level
12	Offer a "sentencing cap" two months lower than the low end of applicable guideline range
8	Offer a "sentencing cap" at the mid-point of the applicable guideline range

A "sentencing cap" means that the court can impose any term of imprisonment up to the cap. For example, a sentencing cap of 12 months means a 0 to 12 month range. In fiscal year 2002, the Tucson

Division prosecuted about 1,150 cases through this program. Approximately 1,325 cases will be prosecuted through this program this fiscal year.

B. Alien Smuggling Fast Track

Alien smuggling cases are particularly time consuming for the Tucson Division. In these cases, at least two of the smuggled aliens are detained as material witnesses. Under local court rules and orders, videotaped depositions of these material witnesses, intended to preserve their testimony for trial, must be conducted within 20 business days of the defendant's arrest. After the depositions, the material witnesses are deported. Thus, the prosecutor, in essence, has to be prepared to conduct a significant portion of the defendant's trial within 20 business days of the defendant's arrest. To address this problem, the alien smuggling fast track program covers all alien smuggling charges except cases in which an alien being smuggled was physically injured or placed in extreme danger.

To qualify for the fast track plea offer, the defendant must (1) agree to plead guilty prior to the time set for the videotape depositions (currently 20 business days from the date of arrest) and (2) agree to waive the right to appeal. In exchange, the government agrees to a reduction in the defendant's sentencing range. If the defendant's crime is punishable pursuant to 8 U.S.C. § 1324(a)(1)(B)(I) or (ii) (transporting or harboring illegal aliens), the defendant is offered a "sentencing cap" at the low end of the applicable guideline range. If the defendant's crime is punishable pursuant to 8 U.S.C. § 1324(a)(2)(B)(ii) (bringing aliens into the country for financial gain), which carries a 3 year mandatory minimum sentence, the defendant is offered a plea to a charge that does not have a mandatory minimum

sentence. In such cases, there is an agreed upon sentencing range at offense level 14 of the sentencing guidelines.

In fiscal year 2002, the Tucson Division prosecuted about 250 cases through this program. Approximately 300 cases will be prosecuted through this program this fiscal year.

C. Marijuana Fast Track

This fast track program covers cases involving between 20 and 100 kilograms of marijuana in which the defendant does not have a prior drug conviction or possess a firearm. (Cases involving less than 20 kilograms of marijuana, and cases involving marijuana backpackers – individuals who hike across the border carrying bundles of marijuana – are generally treated as misdemeanors, absent some other aggravating circumstances. Again, these are guidelines, not hard and fast rules.)

To qualify for the fast track plea offer, the defendant must (1) agree to plead guilty before the government has to respond to any motions and (2) agree to waive the right to appeal. In exchange, the government agrees to a reduction in the defendant's sentencing range. The reduction depends on the weight of marijuana, as set forth below:

Weight of Marijuana	Fast Track Plea Offer
20 to 40 kilograms	12 month sentencing cap
40 to 60 kilograms	18 month sentencing cap
60 to 80 kilograms	24 month sentencing cap
80 to 100 kilograms	30 month sentencing cap

These sentencing caps are at the low end of the applicable guideline range, assuming the defendant qualifies for reductions for acceptance of responsibility (USSG §3E1.1) and "safety valve" (USSG §2D1.1(b)(6)).

In fiscal year 2002, the Tucson Division prosecuted about 360 cases through this program. Approximately 390 cases will be prosecuted through this program this fiscal year.

D. Drug Cases Fast Track

This fast track program covers drug cases other than the marijuana cases described above. Whether to offer this fast track is made on a case by case basis, considering the facts of the case and the current caseload of the Assistant United States Attorney assigned to the case. Currently, because of caseload problems, this fast track plea is offered in most cases in which the defendant does not have a prior conviction or a firearm.

To qualify for this fast track program, the defendant has to (1) agree to plead before the government has to respond to any motions, and (2) agree to waive the right to appeal. In exchange, the government agrees to an additional two level reduction in the defendant's sentencing range.

In fiscal year 2002, the Tucson Division prosecuted about 175 cases through this program. Approximately 200 cases will be prosecuted through this program this fiscal year.

3. Our Assessment Of The Programs

The past several U.S. Attorneys for the District of Arizona all came to the same conclusion regarding fast track programs: rather than decline viable cases involving defendants who commit serious

crimes, they would offer fast track pleas to allow the office to prosecute more cases than would otherwise be possible. We believe this decision, despite resulting in a higher non-substantial assistance downward departure rate under the sentencing guidelines, was the appropriate one to address the needs of the communities along the border. Without the fast track programs, the number of viable cases that would need to be declined would increase substantially. While such a result might improve the guideline departure statistics, it would produce a more lawless atmosphere along the border, as criminals realized that their chances of getting prosecuted are very small, even if caught.

RECENT POLICY CHANGES AT THE DEPARTMENT OF JUSTICE

As I stated earlier, despite what we believe to be the very positive results of many fast track programs, we recognize the legitimate concerns that have been raised about them. Given its unique role as the Executive Branch's prosecutorial authority, the Justice Department has a special responsibility to ensure that its policies and practices fully support the principles of the Sentencing Reform Act as well as the important reforms that are part of the PROTECT Act. We recognize that, just as is the case with federal judges, prosecutors' discretion must be exercised in a manner that does not undercut the consistency and equality in the enforcement of the law that must be maintained in a national system of justice. In other words, just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case. This Attorney General takes these principles very seriously, and he insists that the prosecutorial power entrusted to Department prosecutors must be exercised fairly, consistently, and in a manner that ensures accountability.

As you know, in order to carry out this responsibility most effectively, the Department over the past several months has been undertaking a comprehensive review and re-evaluation of its policies regarding federal charging and sentencing practices, particularly those which have an impact on non-substantial assistance downward departures. Indeed, many aspects of this project have been ongoing since last year, and long pre-date the passage of the PROTECT Act.

As a result of these efforts, and consistent with section 401(*l*) of the PROTECT Act, the Attorney General in July issued a new internal policy directive to all federal prosecutors concerning sentencing recommendations, litigation, and appeals. This week, the Attorney General announced new policies on the charging and disposing of offenses, including a specific new policy with regard to expedited disposition or "fast track" programs. I would like briefly to describe the new policies that the Department has adopted to address these continuing issues of consistency, disparity, transparency and fairness.

1. Sentencing Litigation and Reporting Policy

The Attorney General's July memorandum to all federal prosecutors prohibits prosecutors from engaging in any type of "fact bargaining"; agreements about the applicability of the sentencing guidelines must be fully consistent with the readily provable facts. The memorandum also establishes that prosecutors have an affirmative obligation to oppose any sentencing adjustments, including downward departures, that are not supported by the facts and the law. The policy also requires that, in specific circumstances, prosecutors promptly report adverse, appealable decisions to the Criminal Division's appellate section and that each of those cases be reviewed for appealability.

2. Charging and Disposition Policy

The Attorney General's memorandum on charging policy was released on September 22. In that document, the Attorney General stated in no uncertain terms that in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as expressly authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney in very limited circumstances. The most serious offense or offenses are those that generate the most substantial sentence under the sentencing guidelines. The principle behind this memorandum is simple and straightforward: once a case has been accepted for federal prosecution, the severity of the charges to be filed should depend on the strength of the evidence about what a defendant did, and the seriousness of what the defendant did. The appropriately severe sentences provided under federal law and the Sentencing Guidelines should be pursued where warranted by the evidence.

The memorandum applies the same principle to plea bargaining. Defendants must plead guilty to the count that results in the most substantial sentence, and the resulting sentencing process must be one of complete honesty to the court and among all parties regarding the facts relevant to that defendant's sentence. Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct. As was made clear in the July memorandum, the relevant facts about a defendant's criminal conduct are not subject to negotiation or bargaining.

A copy of the Attorney General's memorandum is attached and contains the details of the policy.

3. Expedited Disposition Programs

Under the Attorney General's new directive, early disposition or "fast track" programs will now be based on the premise that a defendant who promptly agrees to participate in such a program will save the government significant and scarce resources that can be used in prosecuting other defendants. However, the benefits of such programs will be available only to those defendants who demonstrate an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in USSG §3E1.1. As I have already discussed, the Department understands that in some respects, fast track programs introduce sentencing disparities.

Therefore, the new policy states that such programs are properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by a persistently large volume of a particular category of cases, or where state or local prosecution is unavailable or unlikely. The policy clarifies that fast track programs are not to be implemented simply to avoid the ordinary application of the guidelines to a particular class of cases. Also, fast track disposition will not be made available to defendants pleading to violent crimes. All fast track programs – including pre-existing ones, such as those in my own district – must be submitted by the United States Attorney to the Attorney General for express approval.

These criteria are intended to ensure that fast track programs are implemented only when warranted, and that an appropriate review and approval process will ensure accountability and continued Department oversight. A copy of the Attorney General's memorandum on fast track programs is attached.

CONCLUSION

While prosecutorial discretion is a longstanding and traditional element of our system of justice, there is a place for internal policies and procedures limiting that discretion. The policies promulgated by the Attorney General are intended to regulate prosecutorial discretion and to bring about appropriate consistency in charging, plea, and appeal practices. The potential for the inconsistent exercise of prosecutorial discretion to undermine the guidelines has been a longstanding concern of this Commission and other commentators. We think these new policies address these concerns and are important, practical steps that will have a real and positive impact on the federal criminal justice system and advance the longstanding principles of the Sentencing Reform Act.

I thank you again for the invitation to appear before you and for taking up these important issues of federal sentencing policy. I would be happy to address any questions.