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I.

The Fast Track Program Currently In Place in the Southern District of California

The "Fast Track" program in the Southern District of California involves two types of cases: those involving previously deported aliens who attempt to reenter, reenter, or are "found in" the United States, in violation of 8 U.S.C. § 1326, and offenses involving the importation and possession with intent to distribute of controlled substances, in violation of 21 U.S.C. §§ 841, 952, and 960.

A. Cases Involving Attempted Reentry, Reentry and Being Found By Aliens Previously Deported or Removed from the United States.

The existing "Fast Track" Program for cases involving aliens previously deported or removed from the United States who are apprehended attempting to or having entered the United States has been discussed in some detail by the Honorable Marilyn L. Huff, Chief Judge of this district. *See Testimony of Chief Judge Marilyn L. Huff*, S.D. Cal. at p. 3.

This "Fast Track" Program does not implicate departures under the United States Sentencing Guidelines ("USSG"). Rather, it is a charge bargaining program under which individuals charged under 8 U.S.C. § 1326 are offered an opportunity to plead guilty to two counts of violating 8 U.S.C. § 1325[1] (one felony, one misdemeanor count). The defendant

[1] Section 1325 punishes unlawful entry by an alien without regard to any prior deportation.

receives the statutory maximum sentence of 30 months (24-months for the felony, 6-months for the misdemeanor). In exchange for this plea agreement, the defendant must: (1) plead guilty to an information and waive the right to an indictment; (2) agree to do so within the first two weeks after their arrest; (3) agree not to file any motions or otherwise contest any factual issues in the case; (4) agree to applicable Sentencing Guidelines in the case; (5) waive appeal and collateral attack; and (6) stipulate to removal from the United States. Defendants are prohibited from requesting any additional departures under these agreements.

It is also particularly noteworthy that the defendants who are offered this benefit do not have criminal records which include serious violent crimes, such as murder, rape, aggravated assault and battery, kidnaping, various sexual crimes involving children, drug trafficking offenses where the defendant plays a managerial role, or attempts to commit any of the above-enumerated offenses. Individuals with those types of prior offenses and the most serious criminal records, referred to as Asuper aggs,@ are not given any offer whatsoever as our Chief Judge correctly notes in her testimony.

Another category of individuals, those who fall within USSG ' 2L1.2(b)(1)(D) (imposing a 4-level enhancement for prior convictions for Aany other felony@) do not receive any type of AFast Track@ offer either.

Defendants who have prior convictions under 8 U.S.C. ' 1326 do not always receive AFast Track@ offers and they are never offered a lower sentence than they received in the first section 1326 case.

Many of the individuals who do receive these 30-month offers were deported after suffering felony convictions for offenses for which there is a colorable argument that, under the Supreme Court=s Acategorical approach,@ *see Taylor v. United States*, 495 U.S. 575 (1990), the

offenses merited the 8-level Aaggravated felony@ enhancement under USSG ' 2L1.2, rather than a 16-level enhancement.[2] Individuals who have either a low criminal history score or prior offenses clearly qualifying as only Aaggravated felonies@ warranting an 8-level upward adjustment are sometimes offered the opportunity to plead to lesser offenses, such as those contained in 18 U.S.C. ''' 911, 1001 or 1546, provided that a sufficient factual basis for such a plea can be shown.

As our Chief Judge also accurately notes, the judges of our district can always refuse to accept a plea agreement where the particular judge believes that the individual=s punishment should be greater than that called for in the plea agreement.

While Chief Judge Huff's testimony accurately depicts the current smooth running system, only five years ago section 1326 trials dramatically rose. In the wake of the Supreme Court=s decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the United States Attorney=s Office, for a short period of time, discontinued the AFast Track@ Program.[3] The resulting increase in trials substantially increased the workload throughout the Southern District. As a result, the current AFast Track@ Program was instituted, and it has continued to the present day.

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[2] This means that assuming the worst, that these individuals are in Criminal History Category VI, after the standard three-level reduction for acceptance of responsibility, bringing the adjusted offense level from 16 (base offense level 8 plus 8 for an Aaggravated felony@), they receive a sentence which is three months less than those individuals in other districts.

[3] The AFast Track@ Program at that time allowed for a 24- month offer by virtue of a plea of one felony count of 8 U.S.C. ' 1326(a), which was then understood to allow a maximum sentence of 24 months, an understanding that *Almendarez-Torres* rejected.

B. Cases Involving the Importation and Possession with Intent to Distribute of Controlled Substances.

The written testimony provided by Chief Judge Huff sets forth this program and we rely upon her submission. We would add, however, that while the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*, Pub.L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003) (A*The PROTECT Act*@) permits up to a four-level downward departure for AFast Track,@ under our district=s AFast Track@ program, the departure is more modest B each criminal defendant arrested with a controlled substance while attempting entry into the United States is offered only a recommendation of a two-level reduction in exchange for (1) pleading guilty to an information and waiving the right to an indictment; (2) agreeing to do so within the first two weeks after their arrest; (3) agreeing not to file any motions or otherwise contest any factual issues in the case; (4) agreeing to applicable Sentencing Guidelines in the case with the exception that such defendants are permitted to ask for additional downward departures which the government may oppose; and (5) waiving appeal and collateral attack.

It is Federal Defenders of San Diego=s experience, as a whole, that many of the defendants charged with the importation of controlled substances do not receive other downward departures aside from the two-level AFast Track@ departure. Additionally, the AFast Track@ departure is rarely given absent consent and agreement of the United States Attorney=s Office.

As an institutional matter, we believe that if the highly successful AFast Track@ program currently in place for these individuals was discontinued, the result would be a significant increase in trials, similar to that experienced in the section 1326 context in the wake of *Almendarez-Torres*.

C. Policy Benefits of the Fast Track Program.

The policy benefits to the entire Southern District of California are set forth in great detail by our Chief Judge Huff in her written testimony at p. 3 and we agree with her analysis.

Moreover, while both types of cases, the Aillegal reentries@ and the Aborder importations@, may appear simple in terms of the elements of each offense, both can be very time-consuming and resource-intensive when fully litigated. The Adeported alien@ cases often involve complicated issues of Immigration law, necessitate consultation with Immigration specialists, require production of entire Alien Files or AA-files@ from the former Immigration and Naturalization Services= archives, require production of deportation tapes, and an accurate accounting of whether or not the original deportation order was appealed to the Board of Immigration Appeals. The vast majority of these individuals are indigent and these actions, which are necessary if a defense must be undertaken, are undertaken at taxpayer expense. The difficult legal issues also consume a great deal of court time as well as the time of court-appointed and government attorneys. The population of individuals arrested for Adeported alien@ offenses is also a more difficult population to convince to enter a guilty plea absent some form of AFast Track@ disposition because they generally express the view that they have already been punished for their prior offenses with both a jail sentence and a deportation or removal from the United States.

Regarding the Aborder importation@ cases, these cases also involve legal issues arising under the Fourth, Fifth and Sixth Amendments requiring evidentiary hearings. These defendants are often individuals who may be lawful permanent residents or who otherwise have legal status in this country, a valuable benefit which they have an incentive to attempt to preserve via litigation, absent a countervailing benefit, such as a reduced jail sentence. The trials can also be

time-consuming because Aknowledge@ of the presence of the controlled substances is often difficult to demonstrate, many of these defendants lack any criminal history, and generally they are able to mount vigorous defenses, including calling a number of defense witnesses which lengthens the number of trial days.

There are the sentencing issues which arise when both of these types of cases are litigated, as well as appeals. The AFast Track@ program conserves resources on all of these fronts.

II.

THE SOUTHERN DISTRICT'S SECTION 1326 FAST TRACK OFFER DOES NOT CREATE UNWARRANTED SENTENCING DISPARITY

As a charge bargaining system, the approach to section 1326 cases adopted in the Southern District of California does not implicate Congress' directive that the Sentencing Commission Aensure that the incidence of downward departures [is] substantially reduced.@ *The PROTECT Act*, Pub.L. No. 108-21, 117 Stat. 650. Put simply, the charge bargaining system under which defendants charged with reentry offenses under section 1326 are permitted to plead guilty to two counts of unlawful entry under 8 U.S.C. ' 1325 does not require that any downward departure be granted. *See* USSG ' 5G1.1(a) (when statutory maximum sentence is less than the applicable guideline range, the statutory maximum sentence "shall be the guideline sentence"). In fact, such cases involve stipulated sentencing recommendations, thus precluding even requests for departures.

Nor do fast track sentences create "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. ' 3553(a)(6).[4]

[4] Section 3553 and the considerations it sets forth were left untouched by Congress in enacting the PROTECT Act. Section 3553(a) is in fact cited in other portions of the PROTECT

To the extent that defendants who tender guilty pleas pursuant to the fast track program receive lower sentences than other ostensibly similarly situated defendants, that disparity is more properly attributed to the over-breadth of the definitions employed in USSG ' 2L1.2, and the current method of calculation of criminal history points. To the extent that comparison of the sentences of fast track defendants and non-fast track defendants reflects disparity, that disparity is more often attributable to the tendency of the current system to provide similar sentences to defendants with *dis*similar records. In other words, it is the current system of calculation of guideline sentences, rather than fast track programs, which results in Aunwarranted@ similarity in the sentences received by defendants of significantly varying levels of culpability.

A. The Breadth of the Definitions of Qualifying Predicate Convictions Ensures that Defendants With Criminal Records of Substantially Varying Severity Will Be Treated Similarly.

With respect to defendants convicted of reentry offenses under 8 U.S.C. ' 1326, section 2L1.2 frequently requires the assessment of 12 and 16 level upward adjustments based upon prior convictions that are imposed based upon relatively minor offenses. While it is true that the Commission has addressed this issue, providing a more incremental approach, significant inequities persist. For example, all drug offenses for which the sentence is more than 13 months are assessed a 16 level enhancement. *See* USSG ' 2L1.2(b)(1)(A). This across the board approach requires district courts to treat a returning alien who was convicted as a low level

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Act dealing with appeals from sentences. Thus, the PROTECT Act must be read *in pari materia* with 18 U.S.C. ' 3553 which still definitively sets forth the mandatory considerations for the judiciary in sentencing. *See Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 262 (6th Cir.1984)("[W]e are mindful that where two or more statutes deal with the same subject, they are to be read in pari materia and harmonized, if possible.").

courier in a typical Southern District case the same as a kingpin: both will receive 16 level increases.

The crime of violence provisions also cause significant inequities. The Commission has adopted a broad definition of the term "crime of violence," which includes any offense that "has an element the use, attempted use, or threatened use of physical force against the person of another." USSG ' 2L1.2, comment. n.1(B)(ii)(I). Although the definition includes a second part that may have been intended to limit the definition's broad sweep, *see id.* at n.1(B)(ii)(II), the Ninth Circuit held that it was promulgated merely to ensure "that the enumerated crimes always be classified as 'crimes of violence.'" *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (citation, internal quotations omitted).[5] Thus, there are arguably no limitations on the application of the definition of "crime of violence." Because there are no limitations on the definition, offenses like simple assault or threatening communications can be treated in a manner similar to murder or rape.

Indeed, the over-breadth of the "crime of violence" definition is well illustrated by the Southern District's approach to serious violent felonies. Given the district's caseload, as illustrated by Chief Judge Huff's testimony, the United States Attorney's office in the Southern District has determined that the most serious section 1326 offenders -- especially those with serious crimes of violence or sexual offenses -- should not be offered the fast track disposition.[6] Thus, consistent with 18 U.S.C. ' 3553(a)(6), offenders with such records are treated similarly in both fast track and non-fast track jurisdictions. To the extent that disparity results, however, that

[5] Proposed amendments to this commentary do not undercut the analysis in *Bonilla-Montenegro*.

[6] As noted above, practitioners refer to such cases as "super-aggs".

disparity occurs in non-fast track jurisdictions where defendants with records far less serious than those of so-called "super aggs" receive the same 16 level enhancement as the most serious offenders. In other words, for those less serious offenders, the fast track sentence imposed in the Southern District treats "defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. ' 3553(a)(6), in a similar manner. Other jurisdictions, that sentence an alien returning after a simple assault in a manner similar to an alien returning after a rape, do not achieve this goal.

The Commission can reduce both the disparities between fast track and non-fast track jurisdictions and the number of downward departures based upon these inequities in non-fast track cases, and others, by further refining section 2L1.2. One suggestion could be that the Commission increase the sentence required before a drug offense results in a 16 level enhancement. A five year requirement could be imposed before the 16 level enhancement is assessed. Similarly, the current 13 month limit could be required for the 12 level enhancement. All other drug offenses could result in an 8 level enhancement.

Similarly, the Commission should impose limitations on the crime of violence prong. Truly violent crimes provoke lengthy sentences. By imposing a sentence requirement, again, perhaps five years, the Commission could separate serious violent prior convictions from those that qualify only through a formalistic analysis, as the United States Attorney's Office has done in the Southern District of California. Graduated enhancements could be provided for offenses with lower sentences.

Another possibility would be to refine the definition of Acrime of violence,@ adopting a model similar to that employed in the Southern District of California. Given that the fast track program concentrates judicial and prosecutorial resources on criminal defendants with especially

serious records, adopting a definition similar to that employed in making those charging decisions would ensure that the 16 level enhancement contained in section 2L1.2 would similarly be applied to defendants with especially serious records.

By the same token, if the guidelines continue to treat prior offenses similarly in cases where the prior offenses differ substantially in terms of culpability, the Commission should preserve the departure authority of district courts in order to address the disparities caused by imposing similar sentences on defendant with dissimilar records.[7]

B. The Current Method of Calculating Criminal History Results In Similar Treatment of Defendants With Dissimilar Records.

Several features of the current system of criminal history calculation create unwarranted disparity by according similar treatment to defendants with dissimilar criminal records. It is hard to imagine how a guideline system could adequately account for the enormous variation in charging and sentencing practices throughout the country. Because of this diversity, the Guidelines' calculation of criminal history points can and does create serious inequities that courts frequently attempt to redress through downward departures.

One significant source of inequity is the failure to distinguish between misdemeanors and felonies. As an example, a defendant who receives probation and sixty days in custody for driving on a suspended license could receive up to 5 criminal history points for that offense (if his release date is recent and he is still on probation). Yet a defendant who serves out a five year sentence for rape may be given only 3 points if he is no longer on supervision and his release was more than 2 years ago.

[7] The preservation of such authority is equally significant in the career offender context. *See* USSG '' 4B1.1, 4B1.2.

The Commission could limit the disproportionate effect of misdemeanor convictions by limiting the criminal history points that can be attributed to such convictions. One method for accomplishing this goal would be to limit the supervision/recent release enhancements to prior felony convictions. *See* USSG '' 4A1.1(d), (e). Of course, in cases where a district court feels that additional points are merited for misdemeanor convictions, an upward departure could be considered.

Similarly, the Commission could consider increasing the sentencing thresholds for the 1, 2, and 3 point convictions. *See* USSG '' 4A1.1(a)-(c). For instance, the 3 point level requires only 13 months. That low threshold essentially lumps together vast numbers of felony convictions, from less serious drug offenses up to murders and rapes. Indeed, the lowest state prison sentence typically imposed under California law is 16 months. Thus, essentially every defendant sentenced to state prison in California is assessed three criminal history points, no matter what the offense.

An increased threshold, such as 5 years, would not eliminate the problem. It would, however, address some of the more substantial inequities, prompt fewer departures, and result in less disparity between sentences imposed in fast track and non-fast track jurisdictions.

In short, the sentence reductions imposed pursuant to the fast track program in the Southern District of California have the effect of suppressing the disparity created by the current rules regarding calculation of criminal history. To the extent there is disparity between such sentences and longer sentences imposed in non-fast track jurisdictions, that disparity could be addressed by revising the rules applicable to the calculation of criminal history points.

III.

THE MODEST TWO LEVEL FAST TRACK DEPARTURES IMPOSED IN DRUG OFFENSES ACHIEVE THE POLICY GOALS SET FORTH IN CHIEF JUDGE HUFF'S TESTIMONY AND DO NOT THEMSELVES CREATE UNWARRANTED DISPARITY.

The fast track program in the Southern District provides for a jointly recommended two level downward departure. The current practice is effectively in compliance with Congress' direction that such departures be (1) based on a motion by the government, and (2) undertaken pursuant to an early disposition program authorized by the Attorney General. Moreover, the recommended departure does not exceed two levels. In the pre-PROTECT Act practice in the Southern District, departures without a government motion or in excess of two levels were quite rare.

Nor is the proposed system difficult to administer: Chief Judge Huff=s testimony illustrates the effectiveness of the program in the Southern District of California. The system provokes few disputes among the parties as to when such a departure is appropriate. Presumably, the same constitutional limitations and Abad faith@ contract principles which currently govern disputes regarding the government=s willingness to make a downward departure motion under USSG ' 5K1.1 based upon substantial assistance[8] would govern any dispute regarding the government=s willingness to make the motion when the Aearly disposition@ criteria (waiver of indictment, filing no motions, waiving appeal) are satisfied. The Guidelines should recognize this as a possibility and indicate that both the due process clause and contract

[8] *See Wade v. United States*, 504 U.S. 181, 185-86(1992)*; Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Sandoval*, 204 F.3d 283, 285-286 (1st Cir.2000).

principles may govern any disputes. Even so, experience teaches that such disputes arise only rarely and do not compromise the effectiveness of the fast track program.

RESPECTFULLY SUBMITTED,

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