

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
v.	)	<b>CRIMINAL NO. 04-____-A</b>
	)	
<b>CLIENT,</b>	)	
	)	
<b>Defendant.</b>	)	

**DEFENDANT’S POSITION WITH REGARD TO SENTENCING FACTORS**

Pursuant to Rule 32, *Federal Rules of Criminal Procedure*, Section 6A1.3 of the *United States Sentencing Guidelines*, and this Court’s Policy Regarding Procedures to Be Followed in Guideline Sentencings, the Defendant [CLIENT], by counsel, hereby states that he has received and reviewed the original and amended Presentence Reports (“PSR”) prepared in this case. He raises one objection to the guidelines calculations contained in the amended report, received by him on February 4, which changed his guideline range from 18-24 months to 57-71 months.<sup>1</sup> Specifically, he objects that his conviction for “indecentcy with a child” should not qualify as a “crime of violence” under U.S.S.G. § 2L1.2(b)(1)(A)(1).

Additionally, Mr. CLIENT urges this Court to find that a non-guideline sentence is appropriate in this case. This is so for at least three reasons. First, Mr. CLIENT’s underlying aggravated felony involved a consensual encounter between he and his teenaged girlfriend. Second, Mr. CLIENT was previously granted political asylum in this country based on the cruelties he endured in his home country of El Salvador and, as a result of this conviction, Mr. CLIENT has consented to return there. And finally, disparity in immigration sentencing exists in the Fourth Circuit, within which the average departure rate in immigration

---

<sup>1</sup> Pursuant to communications with the probation officer, counsel understands that the final guideline range will be 46-57 months, using a criminal history category of III.

cases for departures other than for substantial assistance was 3.9% in 2002, as compared to the national average of 31.1%, and the average sentence in 2001 was up to 16.8 months longer than in some “fast track” districts.

## **BACKGROUND**

Mr. CLIENT plead guilty to a one-count criminal information on November 24, 2004, to having illegally reentered the United States following a conviction for an aggravated felony, in violation of 8 U.S.C. § 1326. Sentencing was continued to February 18 to allow for the preparation of a PSR. An initial PSR calculated the guideline range at 18-24 months. The final report was prepared on February 14; that report re-calculated the guideline range at 46-57 months after adding an additional eight points, for a total of sixteen points, to Mr. CLIENT’s base offense level under U.S.S.G. § 2L1.2 for his conviction for “indecentcy with a child.”

## **ARGUMENT**

### **I. A Conviction for “Indecency With a Child” Is Not a “Crime of Violence”**

[argument omitted]

### **II. Imposing a Sentence That Is Sufficient But Not Greater Than Necessary**

On January 12, 2005, the Supreme Court ruled in *United States v. Booker*, that the mandatory nature of the United States Sentencing Guidelines – particularly 18 U.S.C. § 3553(b)(1), which purports to make the Guidelines mandatory upon federal courts – is unconstitutional. *United States v. Booker*, 125 S. Ct. 738, 543 U.S. \_\_\_, (Slip Op., Breyer, J, at 16), 2005 WL 50108, at \*24 (U.S. Jan. 12, 2005). The Court struck the mandatory language of the statute and held that, although a court should consult the guidelines in fashioning a sentence, the court is also permitted to “tailor the sentence in light of other

statutory concerns as well” with reference to the factors outlined in 3553(a). *Id.* at \*2. Those factors include (a) the nature and circumstances of the offense and the history and characteristics of the defendant, (b) the kinds of sentences available, (c) the guideline range, (d) the need to avoid unwarranted sentencing disparities, (e) the need for restitution, and (f) the need for the sentence to reflect the following: the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense, to afford adequate deterrence, to protect the public from future crimes and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. *See* 18 U.S.C. § 3553(a).

Courts that have imposed sentences on defendants after *Booker* have held that “[t]he directives of *Booker* and § 3553(a) make clear that courts may no longer uncritically apply the guidelines and, as one court suggested, only depart . . . in unusual cases for clearly identified and persuasive reasons.” *United States v. Ranum*, \_\_\_ F. Supp \_\_\_\_, 2005 WL 161223, at \*1 (E.D. Wis. Jan. 19, 2005) (*citing United States v. Wilson*, \_\_\_ F. Supp. \_\_\_\_, 2005 WL 78552, at \*1 (D. Utah Jan.13, 2005) (internal citations omitted)). The *Ranum* Court went on to hold that “[t]he guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the ‘heartland.’ Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the § 3553(a) factors.” *See id.* at \*2. Section 3553(a)’s primary directive is to “impose a sentence sufficient, but not greater than necessary to comply with the purposes” of sentencing. 18 U.S.C. §3553(a).

**A. The Nature and Circumstances of the Offense**

One of the factors the Court is directed to consider under section 3553(a) is the nature and circumstances of the offense. Here, the nature and circumstances of Mr. CLIENT's offense, illegal reentry, and the nature and circumstances of his prior felony, make a non-guideline sentence reasonable in this case. Mr. CLIENT pled guilty to reentering the United States after having been deported and having been convicted of a prior aggravated felony. Under the Guidelines, Mr. CLIENT is given a sixteen-point increase in his base offense level under section 2L1.2(b)(1)(A) and three criminal history points under section 4A1.1(a) for his 1995 "indecent with a child" conviction.

As discussed previously, the 1995 conviction involved Mr. CLIENT's girlfriend at the time, Brandy August. Mr. CLIENT and Ms. August, both in their teens, lived at the same homeless shelter in Galveston, Texas. Mr. CLIENT and Ms. August dated for approximately six months. Ms. August's mother notified the police when she discovered a consensual physical relationship between her daughter and Mr. CLIENT. The offense, as the PSR indicates, involved kissing and heavy petting. Ms. August was fifteen or sixteen years old at the time and Mr. CLIENT was nineteen. Given the nature of the offense, Mr. CLIENT's consensual relationship with the victim, and the age of the offense, a sixteen-level addition, which effectively triples Mr. CLIENT's offense level and leads to a guideline range of 46-57 months, is unwarranted. *See, e.g., United States v. Galvez-Barrios*, Case No. 04-CR-14, slip op. at 5-8 (E.D. Wis. Feb. 2, 2005) (citation omitted) (examining the history of the sixteen-point enhancement under section 2L1.2 and rejecting it as "out of proportion to any reasonable assessment of dangerousness" and questioning whether a sentence should be increased twice on the basis of a defendant's prior record). (*See Exhibit 1*).

## **B. The Circumstances and History of the Defendant**

Section 3553(a) also directs the Court to consider the circumstances and history of the defendant when determining what sentence is appropriate. Mr. CLIENT is a thirty-two year-old El Salvadorian man. Although he has an extensive criminal history, aside from the conviction explained above, that history largely consists of petty theft and glue huffing. Mr. CLIENT came to the United States alone at the age of fifteen old to escape the El Salvadorian military and the civil war that was raging there.

Mr. CLIENT was granted political asylum in the early 1990s.<sup>2</sup> Mr. CLIENT was drafted into the El Salvadorian army at age thirteen and served in this brutal regime for two years before he escaped to the United States.<sup>3</sup> He traveled to the United States alone when he was fifteen and was granted asylum. Mr. CLIENT's asylum status was later revoked and he has agreed to return to El Salvador as part of the plea in this case. However, the brutality and suffering he endured are part of his history and character that the Court should consider when sentencing him.

---

<sup>2</sup> Mr. CLIENT's Alien or "A" file with relevant immigration documents has been unavailable to counsel during the pendency of this action. The file was apparently sent from the Bureau of Customs and Immigration to the National Records Center in December or January and has not yet been located.

<sup>3</sup> Based on the lack of access to Mr. CLIENT's A File, please find attached the following articles, which outline the general nature of child recruitment into the El Salvadoran Army in the early 1990s:

- Exhibit 2A: Nicole Hertvik, El Salvador: Effecting Change from Within, United Nations Chronicle, Online Addition available at: [http://www.un.org/Pubs/chronicle/2002/issue3/0302p75\\_el\\_salvador.html](http://www.un.org/Pubs/chronicle/2002/issue3/0302p75_el_salvador.html);
- Exhibit 2B: Children, Use in Conflict in El Salvador, Central American Refugee Center, available at: <http://www.icomm.ca/carecen/page82.html>.

Forced recruitment was commonplace during the 1980-1992 civil war in El Salvador. It is estimated that 80 percent of the Salvadoran military, some 48,000 soldiers, were under 18 years of age. (*See* Exhibit 2A at pg. 4 sidebar.) The fighting between government forces and the revolutionary Farabundo Marti Front for National Liberation (FMLN) left 75,000 dead and over a million displaced. (*See id.* at pg. 1.) During the civil war, children were forcibly recruited into the armed forces during mass conscription drives, notably from poor suburbs and rural areas. They were used for armed military duty as well as messengers and informers. (*See* Exhibit 2B.) Secretary-General Javier Pérez de Cuéllar established the Truth Commission, which “received more than 22,000 complaints of extrajudicial executions, torture and forced disappearances that had occurred between January 1980 and July 1991.” (*See* Exhibit 2A at pg. 1-2.) “Ninety-five percent of the violent acts documented were found to have been committed by the military, government security forces and death squads. Intimidation, death threats, executions and disappearances were found to be common tools used against opposition voices, human rights activists and suspected rebels. In addition, the judicial system was found to be ‘incapable of fairly assessing and carrying out punishment.’” (*Id.*) This history should be considered when determining what sentence is reasonable under Section 3553(a).

### **C. The Need to Avoid Unwarranted Sentencing Disparities**

The need to avoid unwarranted sentencing disparities is another consideration under section 3553(a). Imposition of a sentence in the guideline range would in this instance increase sentence disparities among defendants with similar records found guilty of similar conduct, rather than avoid such disparity, as called for by 18 U.S.C. § 3553(a)(7). One of the express purposes of the adoption of the Sentencing Reform Act of 1984 was to promote uniformity in sentencing by narrowing the wide disparity in sentences

imposed by different federal courts for similar criminal conduct by similar offenders. United States Sentencing Guidelines § 1A1.1.3. While a laudable goal, in reality there is little uniformity in sentencing in the federal courts.

In 2002, the national rate for downward departures, outside of substantial assistance departures, for all offenses was 16.8%. However, the rate within the Fourth Circuit was a mere 4.2%.<sup>4</sup> This departure disparity is even more pronounced in immigration cases. The United States Sentencing Commission reports that in 2002 the rate for departures in immigration cases, excluding those made on the basis of substantial assistance, nationwide was 31.1%, while in the Fourth Circuit the rate was 3.9%.<sup>5</sup> The Sentencing Commission also reports that in 2002 the mean sentence in the Fourth Circuit for an immigration offense was 31 months while the median was 27 months.<sup>6</sup> By comparison, the national mean that year was 25.3 months and the national median was 24 months.

Sentencing disparity in immigration cases in “fast track” districts is also pronounced as reported by the Federal Justice Statistics Resource Center.<sup>7</sup> *See* Linda Drazga Maxfield and Keri Burchfield,

---

<sup>4</sup> *See* attached Exhibit 3, United States Sentencing Commission’s Federal Sentencing Statistics by State, District and Circuit. October 1, 2001 through September 30, 2002. Fourth Circuit, Table 8. Available at <http://www.ussc.gov/JUDPACK/2002/4c02.pdf>.

<sup>5</sup> *See* attached Exhibit 4, United States Sentencing Commission’s Federal Sentencing Statistics by State, District and Circuit. October 1, 2001 through September 30, 2002. Fourth Circuit, Table 9. Available at <http://www.ussc.gov/JUDPACK/2002/4c02.pdf>.

<sup>6</sup> *See* attached Exhibit 5, United States Sentencing Commission’s Federal Sentencing Statistics by State, District and Circuit. October 1, 2001 through September 30, 2002. Fourth Circuit, Table 7. Available at <http://www.ussc.gov/JUDPACK/2002/4c02.pdf>.

<sup>7</sup> The database is constructed from data files provided by the U.S. Marshals Service (USMS), the Drug Enforcement Agency (DEA), the Executive Office for U.S. Attorneys (EOUSA), the Administrative Office of the U.S. Courts (AOUSC), the U.S. Sentencing Commission (USSC), and the Federal Bureau of Prisons (BOP). The AOUSC provides criminal court data, as well as data collected by the Pretrial

*Immigration Offense Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 FED. SENT. REP. 260, 262-63 (Mar./Apr. 2002); Erin T. Middleton, *Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border Are Undermining the Sentencing Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827. “Fast track” programs were initially established in judicial districts along the southwest border to accommodate the large numbers of immigration cases in those areas. They have now been extended beyond the border states and, in some cases, beyond the immigration realm. Pursuant to the 2003 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (“PROTECT”) Act, the Sentencing Commission promulgated U.S.S.G. § 5K3.1, which states that upon the government’s motion, 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.” U.S.S.G. § 5K3.1.

In the District of Arizona, where “fast track” treatment is available for immigration cases, in 2001 the average incarceration sentence for immigration offenses<sup>8</sup> was 29.1 months.<sup>9</sup> Only 20.9% of immigration offenses in the District of Arizona were sentenced within the Guideline Range and 77.3% involved

---

Services Administration (PSA), the U.S. courts of appeals (APPEALS), and the Federal Probation Supervision Information System (FPSIS). The source agencies' administrative data files cover federal criminal case processing from the receipt of a criminal matter or arrest of suspect to release from prison into supervision. For more information about the Center and its database, see <http://fjsrc.urban.org/index.cfm>.

<sup>8</sup> Offenses involving illegal entrance into the U.S., illegally reentering after being deported, willfully failing to deport when so ordered, willfully remaining beyond days allowed on conditional permit, or falsely representing oneself to be a citizen.

<sup>9</sup> See attached Exhibit 6, Average incarceration sentence imposed for all offenses, by district, 2001. Available at [http://fjsrc.urban.org/noframe/dist/d2001/cat/s7\\_t1.pdf](http://fjsrc.urban.org/noframe/dist/d2001/cat/s7_t1.pdf).

downward departures not related to substantial assistance.<sup>10</sup> During the same time period in the Southern District of California, where “fast track” treatment is also available, the average sentence for an immigration offense was 17.4 months,<sup>11</sup> with a 27.5% downward departure rate for grounds other than substantial assistance.<sup>12</sup> In the Southern District of California defendants subject to twenty-year statutory maximums and guideline ranges of 70-87 months are permitted under the “fast track” program to plead guilty to offenses with a two-year statutory maximum. *See Galvez-Barrrios*, slip op. at 9 (*citing United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000)). In New Mexico, another “fast track” district, in 2001 the average sentence for an immigration offense was 22.3 months,<sup>13</sup> with a downward departure rate of 53%.<sup>14</sup> The average sentence for immigration offenses in the “fast track” Southern District of Texas was 28.2 months,<sup>15</sup> with a 32.5% non-substantial assistance downward departure rate.<sup>16</sup>

In contrast, in the Eastern District of Virginia, where no “fast track” program is available, the average sentence for an immigration offense in 2001 was 34.2 months,<sup>17</sup> with a departure rate of *zero*.<sup>18</sup>

---

<sup>10</sup> *See* attached Exhibit 7, Sentences within and departing from the U.S. Sentencing Guidelines for immigration offenses, by district, 2001. Available at [http://fjsrc.urban.org/noframe/dist/d2001/cat/s6\\_t7.pdf](http://fjsrc.urban.org/noframe/dist/d2001/cat/s6_t7.pdf)

<sup>11</sup> *See* attached Exhibit 6.

<sup>12</sup> *See* attached Exhibit 7.

<sup>13</sup> *See* attached Exhibit 6.

<sup>14</sup> *See* attached Exhibit 7.

<sup>15</sup> *See* attached Exhibit 6.

<sup>16</sup> *See* attached Exhibit 7.

<sup>17</sup> *See* attached Exhibit 6.

<sup>18</sup> *See* attached Exhibit 7.

In short, an average sentence in the Eastern District of Virginia was 5.1 months, 16.8, 11.9, and 6 months higher than those imposed for similar immigration offenses in Arizona, the Southern District of California, New Mexico and the Southern District of Texas, respectively. The overall rate for downward departures for immigration offenses, not related to substantial assistance in immigration cases was 38.1 %, versus the 0% rate here in 2001.<sup>19</sup>

Mr. CLIENT's guideline range as calculated by the PSR is 46-57 months. While no case-by-case study is possible considering the statistics available, it is clear that sentencing disparity is pronounced where cases within the Fourth Circuit are routinely not given departures while cases outside of the Fourth Circuit routinely are granted such departures. As other courts had held, "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) *see also Galvez-Barrios*, slip op. at 11 (citing disparity and an unreasonable sixteen-point enhancement in section 1326 case to sentence defendant to 24 months where guideline range was calculated at 41-51 months).

Additionally, such disparity would seem to violate the equal protection clause of the United States Constitution by creating two classes of similarly-situated defendants who are subject to gross disparities in sentencing depending upon whether or not they are convicted in districts where such programs have been adopted. This classification and the resulting disparities have no rational basis but, instead, actually confound the Sentencing Guidelines' primary purpose of fostering uniformity and fairness in sentencing. *See New Orleans v. Dukes*, 427 U.S. 297 (1976).

---

<sup>19</sup> See attached Exhibit 7.

**D. The Need for the Sentence to Reflect the Seriousness of the Offense, to Promote Respect for the Law and to Provide Just Punishment for the Offense, to Afford Adequate Deterrence, to Protect the Public from Future Crimes and to Provide the Defendant with Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment**

Some of the very statutory factors which are the ultimate guide to sentencing decisions post-*Booker* clearly argue in favor of less prison time, not more. With a defendant ultimately to be removed and sent out of the country, for example, there is facially less need for the sentence imposed to protect the public from further crimes of the defendant, or to provide the defendant with needed educational or vocational training. *See* 18 U.S.C. § 3553(a)(2)(C), (D). Nor can it promote respect for the law to give Mr. CLIENT a prison sentence that can quite credibly be viewed as greater than the sentence he likely would have received if apprehended in a border community that follows U.S.S.G. § 5K3.1 or some similar “fast track,” or U.S.S.G. § 5K2.0 basis for expediting immigration cases in return for lower sentences. *See* 18 U.S.C. § 3553(a)(2)(A). In light of the sentencing disparity outlined above, and the other factors outlined by section 3553(a), including the nature and circumstances of the offense and the character of Mr. CLIENT, his decision plead guilty quickly, his acceptance of responsibility, and his agreement to return to El Salvador, Mr. CLIENT requests that the Court sentence him to a term of imprisonment of twelve months and one day.

A sentence of twelve months and one day reflects the seriousness of Mr. CLIENT’s illegal reentry while at the same time accounting for the circumstances of his prior offense and his individual circumstances. Also, Mr. CLIENT spent twenty days (from October 14 through November 3, 2004) in immigration custody prior to being transferred to federal custody, and will not be given credit for this time served by the Bureau of Prisons. A year and a day sentence operates to promote respect for the law and to provide

just punishment for the offense. Deterrence is met, as Mr. CLIENT has never been incarcerated related to any immigration offense, has fully accepted responsibility, and understands that he cannot return to the United States. This sentence also protects the public from future crime as it deters Mr. CLIENT and he will be deported subsequent to his sentencing.

### CONCLUSION

For the foregoing reasons, and any others provided at the sentencing hearing, Mr. CLIENT requests that the Court sentence him to a non-guideline sentence of a year and a day.

Mr. CLIENT also requests that the Court recommend to the Bureau of Prisons that it incarcerate him at a facility in or near Virginia so that he may be close to his family.

Respectfully submitted,

CLIENT

---

Anne M. Chapman, Esq.  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
for the Eastern District of Virginia  
1650 King Street, Suite 500  
Alexandria, VA 22314  
(703) 600-0840  
(703) 600-0880 (facsimile)  
Attorney for Defendant