TO: Defenders and CJA Counsel
FR: Amy Baron-Evans, SRC
RE: The Truth About Fast Track
DA: 1/27/06

Attached are documents that may be useful to those seeking a non-guideline sentence based on disparity resulting from the Attorney General's approval of fast track programs in some districts but not others. The cover page is a chart I prepared based on information submitted to the courts in United States v. Medrano-Duran, 386 F. Supp.2d 943 (N.D. Ill. 2005) and United States v. Krukowski, 04 cr 1308 (S.D.N.Y. June 10, 2005), and information from the Sentencing Commission's website. The second document is an excerpt from the government's sentencing brief in Medrano-Duran which includes a chart of immigration cases per AUSA in five districts, and an Appendix describing the program in each of the thirteen approved districts.

To summarize, in five of the thirteen approved districts (Idaho, Nebraska, North Dakota, Oregon and W.D. Washington), each AUSA handles between .58 and 3.32 immigration cases per year. Five districts (C.D. California, N.D. California, S.D. California, Oregon and W.D. Washington), use a charge bargain method, which results in more of a reduction than the up to 4-level departure set forth in USSG 5K3.1. You can get the number of immigration cases per year in your district from the Commission's website, http://www.ussc.gov/JUDPACK/JP2003.htm. To get an accurate count of the AUSAs in your district, you may have to ask the court to order the government to produce that information. This data is for FY2003. The Commission does not yet have data for FY2004, but probably will soon.

The government's argument in these cases is that a non-Guideline sentence would be contrary to congressional will . The usefulness of this data is to show that, even if the government were correct that unwarranted disparity is measured by its claimed case managements needs (and it is not correct but the "congressional will" battle cry may strike fear into the judicial heart), (1) five districts have been appproved to use a charge bargain method, which is not the type of program or the type of disparity Congress approved or what the Commission promulgated, see PROTECT Act, Pub. L. 108-21 § 401(m)(2)(B) (directing Commission to promulgate "a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney."); USSG 5K3.1, and (2) there is no principled distinction between the case management needs of your district and the five approved districts that handle a small number of cases. See 149 Cong. Rec. 2405, H242 (2003) (congressional intent was to "preserv[e] . . . limited departures pursuant to . . . early disposition programs that allow . . . districts, particularly on the southwest border . . . to process very large numbers of cases with relatively limited resources.").

The Medrano-Duran case is good on all of this. An argument that no one seems to have made is the straightforward one that a lower sentence in your district cannot possibly interfere with quick processing of immigration cases in Arizona or New Mexico.

It is always best to make an individualized argument too -- that the guideline sentence in your client's case produces a sentence far greater than necessary to satisfy just punishment in light of the seriousness of the offense, deterrence needs, protection of the public, and any needed rehabilitation or treatment (which illegal aliens don't get from BOP) for the following reasons _____.

You might also want to make the general point that immigration sentences are excessive. For many years (well before the PROTECT Act) the prosecutors and judges who handled the majority of immigration cases found it unnecessary to impose the severe sentences already on the books. Neither the Department of Justice nor Congress has thought these cases sufficiently serious to find the resources to prosecute them in the normal course, instead choosing to process them with large sentencing reductions. As a result, the

actual length of sentences for immigration offenses has steadily decreased over time. See U.S. Sentencing Commission, Special Post-Booker Coding Project 13-15 (Prepared December 1, 2005), http://www.ussc.gov/Blakely/PostBooker_120105.pdf. There is no justification for saddling defendants in unapproved districts with sentences that all recognize -- through their actions -- to be excessive.

You should also make the more purist argument that 18 U.S.C. 3553(a)(6) does not measure unwarranted disparity according to the government's case management needs. It refers to "defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a). The Sentencing Commission has said: "Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders." U.S. Sentencing Commission, Report to Congress: Downward Departures from the Federal Sentencing Guidelines 66-67 (October 2003). This (arguably) is a "policy statement" of the Commission that sentencing courts must consider under 3553(a)(5).

Some good district court cases are United States v. Santos, 2005 WL 3434791 **4-7 (S.D.N.Y. Dec. 12, 2005) (and citing unreported cases); United States v. Medrano-Duran, 386 F. Supp.2d 943, 946-48 (N.D. Ill. 2005); United States v. Peralta-Espinoza , 383 F. Supp.2d 1107, 1108 (E.D. Wis. 2005); United States v. Ramirez-Ramirez, 365 F. Supp.2d 728, 731-32 (E.D. Va. 2005); United States v. Galvez-Barrios, 355 F.Supp.2d 958, 963 (E.D. Wis. 2005).

And, for better or worse, Judge Cassell, well-known for his Wilson opinion contending that the Guidelines already take into account all relevant sentencing considerations and therefore should be given "heavy weight" had this to say: while "these programs clearly result in sentencing disparity between similarly situated offenders," the court "reluctantly concludes that it cannot vary from the Guidelines and give Mr. Perez-Chavez the shorter sentence he would receive in Arizona and other fast-track districts" because Congress could reasonably conclude that "quickly processing large numbers of illegal re-entry cases" outweighs disparity, but the Attorney General should extend fast track programs across the country because "it is hard to see any real justification for having fast track programs in only selected jurisdictions." United States v. Perez-Chavez , 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005). It does not appear that Judge Cassell had available to him or considered the data in the attached documents.

So far, there are no court of appeals decisions from a government appeal of a lower sentence. Three courts of appeal have issued decisions in cases where the defendant raised the issue. None of them preclude this as a basis for a non-Guideline sentence, but you should read them. United States v. Simpson, 2005 WL 3370060 **8-10 (D.C. Cir. Dec. 13, 2005); United States v. Morales-Chaires, 2005 WL 3307395 (10th Cir. Dec. 7, 2005); United States v. Martinez-Flores, 428 F.3d 22, 30 n.3 (1st Cir. 2005) (stating in *dicta* that "[i]t is arguable even post-Booker, it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress' clear (if implied) statement in the PROTECT Act provision that such disparities are acceptable.").

Fast Track Programs Approved by AG

District	# of AUSAs[1]	Immigration Sentencings FY 2003[2]	Immigration % of Total	Immigration Cases per AUSA	Type of Program[3]
Arizona		2,427			5K3.1
C.D. California		325			Charge Bargain
E.D. California		338			5K3.1
N.D. California		135			Charge Bargain
S.D. California		2,019			Charge Bargain
Idaho	24	72	26.77%	3.00	5K3.1
Nebraska	27	80	11.41%	2.96	5K3.1
New Mexico		1,137			5K3.1
North Dakota	17	39	18.75%	2.29	5K3.1
Oregon	50	166	25.42%	3.32	Charge Bargain
S.D. Texas		2,706			5K3.1
W.D. Texas		1,623			5K3.1
W.D. Washington	64	37	5.63%	0.58	Charge Bargain

[1] These numbers come from information submitted by the government United States v. Medrano-Duran, 386 F. Supp.2d 943 (N.D. Ill. 2005). The original source, according to the government's Supplemental Response in Opposition to Defendant's Motion for a Non-Guideline Sentence Based on Fast-Track Programs, is the DOJ Employment Factbook for FY2003, which is on DOJ's Intranet site and not publicly accessible.

[2] These numbers come from Federal Sentencing Statistics by State, District and Circuit, http://www.ussc.gov/JUDPACK/JP2003.htm. The number per district is in Table 5 for that district.

[3] The type of program in each approved district is from documents submitted by the government to the courts in United States v. Medrano-Duran, 386 F. Supp.2d 943 (N.D. Ill. 2005) and United States v. Krukowski, 04 cr 1308 (S.D.N.Y. June 10, 2005).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 04 CR 884
v.	)	
	)	Judge Matthew F. Kennelly
MIGUEL MEDRANO-DURAN	)	

NOTICE OF FILING

TO: Imani Chiphe
Federal Defender Program
55 E. Monroe, Suite 2800
Chicago, IL 60603

PLEASE TAKE NOTICE that on August 3, 2005 the undersigned filed with the Clerk of this Court the GOVERNMENT'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR A NON-GUIDELINE SENTENCE BASED ON FAST-TRACK PROGRAMS service of which is being made upon you.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: _____
JAMES BARZ
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-2817

STATE OF ILLINOIS	)	
	)	SS
COUNTY OF COOK	)	

Cindy Kirksey, being first duly sworn on oath, deposes and says that she is employed in the office of the United States Attorney for the Northern District of Illinois; that on August 3, 2005 she caused a copy of this notice and the above-described motion to be mailed and faxed to the above individual.

_____
SUBSCRIBED and SWORN TO before me
this 3rd day of August, 2005

_____
NOTARY PUBLIC

"OFFICIAL SEAL"
Dorothy Flores
Notary Public, State of Illinois
My Commission Exp. 12/26/2005

small relative to the number of immigration cases they prosecute. The following table helps to illustrate these points by showing the district, number of AUSAs, number of immigration sentencings, the percentage of immigration sentencings relative to the total number of sentencings, and the number of immigration prosecutions per AUSA:[3]

District	AUSAs	Immigration Sentencings	Immigration % of Total	Per AUSA
N.D. Illinois	149	113[4]	8.96%	0.76
Idaho	24	72	26.77%	3.00
Nebraska	27	80	11.41%	2.96
North Dakota	17	39	18.75%	2.29
Oregon	50	166	25.42%	3.32
W.D. Wash.	64	37	5.63%	0.58

With the exception of the Western District of Washington, even the non-border districts with fast-track programs are confronted with relatively larger numbers of immigration prosecutions than this district when measured by percentage of cases and on a

[3]The sentencing data is for Fiscal Year 2003 and available at the United States Sentencing Commission's website under Publications/Federal Sentencing Statistics. *See* http://www.ussc.gov/LINKTOJP.HTM. (tables attached as Group Exhibit 3). The employment data is drawn from the following sources: First, the DOJ Employment Factbook for Fiscal Year 2003 lists the number of AUSAs per state, and thus provides the number for those districts that cover the entire state (Idaho, Nebraska, North Dakota, and Oregon). For the Western District of Washington, the current number of AUSAs is approximately 64. *See* http://www.usdoj.gov/usao/waw/about_us.htm. For the Northern District of Illinois, the approximate current number of AUSAs is 149. *See* http://www.usdoj.gov/usao/iln/aboutus/indext.html.

[4]Indeed, this figure likely overstates, relative to the other districts, the number of § 1326 cases because the Immigration category also includes alien smuggling cases, and there is likely a disproportionate number of such cases in this district because O'Hare International Airport is located here.

Office of the Attorney General
Washington, D. C. 20530

September 22, 2003

TO: All United States Attorneys

FROM: John Ashcroft
Attorney General

SUBJECT: Department Principles for Implementing an Expedited Disposition or "Fast-Track" Prosecution Program in a District

Section 401(m)(2)(B) of the 2003 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act") instructs the Sentencing Commission to promulgate, by October 27, 2003, a policy statement authorizing a downward departure of not more than 4 levels "pursuant to an early disposition program *authorized by the Attorney General* and the United States Attorney." Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003). Although the PROTECT Act requirement of Attorney General authorization only applies by its terms to fast-track programs that rely on downward departures, the Memorandum I have issued on "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing" likewise requires Attorney General approval for any "fast-track" program that relies upon "charge bargaining" — *i.e.*, a program whereby the Government agrees to charge less than the most serious, readily provable offense. This memorandum sets forth the general criteria that must be satisfied in order to obtain Attorney General authorization for "fast-track" programs and the procedures by which U.S. Attorneys may seek such authorization.[1]

I. REQUIRED CRITERIA FOR ATTORNEY GENERAL AUTHORIZATION OF A "FAST-TRACK" PROGRAM.

Early disposition or "fast-track" programs are based on the premise that a defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants and has demonstrated an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in U.S.S.G. § 3E1.1. These programs are properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases. Such programs are not to be used simply to avoid the ordinary application of the Guidelines to a particular class of cases.

[1] The requirement that a fast-track program be approved by the "Attorney General" under the PROTECT Act or under these Principles may also be satisfied by obtaining the approval of the Deputy Attorney General. *See* 28 U.S.C. § 510; 28 C.F.R. § 0.15(a).

GOVERNMENT EXHIBIT 1

In order to obtain Attorney General authorization to implement a "fast track" program, the United States Attorney must submit a proposal that demonstrates that —

(A) (1) the district confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited or "fast-track" basis would significantly strain prosecutorial and judicial resources available in the district; or

(2) the district confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;

(B) declination of such cases in favor of state prosecution is either unavailable or clearly unwarranted;

(C) the specific class of cases consists of ones that are highly repetitive and present substantially similar fact scenarios; and

(D) the cases do not involve an offense that has been designated by the Attorney General as a "crime of violence." *See* 28 C.F.R. § 28.2 (listing offenses designated by the Attorney General as "crimes of violence" for purposes of the DNA collection provisions of the USA PATRIOT Act).

These criteria will ensure that "fast-track" programs are implemented only when warranted. Thus, these criteria specify more clearly the circumstances under which a fast-track program could properly be implemented based on the high incidence of a particular type of offense within a district — one of the most commonly cited reasons for justifying fast-track programs. Paragraph (A)(2), however, does not foreclose the possibility that there may be some other exceptional local circumstance, other than the high incidence of a particular type of offense, that could conceivably warrant "fast-track" treatment.

II. REQUIREMENTS GOVERNING UNITED STATES ATTORNEY IMPLEMENTATION OF FAST-TRACK PROGRAMS.

Once a United States Attorney has obtained authorization from the Attorney General to implement a fast-track program with respect to a particular specified class of offenses, the United States Attorney may implement such program in the manner he or she deems appropriate for that district, provided that the program is otherwise consistent with the law, the Sentencing Guidelines, and Department regulations and policy. Any such program must include the following elements:

A. *Expedited disposition.* Within a reasonably prompt period after the filing of federal charges, to be determined based on the practice in the district, the Defendant must agree to plead guilty to an offense covered by the fast-track program.

B. *Minimum requirements for "fast-track" plea agreement.* The Defendant must enter into a written plea agreement that includes at least the following terms:

i. The defendant agrees to a factual basis that accurately reflects his or her offense conduct;

ii. The defendant agrees not to file any of the motions described in Rule 12(b)(3), Fed. R. Crim. P.

iii. The defendant agrees to waive appeal; and

iv. The defendant agrees to waive the opportunity to challenge his or her conviction under 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel.

C. *Additional provisions of plea agreement.* In exchange for the above, the attorney for the Government may agree to move at sentencing for a downward departure from the adjusted base offense level found by the District Court (after application of the adjustment for acceptance of responsibility) of a specific number of levels, not to exceed 4 levels. The plea agreement may commit the departure to the discretion of the district court, or the parties may agree to bind the district court to a specific number of levels, up to four levels, pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P. A "charge bargaining" fast-track program should provide for sentencing reductions that are commensurate with the foregoing. The parties may otherwise agree to the application of the Sentencing Guidelines consistently with the provisions of the Sentencing Guidelines and Rule 11.

III. PROCEDURES WITH RESPECT TO IMPLEMENTATION OF FAST-TRACK PROGRAMS.

Procedures for Attorney General approval. Before implementing a fast-track program, a district must submit to the Director of the Executive Office for United States Attorneys (EOUSA), for Attorney General approval, its proposal to implement a fast-track program. Likewise, any such program in existence on the date of this Memorandum may not be continued after October 27, 2003, unless a fast-track proposal has been submitted and approved. Any fast-track proposal must contain the following elements:

A. An identification of the specific category of violations to be covered by the fast-track program.

B. A detailed explanation of why the criteria described in Section I are satisfied with respect to such offenses. If the district has previously implemented a fast-track program for such offenses (*i.e.*, prior to the date of this memorandum), the explanation should include a detailed discussion of the experience under such program in the district.

Notice to EOUSA of compliance with additional requirements for fast-track programs. The district must notify EOUSA of any fast-track programs it adopts. The district must also identify in the Case Management System any case disposed of pursuant to an approved fast-track program, so that the number of cases and their dispositions may be determined for reporting or other statistical purposes.

cc: The Acting Deputy Attorney General
The Associate Attorney General
The Solicitor General
The Assistant Attorney General, Criminal Division
The Director, Executive Office for United States Attorneys

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 29, 2004

MEMORANDUM

TO: United States Attorneys for the following districts: Arizona, Central District of California, Eastern District of California, Northern District of California, Southern District of California, Southern District of Florida, Northern District of Georgia, Idaho, Nebraska, New Mexico, Eastern District of New York, North Dakota, Oregon, Southern District of Texas, Western District of Texas and the Western District of Washington

FROM: James B. Comey
Deputy Attorney General

SUBJECT: Authorization of Early Disposition Programs

Section 401(m)(2)(B) of the 2003 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT Act") instructed the Sentencing Commission to promulgate, by October 27, 2003, a policy statement authorizing a downward departure of not more than 4 levels "pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003). To that end, the United States Sentencing Commission promulgated a policy statement virtually tracking the language of the PROTECT Act. Although the PROTECT Act requirement of Attorney General authorization only applies by its terms to early disposition programs that rely on downward departures, the Attorney General issued his memo entitled "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing" on September 22, 2003 ("AG Guidelines"), that likewise requires Attorney General approval (approval that may be accomplished by obtaining the approval of the Deputy Attorney General[1]) for any early disposition program that relies upon "charge bargaining" — *i.e.*, a program whereby the Government agrees to charge less than the most serious, readily provable offense.

[1] The requirement that a fast-track program be approved by the "Attorney General" under the PROTECT Act or under the Sentencing Guidelines may also be satisfied by obtaining the approval of the Deputy Attorney General. *See* 28 U.S.C. § 510; 28 C.F.R. § 0.15(a).

GOVERNMENT EXHIBIT 2

On October 24, 2003, Acting Deputy Attorney General Robert D. McCallum, Jr., authorized the following United States Attorney's Offices (USAOs) to implement early disposition programs as such programs relate to the following classes of cases:

(1) District of Arizona – illegal reentry after deportation cases
(2) District of Arizona – transportation or harboring of aliens cases
(3) District of Arizona – alien baby/child smuggling and "bringing in" (i.e., cases involving defendants who are caught guiding defendants across the border) cases
(4) District of Arizona – drug cases arising along the border
(5) District of Arizona – first time marijuana offenses along the border involving less than 20 kilograms of marijuana and first time drug backpacking offenses (regardless of the amount of marijuana carried)
(6) Central District of California – illegal reentry after deportation cases
(7) Eastern District of California – illegal reentry after deportation cases
(8) Northern District of California – illegal reentry after deportation cases
(9) Southern District of California – illegal reentry after deportation cases
(10) Southern District of California – transportation or harboring of alien cases
(11) Southern District of California – drug cases arising along the border
(12) Northern District of Georgia – cases involving aliens using false/fraudulent immigration documents.
(13) District of Idaho – illegal reentry after deportation cases
(14) District of Nebraska – illegal reentry after deportation cases
(15) District of New Mexico – illegal reentry after deportation cases
(16) District of New Mexico – transportation or harboring of alien cases
(17) District of New Mexico – drug backpacking cases
(18) Eastern District of New York – drug courier cases arising out of John F. Kennedy International Airport
(19) District of North Dakota – illegal reentry after deportation cases
(20) District of Oregon – illegal reentry after deportation cases
(21) Southern District of Texas – Laredo Division drug cases arising along the border
(22) Southern District of Texas – illegal reentry after deportation cases
(23) Southern District of Texas – transportation or harboring of alien cases
(24) Western District of Texas – illegal reentry after deportation cases
(25) Western District of Texas – transportation or harboring of alien cases
(26) Western District of Washington – illegal reentry after deportation cases

All of the early disposition programs identified above were initially authorized through September 30, 2004. To continue thereafter, USAOs were required to submit a request for reauthorization. The Office of the Deputy Attorney General received requests for reauthorization for each of the programs listed above. To facilitate a thorough review of these requests, each early disposition program was temporarily reauthorized through October 31, 2004 by memo executed on September 29, 2004.

Having reviewed each of these requests for reauthorization, and finding that each of the early disposition programs meet the AG Guidelines, I hereby authorize the USAOs to implement the early disposition programs identified above, as well as any expansion of such programs as may have been requested in the requests for reauthorization.

In addition to these requests for reauthorization, the Office of the Deputy Attorney General received two requests to implement for the first-time the following early disposition programs:

(27) Southern District of Florida – cases involving aliens using false/fraudulent immigration documents
(28) Western District of Texas – drug cases arising at border ports of entry

Having reviewed these two requests for authorization, and finding that each program meets the AG Guidelines, I hereby authorize these early disposition programs as well.

United States Attorney's Offices with programs authorized herein are reminded that they must identify in the Case Management System any case disposed of pursuant to an approved early disposition program, so that the number of cases and their dispositions may be determined for reporting or other statistical purposes. All programs authorized herein are authorized through September 30, 2005. To continue a program thereafter, USAOs must submit a request for reauthorization to the Executive Office for United States Attorneys by September 1, 2005, which request shall contain all information requested pursuant to the Attorney General's September 22, 2003 memorandum, in addition to a summary of case data required to be maintained in the Case Management System.

cc: The Attorney General
The Associate Attorney General
The Solicitor General
The Assistant Attorney General, Criminal Division
The Director, Executive Office for United States Attorneys
The Chair, Attorney General's Advisory Committee
The Chair, Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee
The Assistant Director, Evaluation and Review Staff, Executive Office for U.S. Attorneys
The Director, Office of Policy and Legislation, Criminal Division

APPENDIX A

FAST-TRACK DISPOSITIONS DISTRICT-BY-DISTRICT RELATING TO ILLEGAL REENTRY CASES[1]

DISTRICT OF ARIZONA:

Tucson Division

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

The defendant typically pleads guilty to one count of violating Title 8, United States Code, Section 1326, and the Government generally agrees to a reduction pursuant to U.S.S.G. § 5K3.1. The amount of the reduction depends on the defendant's criminal history and on whether or not he/she was on supervised release at the time of his/her offense. If the defendant's offense level under U.S.S.G. § 2L1.2 is level 24, 20, or 16 (meaning, essentially, that the defendant has a prior aggravated felony of some type), the defendant receives a three-level reduction. If the defendant's offense level under § 2L1.2 is level 12 or 8, the defendant receives a four-level reduction if his/her Criminal History Category is not greater than IV, and a three level reduction if his/her Criminal History Category is V or VI.

If the defendant is on supervised release, the amount of the reduction is decreased one level. That is, if a defendant's offense level is 24, 20, or 16, and he/she was on supervised release, he/she gets a two-level reduction. If the defendant's offense level is 12 or 8, he/she gets a three-level reduction if his/her Criminal History Category is not greater than IV, and a two-

[1] As submitted for fiscal year 2005.

level reduction if his/her Criminal History Category is V or VI. In these cases, the Government also pursues the supervised release violation, if it is pending in the District of Arizona. In the supervised release revocations, the Government agrees that the term of imprisonment on the revocation shall not exceed the midpoint of the applicable range determined pursuant to U.S.S.G. § 7B1.4.

Phoenix and Yuma Divisions

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

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

CENTRAL DISTRICT OF CALIFORNIA

For defendants who have committed the offense of illegal entry after deportation in violation of Title 8, United States Code, Section 1326, the Central District of California employs

a "fast-track" charge-bargain program.

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

EASTERN DISTRICT OF CALIFORNIA

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

The Government typically agrees to pursue only one count of Title 8, United States Code, Section 1326; to dismiss all other counts (usually this is the sole count of the indictment so

dismissal is not applicable); to recommend a three-level reduction in total offense level for acceptance of responsibility and a four-level reduction in offense level pursuant to § 5K3.1; and to stipulate to a sentence within the applicable Sentencing Guidelines range.

NORTHERN DISTRICT OF CALIFORNIA

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

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

SOUTHERN DISTRICT OF CALIFORNIA

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

The Government typically agrees to prosecute the defendant under Title 8, United States Code, Section 1325 (or some alternative charge, e.g., Title 18, United States Code, Sections 911,

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

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

DISTRICT OF IDAHO

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

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

DISTRICT OF NEBRASKA

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

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

DISTRICT OF NEW MEXICO

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

If the defendant has a prior felony conviction that is: (1) a drug trafficking offense for which the sentence imposed exceeded 13 months; (2) a firearms offense; (3) a human trafficking

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

DISTRICT OF NORTH DAKOTA

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

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

DISTRICT OF OREGON

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

Illegal reentry sentencing is governed by U.S.S.G. § 2L1.2. This section sets a base offense level of 8, with specific offense characteristic enhancements determined by the defendant's criminal history: (A) 16 levels if the defendant has a prior conviction for a serious drug offense or a crime of violence; (B) 12 levels for less serious drug crimes; and (C) 8 levels for all other aggravated felonies. Defendants are required to plead guilty to either one or two counts of illegal entry without inspection, in violation of Title 8, United States Code, Section 1325. The first conviction of that charge carries a maximum penalty of six months' imprisonment, and the second carries a maximum term of 24 months. Defendants who would be subject to category "A" enhancements are required to agree to a 30 month sentence, the statutory maximum for two Section 1325 counts run consecutively. Defendants in the "B" category also plead guilty to two counts, but their sentences are to run concurrently, resulting in a 24 month sentence. Finally, the least serious offenders, those in the "C" category, are permitted to plead guilty to a single Section 1325 charge, and receive a six-month sentence. Defendants must be able to make a factual basis for their guilty pleas to violating Title 8, United States Code, Section 1325.

SOUTHERN DISTRICT OF TEXAS

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

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

WESTERN DISTRICT OF TEXAS

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

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

WESTERN DISTRICT OF WASHINGTON

For defendants eligible for fast-track disposition who have committed the offense of illegal entry after deportation in violation of Title 8, United States Code, Section 1326 and who

have a Criminal History Category (CHC) of II through V, the Western District of Washington employs a charge-bargain program.

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

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