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## Fast-Track Disparities in the Post-Booker World: Re-Examining Illegal Reentry Sentencing Policies

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# FAST-TRACK DISPARITIES IN THE POST- BOOKER WORLD: RE-EXAMINING ILLEGAL REENTRY SENTENCING POLICIES

## I. INTRODUCTION

Consider this typical illegal reentry case: at the age of sixteen, Miguel Medrano-Duran left Mexico and illegally came to the United States.<sup>1</sup> Over the next five years he lived in Chicago, Illinois, was convicted of several crimes, and spent time in county jail.<sup>2</sup> In 2004 Medrano-Duran was ultimately deported to Mexico but returned to Chicago just months later.<sup>3</sup> Now, because he has a criminal history and does not have permission to be in the country, Medrano-Duran has committed the federal crime of illegal reentry.<sup>4</sup> Even though he did not commit any other crimes after reentering the United States, Medrano-Duran's status as an illegal immigrant and his criminal record subject him to a mandatory minimum sentence of at least fifty-seven months of incarceration under federal law.<sup>5</sup>

Like the great majority of illegal reentry offenders, Medrano-Duran asserted no pretrial rights and made a quick decision to plead guilty.<sup>6</sup> Unlike a growing minority of defendants in districts with "fast-track" or "early disposition" programs, however, Medrano-Duran received nothing

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1. See *United States v. Medrano-Duran*, 386 F. Supp. 2d 943, 944 (N.D. Ill. 2005).

2. *Id.* In 2000 Medrano-Duran was convicted of criminal trespass to a vehicle and was given probation. In 2001 he forcibly took a wristwatch from an individual and received 180 days in jail as punishment. Later that same year, Medrano-Duran was charged with burglary of a motor vehicle and with theft, and spent an unknown length of time in a "boot camp" facility. *Id.*

3. *Id.*

4. See 8 U.S.C. § 1326(b) (2000) provides:

(b) Criminal penalties for reentry of certain removed aliens: Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both . . . .

5. *Medrano-Duran*, 386 F. Supp. 2d at 944.

6. *Id.* Of all defendants sentenced for immigration offenses from October 1, 2004, through January 11, 2005, 98.7% pled guilty rather than go to trial. U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE 11, GUILTY PLEAS AND TRIALS IN EACH PRIMARY OFFENSE CATEGORY, PRE-BOOKER (2005), available at [http://www.ussc.gov/ANNRPT/2005/table11\\_pre.pdf](http://www.ussc.gov/ANNRPT/2005/table11_pre.pdf). Similarly, 98.2% of immigration defendants sentenced from January 12 through September 30, 2005, entered a guilty plea. U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE 11, GUILTY PLEAS AND TRIALS IN EACH PRIMARY OFFENSE CATEGORY, POST-BOOKER (2005), available at [http://www.ussc.gov/ANNRPT/2005/table11\\_post.pdf](http://www.ussc.gov/ANNRPT/2005/table11_post.pdf).

from the U.S. Attorney in exchange for his cooperation.<sup>7</sup> “Fast-track programs allow a prosecutor to offer a defendant a reduced sentence in exchange for a pre-indictment guilty plea.”<sup>8</sup> Judge Kennelly, who decided Medrano-Duran’s case, explained that “[f]ast track programs for illegal re-entry cases have existed for a number of years in some districts, primarily districts on the Mexican border with a large number of illegal re-entry cases.”<sup>9</sup> Thirteen federal districts currently employ fast-track programs to process more efficiently illegal reentry cases similar to Medrano-Duran’s.<sup>10</sup> “The purpose of these programs was and is to facilitate prompt and easy disposition of cases to reduce the burdens they impose in those districts—there was not enough physical space to house detained defendants, and there were not enough prosecutors to handle all the cases brought to them.”<sup>11</sup>

Until the Supreme Court’s landmark January 2005 decision in *United States v. Booker*,<sup>12</sup> the United States Sentencing Guidelines<sup>13</sup> (“the Guidelines”) governed the length of sentence a criminal defendant could receive in federal courts.<sup>14</sup> Pre-*Booker*, the Guidelines mandated that

7. *Medrano-Duran*, 386 F. Supp. 2d at 944.

8. Erin T. Middleton, Note, *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, 827 (2004).

9. *Medrano-Duran*, 386 F. Supp. 2d at 944.

10. Those districts are Arizona, Central District of California, Eastern District of California, Northern District of California, Southern District of California, Idaho, Nebraska, New Mexico, North Dakota, Oregon, Southern District of Texas, Western District of Texas, and the Western District of Washington. See Government’s Memorandum of Law in Opposition to the Defendant’s Motion for a Non-Guideline Sentence Based on the Existence of Fast-Track Programs at 46, *United States v. Krukowski*, No. 04 Cr. 1308 (S.D.N.Y. filed June 10, 2005), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/61005\\_govt\\_opposition\\_to\\_sg\\_variance\\_due\\_to\\_fasttrack.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/61005_govt_opposition_to_sg_variance_due_to_fasttrack.pdf) [hereinafter Government *Krukowski* Memo] (memo from Deputy Attorney General James Comey verifying that fast-track programs are currently approved and in place in the districts listed). Eight districts employ “departure-based” programs, reducing the applicable Guidelines range when certain conditions are met. *Id.* at 31–40. Four districts, including the Central, Northern, and Southern Districts of California, use “charge bargaining” programs. *Id.* See also *infra* note 16. The Western District of Washington uses a combination program: charge bargaining for defendants with minor criminal histories and a departure-based program for defendants with more severe criminal histories. Government *Krukowski* Memo, at 39–40.

11. *Medrano-Duran*, 386 F. Supp. 2d at 944.

12. 543 U.S. 220 (2005).

13. See U.S. SENTENCING COMM’N, 2005 FEDERAL SENTENCING GUIDELINES MANUAL § 1A1.1 (2005), available at [http://www.ussc.gov/2005guid/tabcon05\\_1.htm](http://www.ussc.gov/2005guid/tabcon05_1.htm) [hereinafter MANUAL].

14. Using a two-step formula consisting of (1) the crime committed and (2) the defendant’s criminal history, federal judges used the Guidelines to determine the permissible range within which they could sentence the defendant. See MANUAL, § 1B1.1, Application Instructions (2005); see also *Booker*, 543 U.S. at 233–34 (“The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. . . . Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.”).

Medrano-Duran would receive between fifty-seven and seventy-one months in prison in districts without fast-track programs.<sup>15</sup> In districts with fast-track programs, such as the Southern District of California, Medrano-Duran would receive no more than thirty months in prison.<sup>16</sup>

Judges in non-fast-track districts have generally rejected the argument that this significant disparity is grounds for “departure”<sup>17</sup> from the mandatory Guideline range.<sup>18</sup> In the post-*Booker* world, however, the judiciary has new freedom to vary from the (now advisory) Guideline ranges, and several courts have done so.<sup>19</sup> Because the *Booker* opinion places new emphasis on reducing sentencing disparities for similarly situated defendants,<sup>20</sup> fast-track programs may now provide a fertile ground for sentence reductions never available before.

This Note examines the use of fast-track programs to deal with illegal reentry offenders, and argues that the district-to-district sentencing disparities created by such programs should be eliminated by implementing a nationwide early disposition policy. Part II of this Note discusses the history of fast-track programs, from their inception in Southern California to their official recognition by Congress in 2003. Part

15. See *Medrano-Duran*, 386 F. Supp. 2d at 944 (identifying the Guidelines sentencing range for Medrano-Duran, at offense level twenty-one and criminal history category IV, as fifty-seven to seventy-one months’ imprisonment). MANUAL, *supra* note 13, § 2L1.2 (2005). U.S. SENTENCING GUIDELINES MANUAL, CHAPTER FIVE—PART A—SENTENCING TABLE, available at <http://www.ussc.gov/2005guid/5a.htm>. The offense level / criminal history category system used by the Guidelines is complicated and warrants further explanation that is unnecessary for the understanding of this Note. For a quick tutorial on the Sentencing Table, see U.S. SENTENCING GUIDELINES MANUAL, COMMENTARY TO SENTENCING TABLE, CHAPTER FIVE—PART A—SENTENCING TABLE, available at [http://www.ussc.gov/2005guid/tabcon05\\_1.htm](http://www.ussc.gov/2005guid/tabcon05_1.htm).

16. The Northern, Central, and Southern Districts of California’s charge-bargaining fast-track programs allow 8 U.S.C. § 1326 (illegal reentry) offenders to plead to one or two counts under 8 U.S.C. § 1325 (improper entry) instead. Generally, defendants with criminal histories receive two counts and serve thirty-month sentences, while defendants with clean records or only minor arrests plead to one count and receive sentences of sixty days. All offenders are required to “(1) waive indictment, (2) file no motions, (3) plead guilty within 60 days of arraignment, (4) stipulate to removal after completion of the sentence, (5) agree to immediate sentencing, and (6) waive appeal and collateral attack.” U.S. SENTENCING COMM’N, TESTIMONY OF CHIEF JUDGE MARILYN L. HUFF, S. DIST. OF CAL. BEFORE THE U.S. SENTENCING COMM’N CONCERNING FAST TRACK OR EARLY DISPOSITION PROGRAMS, at 23 (2003), [http://www.ussc.gov/hearings/9\\_23\\_03/Huff.pdf](http://www.ussc.gov/hearings/9_23_03/Huff.pdf) [hereinafter HUFF TESTIMONY].

17. “Downward departure. In the federal sentencing guidelines, a court’s imposition of a sentence more lenient than the standard guidelines propose, as when the court concludes that a criminal’s history is less serious than it appears.” BLACK’S LAW DICTIONARY 469 (8th ed. 2004); see also MANUAL, *supra* note 13, § 5K2.0 (2005) (policy statement explaining permissible grounds for departure).

18. See generally Part II.B and accompanying notes.

19. See generally Part II.E and accompanying notes.

20. *Booker*, 543 U.S. at 252 (“[T]he sentencing statute’s basic aim [is] ensuring similar sentences for those who have committed similar crimes in similar ways.”).

II also summarizes the case law, before and after the *Booker* decision, addressing the sentencing disparities created by fast-track programs and whether the disparities constitute grounds for more lenient sentencing than the Guidelines recommend. Part III discusses in more depth some of the arguments for and against fast-track programs. Finally, Part IV suggests that a nationwide fast-track program is the best way to ensure uniform sentences and resolve the disparity debate in the district and circuit courts.

## II. HISTORY

### A. *The Birth of Fast-Track*

Fast-track programs are made possible by the principle of prosecutorial discretion: the notion that prosecutors have the right to decide who, what, when, where, and why they will bring charges, so long as those decisions are not made in an inherently discriminatory manner.<sup>21</sup> The Supreme Court has long held that, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”<sup>22</sup> As a result, prosecutors have a powerful bargaining chip with which to encourage guilty pleas.<sup>23</sup> By offering lesser charges as a “reward” to illegal reentry

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21. “Prosecutorial discretion. A prosecutor’s power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court.” BLACK’S LAW DICTIONARY 499 (8th ed. 2004).

It sometimes rests in the discretion of the prosecuting attorney to decide what charges to file, against whom, when, and in what court a prosecution should be brought. While prosecutorial discretion as to whom to prosecute is broad, it is not unfettered and is subject to constitutional constraints. . . . Within limits set by the legislature’s constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation by the prosecutor so long as the selection is not deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. . . . Public perception of the criminal justice system is one of a broad spectrum of factors a prosecutor may properly consider in the exercise of his or her charging discretion.

27 C.J.S. *District and Prosecuting Attorneys* § 29 (2005). “[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation’ so long as ‘the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (citation omitted).

22. *Bordenkircher*, 434 U.S. at 364.

23. “To hold that the prosecutor’s desire to induce a guilty plea is an ‘unjustifiable standard,’ which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself.” *Id.* at 364–65.

defendants who cooperate and quickly plead guilty, prosecutorial resources are preserved.<sup>24</sup>

Because prosecutorial discretion results in a lower workload for the prosecutor, early disposition programs are most useful when caseloads are high.<sup>25</sup> That was the situation in the Southern District of California when the first fast-track program was born.<sup>26</sup> Overwhelmed by illegal reentry cases, the district's U.S. Attorney established an early disposition program for processing these offenders in a more efficient manner.<sup>27</sup> Under the innovative system, instead of charging defendants under 8 U.S.C. § 1326(b)<sup>28</sup> (which carries a maximum penalty of five or fifteen years depending on the defendant's criminal history), illegal reentrants are allowed to plead to 8 U.S.C. § 1326(a), which carries only a two-year maximum sentence.<sup>29</sup> In exchange for this leniency, the defendant gives up a variety of rights:

The policy requires that the defendant waive indictment, enter a guilty plea at the first appearance before the district court, waive appeal of all sentencing issues, stipulate that the applicable guideline range exceeds the 2-year statutory maximum, stipulate to the 2-year sentence, and agree not to seek any downward adjustments or departures.<sup>30</sup>

24. Of course, prosecutorial discretion can also be used to inflate the charges brought against a defendant, and the Court has even allowed prosecutors to act in a retaliatory and threatening manner in deciding what charges to bring. *See id.* at 365.

25. *See supra* note 11 and accompanying text.

26. *See* Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT'G REP. 254, 254 (1996). "For two or more generations, more than 50% of those who attempted to enter the United States did so through the Southern District of California. Each year, up to 600,000 arrests were made here at a porous and largely unguarded border." *Id.*

27. *See* *United States v. Estrada-Plata*, 57 F.3d 757, 759 (9th Cir. 1995) ("On July 22, 1993, the United States Attorney's Office for the Southern District of California implemented the fast-track policy for immigration defendants charged with violating § 1326(b).").

28. *See supra* note 4.

29. 8 U.S.C. § 1326(a) (2000) provides:

(a) In general: Subject to subsection (b) of this section, any alien who—(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both.

30. *Estrada-Plata*, 57 F.3d at 759.

In 1995, the Southern District of California program was officially sanctioned by the Ninth Circuit in *United States v. Estrada-Plata*.<sup>31</sup> Rejecting a claim that the program was discriminatory, the court wrote, “we find absolutely nothing wrong (and, quite frankly, a great deal right) with such a practice. The policy benefits the government and the court system by relieving congestion. But more importantly, the policy benefits § 1326(b) defendants by offering them a substantial sentence reduction.”<sup>32</sup> The program has since been extended by each of five subsequent U.S. Attorneys in the Southern District of California, and has been adopted in the Central, Eastern, and Northern Districts of California as well.<sup>33</sup> With the number of arrests for illegal reentry in the Southern District of California continuing to climb each year, it appears that the district’s fast-track program is still useful today in reducing caseloads and conserving prosecutorial resources.<sup>34</sup>

### B. Pre-Booker Fast-Track Litigation

Federal courts in California handle more immigration cases than any other district, but there are also a large number of illegal reentry offenders apprehended in other parts of the country.<sup>35</sup> The disparity in sentences

31. *Id.* at 761.

32. *Id.* The court continues: “These defendants have nothing to lose and much to gain from the fast-track policy. We flatly reject the contention that the policy is discriminatory.” *Id.*

33. See HUFF TESTIMONY, *supra* note 16, at 2 (“[S]ince 1994, the five successive U.S. Attorneys in our district have established fast track or early disposition programs while exercising their prosecutorial discretion.”); see also Written Testimony from Maria E. Stratton, Fed. Pub. Defender for the Cent. Dist. of Cal., to the U.S. Sentencing Comm’n, at 1–2, (Sept. 18, 2003), [http://www.ussc.gov/hearings/9\\_23\\_03/stratton.pdf](http://www.ussc.gov/hearings/9_23_03/stratton.pdf) [hereinafter Stratton Testimony] (stating when the fast-track program for the Central District of California was established, and explaining how it is applied to § 1326(b) defendants); *supra* note 10 and accompanying text (listing the districts employing fast-track programs).

34. See Federal Court Management Statistics, <http://www.uscourts.gov/fcmstat/index.html> (click on “District Courts” under each year, then choose “California Southern” in the drop-down menu; then click the “Generate” button) (documenting a steady increase in the volume of immigration offenses charged, from 41% of the total criminal caseload in 1999, peaking at 65% of the total criminal caseload in 2004, and constituting fully 54% of the total criminal caseload in 2005).

This trend might also indicate that fast-track programs are not a good deterrent to illegal immigration. See *infra* notes 139–40 and accompanying text.

35. See U.S. SENTENCING COMM’N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, APPENDIX B, CALIFORNIA SOUTHERN (2001), available at <http://www.ussc.gov/ANNRPT/1999/cas99.pdf>. The 204 immigration cases in the Southern District of New York, and especially the mere 264 cases in the entire state of Utah, seem insignificant in comparison to the 1675 cases in California. These cases nevertheless produced 568 disparately sentenced defendants in districts other than the Southern District of California. See, e.g., U.S. SENTENCING COMM’N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, APPENDIX B, NEW YORK SOUTHERN (2001), available at <http://www.ussc.gov/ANNRPT/1999/nys99.pdf>; U.S. SENTENCING COMM’N, 1999 SOURCEBOOK OF FEDERAL

received by California defendants and those received by defendants in other states quickly became apparent to defense attorneys.<sup>36</sup> In 1999 and 2000, several (unsuccessful) attempts were made to secure sentence reductions (also known as “downward departures” from the Guidelines)<sup>37</sup> on the basis of sentencing disparities created by California’s fast-track programs.<sup>38</sup>

The first attempt at a downward departure based on fast-track disparities was launched in the Central District of California (before that district adopted a fast-track program of its own), in the case of *United States v. Banuelos-Rodriguez*.<sup>39</sup> In 1995, Rogelio Banuelos-Rodriguez pled guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326.<sup>40</sup> “At sentencing, [Banuelos-Rodriguez] argued for a downward departure from the sentencing guideline range based on an alleged discrepancy between the length of sentences received by § 1326 violators prosecuted in the Central District of California and the length of sentences received by § 1326 violators in the Southern District of California.<sup>41</sup> Finding that sentencing disparities were an impermissible grounds for departure, the district court sentenced Banuelos-Rodriguez within the mandatory Guideline range: seventy months in prison followed by three

SENTENCING STATISTICS, APPENDIX B, UTAH (2001), available at <http://www.ussc.gov/ANNRPT/1999/ut99.pdf>.

36. See MANUAL, *supra* note 13, § 2L1.2 (2005) (unlawfully entering or remaining in the United States). The base-offense level for unlawful entry is 8. Under California’s fast-track program, a defendant pleads to either one or two counts of violating 8 U.S.C. § 1326(a), resulting in an offense level of either 8 or 16. The result is a sentence of either six or twenty-four months. See MANUAL, *supra* note 13, CHAPTER FIVE–PART A–SENTENCING TABLE, available at [http://www.ussc.gov/2005guid/tabcon05\\_1.htm](http://www.ussc.gov/2005guid/tabcon05_1.htm). In a district without a fast-track program, a defendant guilty of violating 8 U.S.C. § 1326(b) (the same crime for which defendants in California receive fast-track status) qualifies for a sixteen-level enhancement under § 2L1.2(1)(A) of the Guidelines, bringing the base-offense level to 24. The result is a sentence (based on criminal history category—which will be at least III if defendant has a prior felony) of between 63 and 125 months. See *id.* Clearly, there is a disparity between the sentences meted out for violation of § 1326(b) in fast-track districts (6–24 months) and the sentences imposed for the same crime in non-fast-track districts (63–125 months).

37. A “downward departure” is an official judgment, arrived at through Guidelines-prescribed procedures, that a more lenient sentence is appropriate in a particular case. See MANUAL, *supra* note 13, § 5K2.0 (2005) (policy statement explaining grounds for departure). See also *supra* note 17.

38. See *United States v. Armenta-Castro*, 227 F.3d 1255 (10th Cir. 2000); *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000); *United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir. 2000).

39. 215 F.3d 969 (9th Cir. 2000). The Central District of California adopted a fast-track program in 2003, after the Attorney General officially sanctioned such programs and laid out guidelines for their implementation. See generally Stratton Testimony, *supra* note 33, at 2–3. Banuelos-Rodriguez was sentenced in 1995. *Banuelos-Rodriguez*, 215 F.3d at 971.

40. *Banuelos-Rodriguez*, 215 F.3d at 971. See *supra* notes 4 and 29 (full text of 8 U.S.C. § 1326).

41. *Banuelos-Rodriguez*, 215 F.3d at 971.



years of supervised release.<sup>42</sup> On appeal the Ninth Circuit affirmed the district court's decision.<sup>43</sup>

At about the same time that Banuelos-Rodriguez was sentenced, an illegal reentry defendant in the Southern District of New York was testing a similar argument in *United States v. Bonnet-Grullon*.<sup>44</sup> Francis Bonnet-Grullon was convicted for selling crack cocaine in New York State in 1994.<sup>45</sup> He was deported to the Dominican Republic in early 1995, but was subsequently arrested twice in 1997 in New York City for criminal possession of a controlled substance, and was charged federally with illegal reentry shortly thereafter.<sup>46</sup> He pled guilty under 8 U.S.C. § 1326(b), and was sentenced within the Guidelines range to seventy months in prison.<sup>47</sup> Noting that "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," the court

42. *Id.* at 971.

43. *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 978 (9th Cir. 2000) (en banc). The Ninth Circuit sat first as a three-judge panel and found that it was error to treat sentencing disparities as a prohibited grounds for departure. *United States v. Banuelos-Rodriguez*, 173 F.3d 741, 747 (9th Cir. 1999) (withdrawn). Instead, the panel examined Banuelos-Rodriguez's sentence through the Supreme Court's *Koon* test for downward departures. *Id.* at 743. The relevant factors of the *Koon* test are:

- 1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case?
- 2) Has the [United States Sentencing] Commission forbidden departures based on those features?
- 3) If not, has the [United States Sentencing] Commission encouraged departures based on those features?
- 4) If not, has the [United States Sentencing] Commission discouraged departures based on those features?

*United States v. Koon*, 518 U.S. 81, 95 (1996) (citing *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)). Finally, the panel noted that "it is the task of Congress, not the federal courts, to identify factors which are categorically forbidden as grounds for departure from the Sentencing Guidelines." *Banuelos-Rodriguez*, 173 F.3d at 747.

On remand, the district court again declined to grant a downward departure, and the Ninth Circuit agreed to rehear Banuelos-Rodriguez's appeal en banc. *United States v. Banuelos-Rodriguez*, 195 F.3d 454 (9th Cir. 1999). This resulted in a withdrawal of the panel opinion and the issuing of a new opinion affirming the district court's decision. *Banuelos-Rodriguez*, 215 F.3d at 978. The court ultimately held that "separation of powers concerns prohibit us from reviewing a prosecutor's charging decisions absent a prima facie showing that it rested on an impermissible basis, such as gender, race or denial of a constitutional right." *Id.* at 977 (citing *United States v. Palmer*, 3 F.3d 300, 305 (9th Cir. 1993)). Challenges to fast-track policies could thus *only* be directed toward the executive branch, which determines charging practices for prosecutors. *Id.*

44. 53 F. Supp. 2d 430 (S.D.N.Y. 1999).

45. *Id.* at 431.

46. *Id.*

47. *United States v. Bonnet-Grullon*, 212 F.3d 692, 693 (2d Cir. 2000).

nonetheless found itself bound by Second Circuit precedent to deny Bonnet-Grullon's request for a downward departure.<sup>48</sup>

On appeal, the Second Circuit analyzed the Sentencing Commission's *intent* in dealing with such sentencing disparities.<sup>49</sup> Finding that Bonnet-Grullon's case was not "unusual" in any way,<sup>50</sup> and arguing that an existing Guidelines policy statement<sup>51</sup> allows for exactly the type of prosecutorial discretion utilized by fast-track programs, a three judge panel affirmed the district court.<sup>52</sup>

The final pre-*Booker* fast-track opinion followed closely on the heels of the *Banuelos-Rodriguez* and *Bonnet-Grullon* decisions. In *United States v. Armenta-Castro*,<sup>53</sup> the Tenth Circuit held that "the governing provisions of the United States Code and the Sentencing Guidelines categorically proscribe the consideration of sentencing disparities flowing from the exercise of prosecutorial discretion in charging and plea bargaining practices."<sup>54</sup> The Tenth Circuit, like the Second, found that the commentary to § 6B1.2 of the Guidelines implicitly prohibits judicial interference in the exercise of prosecutorial discretion by setting forth criteria for when plea agreements can and cannot be accepted.<sup>55</sup> The court also advanced a new argument against consideration of sentencing disparities created by fast-track programs: "[i]nterjection of this issue into sentencing proceedings would mandate cumbersome and involved evidentiary hearings in every case."<sup>56</sup> *Armenta-Castro* appeared to be the

48. *Bonnet-Grullon*, 53 F. Supp. 2d at 435–36. See *United States v. Stanley*, 928 F.2d 575 (2d Cir. 1991) holding that the Sentencing Commission and Congress are free to address the issue of sentencing disparities created by non-uniform plea bargaining practices, and that the Sentencing Commission's decision not to make major changes in plea bargaining practices was an implicit approval that such disparities are "warranted").

49. *Bonnet-Grullon*, 53 F. Supp. 2d at 703. Citing a Guidelines policy statement published by the U.S. Sentencing Commission, the court found that the Commission had forbidden departures based on sentencing disparities created by plea-bargaining. "The court may accept an agreement calling for dismissal of charges or an agreement not to pursue potential charges if the remaining charges reflect the seriousness of the actual offense behavior. This requirement does not authorize judges to intrude upon the charging discretion of the prosecutor." *Id.* (citing MANUAL, *supra* note 13, § 6B1.2 (commentary to the Guidelines policy statement referenced by the court)).

50. This is a reference to the Supreme Court's *Koon* test for downward departure, set forth *supra* note 43.

51. See MANUAL, *supra* note 13, § 6B1.2(a) ("In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges, . . . the court may accept the agreement.").

52. *Bonnet-Grullon*, 212 F.3d at 709–10.

53. 227 F.3d 1255 (10th Cir. 2000).

54. *Id.* at 1258.

55. *Id.* at 1259. See *supra* note 51.

56. *Armenta-Castro*, 227 F.3d at 1259.

last word on fast-track disparities until the Supreme Court's decision in *United States v. Booker*.<sup>57</sup>

### C. Statutory Developments and the Growth of Fast-Track

In 2003, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act.<sup>58</sup> Among many other things, the Act officially sanctioned fast-track programs by mandating that the United States Attorney General set standards for such programs within six months.<sup>59</sup> On September 22, 2003, Attorney General John Ashcroft sent two memos to "all Federal Prosecutors."<sup>60</sup> The first memo discussed the exceptions to a prosecutor's "General Duty to Charge and Pursue the Most Serious, Readily Provable Offense in All Federal Prosecutions," including situations where the district has authorized a fast-track program.<sup>61</sup> The memo also laid out "Department Policy Concerning Plea Agreements," noting that the PROTECT Act authorizes federal prosecutors to agree to downward departures when a fast-track program is in place.<sup>62</sup>

57. 543 U.S. 220 (2005).

58. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 [hereinafter PROTECT Act], Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of UNITED STATES CODE TITLES 18, 21, 28, 42, 47, and FED. R. CRIM. P. 7).

59. See PROTECT Act, Pub. L. 108-21, § 401(m), 117 Stat. 675 (2003).

Not later than 180 days after the enactment of this Act, the United States Sentencing Commission shall— . . . (2) promulgate, pursuant to section 994 of title 28, United States Code— . . . (B) 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 . . .

60. MEMORANDUM FROM ATTORNEY GENERAL JOHN ASHCROFT, DEP'T OF JUSTICE, REGARDING DEPARTMENT POLICY CONCERNING CHARGING CRIMINAL OFFENSES, DISPOSITION OF CHARGES, AND SENTENCING (Sept. 22, 2003), available at [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm) [hereinafter ASHCROFT MEMO I]; and MEMORANDUM FROM ATTORNEY GENERAL JOHN ASHCROFT, DEP'T OF JUSTICE, REGARDING DEPARTMENT PRINCIPLES FOR IMPLEMENTING AN EXPEDITED DISPOSITION OR "FAST-TRACK" PROSECUTION PROGRAM IN A DISTRICT (Sept. 27, 2003), reprinted in 16 FED. SENT'G REP. 134 (2003) [hereinafter ASHCROFT MEMO II].

61. ASHCROFT MEMO I at 2–4. Other exceptions to a prosecutor's general duty to charge and pursue the most serious, readily provable offense include when the sentence would not be affected (if the mandatory minimum sentence would be the same, regardless of which crime is charged), when the prosecutor reassesses the evidence post-indictment and changes his or her mind about what charge to pursue, when the defendant has provided substantial assistance to the prosecutor, when seeking statutory enhancements would discourage the defendant from pleading guilty, and "other exceptional circumstances." *Id.*

62. *Id.* at 6–7.

The second memo laid out, in detail, the requirements for implementing a valid fast-track program.<sup>63</sup> Stating that “[t]hese 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,” the Attorney General required interested districts to submit a proposal demonstrating that certain conditions were met for whatever offense they sought to “fast-track.”<sup>64</sup> The memo also set forth “the minimum requirements for ‘fast-track’ plea agreement[s].”<sup>65</sup>

On October 24, 2003, the Acting Deputy Attorney General approved twenty-six fast-track applications in fifteen districts.<sup>66</sup> Of these, only thirteen specifically addressed the crime of illegal reentry.<sup>67</sup> Those districts were: Arizona; Idaho; Nebraska; New Mexico; North Dakota; Oregon; the Central, Eastern, Northern, and Southern Districts of California; the Southern and Western Districts of Texas; and the Western

63. ASHCROFT MEMO II at 134–35.

64. *Id.* at 134. The required conditions are:

- (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). *Id.* at 134–35.

65. *Id.* at 135. The minimum requirements are:

- (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. [a.k.a. “pretrial motions”];
- (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 [a.k.a. “habeas petition”], except on the issue of ineffective assistance of counsel.

66. *See* Government *Krukowski* Memo, *supra* note 10, at 42 (memo from Deputy Attorney General James B. Comey verifying that fast-track programs are currently approved and in place in fifteen districts).

67. *Id.* Other approved fast-track programs included those dealing with drug cases arising along the border in Arizona, the Southern District of California, and the Southern District of Texas, drug backpacking cases in New Mexico, and drug courier cases arising out of John F. Kennedy International Airport in the Eastern District of New York, among others. *Id.*

District of Washington.<sup>68</sup> All of these programs were renewed in 2004 and again in 2006.<sup>69</sup>

*D. An Unexpected Twist: United States v. Booker*

The thirteen illegal reentry fast-track programs operated without incident, and the circuit case law on the matter remained unchallenged, until the Supreme Court's January 2005 decision in *United States v. Booker*.<sup>70</sup> Holding for the first time that the United States Sentencing Guidelines violate criminal defendants' Sixth Amendment right to a jury trial,<sup>71</sup> the Court set out to preserve any and all elements of the Guidelines that were not unconstitutional.<sup>72</sup> In this effort, the Court noted that "Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."<sup>73</sup> Justice Breyer explained that one of the major reasons the Sentencing Guidelines were created was to counteract the disparities created by plea bargaining:

The [Guidelines] reasonably assume that their efforts to move the trial-based sentencing process in the direction of greater sentencing uniformity would have a similar positive impact upon plea-bargained sentences, for plea bargaining takes place *in the shadow*

68. *Id.*

69. *Id.* at 3. According to an August 8, 2006 post on Professor Douglas A. Berman's Sentencing Law and Policy blog, an unnamed source has informed him that "on Friday [August 4, 2006] the Justice Department re-authorized all existing 'fast track' programs (through something like December 31, 2006) and authorized an additional 4 to 5 new programs in various districts." Responding to an online poster's request for official documentation of the August 4 fast-track renewal, Professor Berman posted this reply: "I don't know, I don't know, and I don't know. I wonder if anyone has tried a FOIA request on DOJ's fast-track documents." DOUGLAS A. BERMAN, SENTENCING LAW AND POLICY, *IMPORTANT DOJ Fast-track Policy Clarification!!*, Aug. 8, 2006, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/08/important\\_fastt.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/08/important_fastt.html).

70. 543 U.S. 220 (2005).

71. "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244. Because a mandatory Guidelines system sometimes requires judges to consider facts neither found by a jury nor admitted by a defendant (when they consider the possible sentencing enhancements provided for each offense in the Guidelines Manual), the mandatory scheme is unconstitutional. *See generally id.* at 230-37.

72. The second half of the majority opinion, written by Justice Breyer, carefully considered the possible constitutional remedies, and concluded that an advisory Guidelines system was what Congress most likely would have enacted if it knew that a mandatory system was unconstitutional. *See id.* at 249. ("[I]n light of today's holding, we compare maintaining the Act as written with jury factfinding added (the dissenters' proposed remedy) to the total invalidation of the statute, and conclude that Congress would have preferred the latter.")

73. *Id.* at 253. *See generally* 28 U.S.C. § 991(b)(1)(B) (2000), and MANUAL § 1A1.1(A)(3).

of (*i.e.*, with an eye towards the hypothetical result of) a potential trial.<sup>74</sup>

While the Court readily admitted that “[t]his system has not worked perfectly,” the majority nevertheless strained to preserve as much of the Guidelines system as constitutionally possible.<sup>75</sup>

The Court noted that, even though some portions of the Guidelines were being excised as unconstitutional,<sup>76</sup> “[t]he remainder of the [Federal Sentencing Reform] Act ‘functions independently.’”<sup>77</sup> The end result of the *Booker* holding is that the Guidelines are no longer binding on federal judges. However,

[t]he [Federal Sentencing Reform] Act nonetheless requires judges to consider the Guidelines ‘sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,’ the pertinent Sentencing Commission policy statements, *the need to avoid unwarranted sentencing disparities*, and the need to provide restitution to victims.<sup>78</sup>

The Court intended these factors, in combination with those set forth in 18 U.S.C. § 3553(a)(2),<sup>79</sup> to guide sentencing judges post-*Booker* in determining whether to impose a Guidelines-range sentence, a reduced sentence, or even a longer sentence than the Guidelines recommend.<sup>80</sup>

74. *Booker*, 543 U.S. at 255.

75. *See supra* note 72. *See also Booker*, 543 U.S. at 246 (“The other approach, which we now adopt, would (through severance and excision of two provisions) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.”). *See also id.* at 264. (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”).

76. *See Booker*, 543 U.S. at 258–65 (discussing why 18 U.S.C. §§ 3553(b)(1) and 3742(e) are invalidated by the *Booker* opinion).

77. *Id.* at 266 (citations omitted).

78. *Id.* at 259–60 (emphasis added) (citations omitted). *See* 18 U.S.C. § 3553(a)(1), (3), and (5)-(7) (2000).

79. *See* 18 U.S.C. § 3553(a)(2) (2000). The *Booker* opinion summarizes 18 U.S.C. § 3553(a)(2) as follows: “the Act . . . requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.” *Booker*, 543 U.S. at 260.

80. Circuit court opinions post-*Booker* present a complex and voluminous body of case law. The individual sentencing practices and the ever-changing nuances of post-*Booker* appellate practice are beyond the scope of this Note. For a helpful synopsis of the *Booker* opinion, visit Professor Douglas A. Berman’s “*Booker Basics*” at <http://moritzlaw.osu.edu/faculty/berman/booker.php>.

*E. Post-Booker Fast-Track Litigation: District Courts*

Post-*Booker*, the Federal Sentencing Reform Act's directive to impose uniform sentences is in direct conflict with the freedom judges now have to vary from the Guidelines ranges.<sup>81</sup> Seizing upon this opportunity to find new and fruitful grounds for variances from the Guidelines, defense attorneys in districts without fast-track programs have resurrected the disparity argument.<sup>82</sup> Results have been mixed, but some illegal reentry defendants in non-fast-track districts have been successful in arguing for a more lenient sentence based on sentencing disparities and the new flexibility afforded to judges by *Booker*.<sup>83</sup>

Less than a month after *Booker* became law, the Eastern District of Wisconsin considered the case of *United States v. Galvez-Barrios*, which involved an illegal reentry offender with a particularly sympathetic story.<sup>84</sup> After living in the United States for many years and parenting four children, Galvez-Barrios encountered a string of bad luck involving a self-defense shooting, deportation, and rediscovery as an illegal alien after being stranded in his car during a snowstorm.<sup>85</sup> The court wrote: “[a]

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81. See *Booker*, 543 U.S. at 300 (Stevens, J., dissenting) (“True, judges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C.A. § 3553(a).”). See also *id.* at 301 (Stevens, J., dissenting) (“Congress’ demand in the PROTECT Act that departures from the Guidelines be closely regulated and monitored is eviscerated—for there can be no ‘departure’ from a mere suggestion. How will a judge go about determining how much deference to give to the applicable Guidelines range?”).

82. See cases cited at note 38, and accompanying text. The argument is as follows: if 8 U.S.C. § 1326(b) defendants in fast-track districts regularly receive lower sentences than illegal reentry offenders in non-fast-track districts, and if the disparity in sentences is *unwarranted* under 18 U.S.C. § 3553(a)(6), then the court may use that disparity as grounds for granting a variance from the normal Guidelines range (to bring a defendant’s sentence in line with those received by defendants in fast-track districts).

83. See, e.g., *United States v. Delgado*, No. 6:05-cr-30-Orl-31KRS, slip op. at 4 (M.D. Fla. 2005), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/presnell\\_sentencing\\_opinion\\_us\\_v.%20Delgado.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/presnell_sentencing_opinion_us_v.%20Delgado.pdf) (“the Court will exercise its discretion to reduce Delgado’s sentence by the equivalent of a 4-level departure in recognition of this sentencing disparity”).

84. 355 F. Supp. 2d 958 (E.D. Wis. 2005). Jose Galvez-Barrios had resided in the United States since the late 1970s. *Id.* at 959. He achieved permanent resident status in Chicago in 1986, and had four American-born children with his long-term girlfriend. *Id.* In 1993, Galvez-Barrios was attacked and robbed by a group of gang members and shot one of them to recover his property. *Id.* After the incident, he turned himself in and was convicted of aggravated battery with a firearm. *Id.* In 1998 he was paroled and deported. *Id.* He reentered the United States in 2000 but was found and deported again in 2002. *Id.* Galvez-Barrios returned yet a third time, and lived peacefully in Chicago until January 2004 when he was rescued by sheriff’s deputies in a snowstorm and discovered as an illegal reentry offender. *Id.* at 959–60.

85. *Galvez-Barrios*, 355 F. Supp. 2d. at 958–60.

*Booker* directs, in determining defendant's sentence I gave serious consideration to the *advisory* guidelines."<sup>86</sup>

Taking into account the defendant's unusually hard-luck tale, the court was disturbed by the Guidelines range of fifty-seven to seventy-one months' imprisonment,<sup>87</sup> and "was also troubled by the unwarranted sentencing disparity under the Guidelines for § 1326 offenders."<sup>88</sup> Concluding that "under *Booker* and § 3553(a)(6),<sup>89</sup> it may be appropriate in some cases for courts to exercise their discretion to minimize the sentencing disparity that fast-track programs create," the court sentenced Galvez-Barrios to only twenty-four months in prison—less than half the normal Guidelines range.<sup>90</sup> Although recent developments in the Seventh Circuit indicate that this type of reduction is no longer proper,<sup>91</sup> the Government has not noticed any appeal of Galvez-Barrios's sentence.<sup>92</sup>

The Eastern District of Virginia similarly reduced an illegal reentrant's sentence from the Guidelines' range of fifty-seven to seventy-one months to a mere twenty-four months of imprisonment in *United States v. Ramirez-Ramirez*.<sup>93</sup> The court held that, "[i]n some cases, under *Booker* and 18 U.S.C. § 3553(a),<sup>94</sup> it may be appropriate for the Court to exercise its discretion in order to minimize the sentencing disparities that exist in

86. *Id.* at 961 (emphasis added).

87. *Id.* at 963 (Galvez-Barrios's crime carries an offense level of 21 and a criminal history category of IV, placing him in Zone D of the Sentencing Table, indicating a range of fifty-seven to seventy-one months' imprisonment); see MANUAL, *supra* note 13, § 2L1.2, and U.S. SENTENCING GUIDELINES MANUAL, CH. 5 PT. A SENTENCING TBL, available at [http://www.ussc.gov/2005guid/tabcon05\\_1.htm](http://www.ussc.gov/2005guid/tabcon05_1.htm).

88. *Galvez-Barrios*, 355 F. Supp. 2d at 963 (citing Erin T. Middleton, Note, *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 (2004), and noting that defendants in the Southern District of California are "allowed to plead guilty to an offense carrying a two year statutory maximum penalty").

89. See 18 U.S.C. § 3553(a) (2000)

Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider— . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . .

90. *Galvez-Barrios*, 355 F. Supp. 2d at 963–64. The Eastern District of Wisconsin later extended this principle in a different case: *United States v. Peralta-Espinoza*, 383 F. Supp. 2d 1107 (E.D. Wis. 2005).

91. See *United States v. Galicia-Cardenas*, 443 F.3d 553, 555 (7th Cir. 2006). See also *infra* note 123 and accompanying text.

92. A Public Access to Court Electronic Records (PACER) search reveals that the case filed was closed by the court on February 2, 2005 (the date the opinion was issued), and no appeal has been noticed by either party.

93. 365 F. Supp. 2d 728, 733 (E.D.Va. 2005).

94. See *supra* note 89 (full text of 18 U.S.C. § 3553(a)(6)).



cases involving illegal reentry.”<sup>95</sup> Although the Fourth Circuit later became the only circuit to roundly reject this approach,<sup>96</sup> the Government has allowed Ramirez-Ramirez’s sentence to stand.<sup>97</sup>

Other districts followed suit. In May 2006 Judge Presnell of the Middle District of Florida reduced Jairo Modesto Miranda-Garcia’s sentence by eight levels, bringing his sentence from the forty-one to fifty-one month range down to eighteen months of imprisonment.<sup>98</sup> After noting the sentencing disparities created by fast-track programs, Judge Presnell justified his decision on the grounds that he had considered “all of the statutory sentencing factors, and particularly 18 U.S.C. § 3553(a)(6) . . . .”<sup>99</sup> One month later, Judge Presnell used the same logic to reduce a different illegal reentrant’s sentence in *United States v. Delgado*.<sup>100</sup>

In August 2005 the Northern District of Illinois issued the second opinion within the Seventh Circuit to find that sentencing disparities created by fast-track programs were unwarranted: *United States v. Medrano-Duran*.<sup>101</sup> This Seventh Circuit trend soon came to an end, though, with an ambiguous ruling that may bar the consideration of fast-track disparities as grounds for a sentence reduction.<sup>102</sup>

95. *Ramirez-Ramirez*, 365 F. Supp. 2d at 732 (citing *Galvez-Barrios*, 355 F. Supp. 2d at 962; *Bonnet-Grullon*, 53 F. Supp. 2d at 435) (emphasis added). The court cited extensively from statistics published by the Federal Justice Statistics Resource Center and the United States Sentencing Commission as proof that significant sentencing disparities exist among illegal reentry defendants. See *Ramirez-Ramirez*, 365 F. Supp. 2d at 731–32.

96. See *United States v. Perez-Pina*, 453 F.3d 236, 242–44 (4th Cir. 2006). See also *infra* notes 121–22 and accompanying text.

97. A PACER search reveals that the Government withdrew its notice of appeal on June 9, 2005.

98. *United States v. Miranda-Garcia*, No. 6:05-CR-202-ORL-31DAB, 2006 WL 1208013 (M.D. Fla. May 4, 2006). After noting the sentencing disparities created by fast-track programs, Judge Presnell justified his decision on the grounds that he had considered “all of the statutory sentencing factors, and particularly 18 U.S.C. § 3553(a)(6) . . . .” *Id.* at \*2. According to the PACER docket report, the United States originally noticed appeal of Miranda-Garcia’s sentence on June 2, 2006, but the court of appeals dismissed the appeal at the request of the government on July 24, 2006. Miranda-Garcia’s reduced sentence will be allowed to stand.

99. *Id.* at \*2.

100. No. 6:05-cr-30-Orl-31KRS (M.D. Fla. June 7, 2005), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/presnell\\_sentencing\\_opinion\\_us\\_v.%20Delgado.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/presnell_sentencing_opinion_us_v.%20Delgado.pdf). The court’s Memorandum Sentencing Opinion indicates that two other judges in the Middle District of Florida had previously ordered similar variances: *United States v. Villalobos*, No. 6:04-CR-206-Orl-28JGG (M.D. Fla. Apr. 18, 2005); *United States v. Maldonado-Sanchez*, No. 8:03-CR-371-T-30TGW (M.D. Fla. Jan. 30, 2004). *Delgado*, 6:05-CR-30-Orl-31KRS at 4.

101. 386 F. Supp. 2d 943, 948 (N.D.Ill. 2005) (“Reduction of a sentence for a defendant in a non-fast track district tends to reduce disparity when viewed on a national level.”). See also *supra* notes 1–7 and accompanying text; *Galvez-Barrios*, 355 F. Supp. 2d at 963; *supra* notes 84–92 and accompanying text.

102. See *Galicía-Cardenas*, 443 F.3d at 555; *infra* note 123 and accompanying text. A PACER search reveals that, despite the Seventh Circuit’s judgment in *Galicía-Cardenas*, no appeal has been noticed by the government in the *Medrano-Duran* case. It appears the sentence will stand. *Id.*

Finally, Judge Sweet, in the Southern District of New York, granted two separate variances in late 2005 on the grounds that sentencing disparities based on geography are unwarranted under the definition of 18 U.S.C. § 3553(a)(6).<sup>103</sup> In both cases, Judge Sweet attempted to bring the defendants' sentences in line with those of illegal reentry defendants prosecuted in fast-track districts by instituting a four-point offense-level reduction.<sup>104</sup>

But not all courts have been willing to consider fast-track disparities in a different light post-*Booker*. In *United States v. Perez-Chavez*, the Central District of Utah resurrected the pre-*Booker* rationale for rejecting sentencing disparities as grounds for a more lenient sentence.<sup>105</sup> Treating the Tenth Circuit's opinion in *United States v. Armenta-Castro*<sup>106</sup> as controlling law, the *Perez-Chavez* court held that Congress had sanctioned sentencing disparities when it ordered the creation of official fast-track guidelines in the PROTECT Act of 2003.<sup>107</sup> The court also extended the Tenth Circuit's holding that challenges to the U.S. Attorneys' legitimate use of prosecutorial discretion are better directed to the executive branch than to the judiciary.<sup>108</sup>

103. See *United States v. Linval*, No. 05 CR 345(RWS), 2005 WL 3215155 (S.D.N.Y. Nov. 23, 2005); *United States v. Santos*, 406 F. Supp. 2d 320 (S.D.N.Y. 2005). Both opinions use nearly identical language and were issued within three weeks of each other. *Id.* The Second Circuit has not definitively ruled on whether fast-track sentencing disparities are proper grounds for reducing an illegal reentry defendant's sentence, so Judge Sweet's opinions appear to be good law. See *United States v. Urena*, 173 F. App'x 72, 73 n.2 (2d Cir. 2006); *infra* note 114 and accompanying text.

104. *Linval*, 2005 WL 3215155 at \*7; *Santos*, 406 F. Supp. 2d at 329.

105. 422 F. Supp. 2d 255 (D. Utah 2005). *Perez-Chavez*'s wife had illegally reentered the United States in order to receive necessary medical care while she was pregnant. *Id.* at 1257. After their child was born prematurely and the defendant's father-in-law became terminally ill, *Perez-Chavez* followed his wife and also illegally reentered the United States. *Id.* at 1257–58.

106. 227 F.3d 1255 (10th Cir. 2000). See *supra* notes 53–56 and accompanying text.

107. *Perez-Chavez*, 422 F. Supp. 2d at 1263 (“Congress has concluded that advantages stemming from fast-track programs outweigh their disadvantages, and that any disparity that results from fast-track programs is not ‘unwarranted.’ . . . If Congress is willing to accept that disparity, so must this court.”). See *supra* note 59 (setting forth the text of the PROTECT Act authorizing fast-track programs).

108. *Perez-Chavez*, 422 F. Supp. 2d at 1264 (“Criminal prosecution is the ‘special province’ of the Executive, stemming from the President’s constitutional responsibility to ‘take care that the Laws be faithfully executed.’”) (citations omitted). The court went on to grant *Perez-Chavez*'s motion for a variance “due to extraordinary family circumstances” and sentenced him to only eight months of imprisonment. *Id.* at 1269.

One judge in the Southern District of New York also refused to vary from the guidelines, but only because the particular defendant's conduct did not warrant any special leniency.<sup>109</sup> The court recognized that sentencing disparities exist and reserved the right to grant a reduction if an appropriate case arose.<sup>110</sup> No other district courts appear to have addressed the issue of whether fast-track disparities can justify sentence reductions for certain illegal reentrants.

#### *F. Post-Booker Fast-Track Litigation: Appellate Courts*

The most significant developments in the fast-track sentencing disparity debate have emerged from the appellate courts. As of August 2006 all but four of the circuits have made some attempt to resolve whether fast-track disparities warrant lower sentences.<sup>111</sup> Only the D.C. Circuit and the Third Circuit remain silent—perhaps a testament to those circuits' low volume of illegal reentry cases.<sup>112</sup> The First Circuit has repeatedly been faced with the question of whether fast-track sentencing disparities warrant variance from the Guidelines, but each time the court has avoided resolving the issue by ruling against the defendant on other

109. See *United States v. Duran*, 399 F. Supp. 2d 543, 549 (S.D.N.Y. 2005).

Some courts have found downward adjustments warranted in illegal reentry cases where the defendant did not commit any further serious criminal offenses after illegally reentering the United States, regularly maintained gainful employment, or supported for substantial periods of time households of family members who were citizens or legal residents. Duran's conduct after reentry, however, does not provide a basis for a downward adjustment to his sentence on any of these grounds. After illegally reentering the United States, Duran was convicted of a drug sale—the same offense for which he was convicted prior to his deportation. In fact, Duran was convicted of six separate offenses related to drug sales or possession prior to his deportation.

*Id.* (citations omitted).

110. *Id.* at 548.

[T]he Court is mindful, as suggested above, of the reality that until these issues are ultimately resolved by higher courts, sentencing disparities are developing within the district in these cases among the judges who consider, at some point and in some measure, the fast-track and double-counting factors and those who do not, and that conceivably those differences may provide some grounds for adjustment under this criterion pursuant to 18 U.S.C. § *Id.* 3553(a).

*Id.*

111. See *infra* notes 116–23 and accompanying text.

112. District courts in the Third Circuit, which are comprised of the districts of Pennsylvania, New Jersey, and Delaware, together handled only 158 criminal immigration cases in 2005, and immigration offenses constituted only six percent of the total criminal caseload throughout the Circuit. See Federal Court Management Statistics 2005 District Courts, available at <http://www.uscourts.gov/fcmstat/index.html> (click on "District Courts" under 2005; then choose the name of the district in the drop-down menu and click the "Generate" button). No district in the Third Circuit operates a fast-track program. See *supra* note 10.

grounds.<sup>113</sup> Similarly, in an unpublished opinion, the Second Circuit has acknowledged that the issue is ripe for resolution, but has thus far declined to establish any guiding principles.<sup>114</sup>

The remaining circuit court opinions fall into three categories. First, there are the circuits that believe fast-track sentencing disparities are but one of many factors to be considered at sentencing, and that the balance of those factors may or may not create an imperative to vary downwards from the Guidelines.<sup>115</sup> Because each case is different, no blanket rule can be made regarding variances based on fast-track disparities—sometimes such a variance will be reasonable and other times it will not. The Tenth Circuit was the first to articulate this principle in *United States v. Morales-Chaires*, decided in December 2005.<sup>116</sup> By July 2006 both the Sixth

113. See *United States v. Melendez-Torres*, 420 F.3d 45 (1st Cir. 2005). Rejecting defendant's equal protection claim and ignoring the other implications of fast-track disparities, the court held that "the U.S. Attorney General and the U.S. Attorney for the District of Maine are in the best position to evaluate whether the local conditions in Maine warrant such a program[.]" and offered several reasons why a district may in fact choose *not* to implement a fast-track program. *Id.* at 53. "For example, they may find that the absence of the program could permit swifter adjudication with corresponding benefits to aliens, or that [they] could achieve greater deterrence through harsher sentences." *Id.*

*United States v. Martinez-Flores*, 428 F.3d 22 (1st Cir. 2005). The Court first dismissed a creative nondelegation argument raised by the defendant: "[h]e argues that by virtue of the PROTECT Act provision, Congress delegated excessive legislative power to the Attorney General to decide when districts may install fast-track programs and when they may not." *Id.* at 26. The court then examined the district court's sentence for plain error and found none. *Id.* at 30. At the end of the opinion, the court briefly discusses fast-track sentencing disparities in a footnote:

It is arguable that 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. . . . Because we resolve the question in this case on *Booker* plain-error grounds, we need not reach that or any other issue of reasonableness.

*Id.* at 30 n.3.

*United States v. Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) ("In any event, the district court ruled that the defendant had not furnished a factual basis for assessing the extent of the disparities or provided a reason why to take them into account. . . . In declining to alter the sentence on this ground, the district court did not act unreasonably.").

114. See *Urena*, 173 F. App'x 72, 73 n.2 ("While this is certainly an intriguing question ripe for resolution by this Court, we need not reach this particular issue here, because even assuming the district court should have considered sentencing disparities created by the use of fast-track programs, Urena's circumstances in this case, including his criminal history, more than offset any alleged fast-track disparities.").

115. See *infra* notes 116–17 and accompanying text.

116. 430 F.3d 1124 (10th Cir. 2005).

We conclude that, in this particular case, we need not resolve whether sentencing disparities caused by the existence of fast-track programs in some jurisdictions are or are not, or may be in certain circumstances, considered unwarranted under § 3553(a)(6). Section 3553(a)(6)'s directive to sentencing courts to avoid "unwarranted sentencing disparities among defendant[s] with similar records who have been found guilty of similar conduct" is *but one of several factors* for a court to consider in determining a *reasonable* sentence.

*Id.* at 1131 (emphasis added).

Circuit and the Eleventh Circuit had adopted this approach,<sup>117</sup> holding that courts are not *required* to reduce sentences based on fast-track disparities, but that such a departure could be appropriate in the right situation.

The second approach focuses on the definition of “unwarranted sentenc[ing] disparities” in 18 U.S.C. § 3553(a)(6).<sup>118</sup> Beginning with the Eighth Circuit in February 2006,<sup>119</sup> three appellate courts, including the

The Tenth Circuit later articulated this same rationale in ruling against defendants in the cases *United States v. Gomez-Castillo*, No. 05-4139, 2006 WL 1166119, slip op. at \*5 (10th Cir. May 3, 2006) (“Consistent with our decision in *Morales-Chaires*, the court found that those disparities did not trump the remaining § 3553(a) sentencing factors; rather, disparities are a factor, to be considered along with the remaining § 3553(a) factors.”); *United States v. Flores-Perez*, No. 05-4182, 2006 WL 1389116, slip op. at \*2 (10th Cir. May 18, 2006); *United States v. Salazar-Alpizar*, No. 05-1368, 2006 WL 1376870, slip op. at \*5 (10th Cir. May 19, 2006).

117. *See United States v. Castro*, 455 F.3d 1249 (11th Cir. 2006). “Section 3553(a) enumerates several factors that must be considered to determine a reasonable sentence, and the ‘need to avoid unwarranted sentencing disparities,’ 18 U.S.C. § 3553(a)(6), is one of them.” *Id.* at 1252.

*See also United States v. Hernandez-Fierros*, 453 F.3d 309 (6th Cir. 2006). “The rationale of this court’s sister circuits is persuasive. Under 18 U.S.C. § 3553(a), the need to avoid unwarranted sentencing disparity is only one of the factors that a district court should consider in determining an appropriate sentence.” *Id.* at 313. The Sixth Circuit had earlier issued an unpublished opinion that seemed to take a more hard-line stance against sentence reductions based on fast-track disparities, but the court appears to abandon that line of thought in the *Hernandez-Fierros* opinion. *See United States v. Hernandez-Cervantes*, 161 F. App’x 508 (6th Cir. 2005).

118. *See supra* note 89.

119. *See United States v. Sebastian*, 436 F.3d 913, 916 (8th Cir. 2006). The Eighth Circuit quickly used this opinion to dispose of a slew of other illegal reentry appeals premised on failure to consider fast-track sentencing disparities. *See, e.g., United States v. Vergara-Viernes*, 175 F. App’x 100, 101 (8th Cir. 2006); *United States v. Vasquez-Cardona*, 175 F. App’x 105, 106 (8th Cir. 2006); *United States v. Cabrera-Villegas*, 170 F. App’x 990, 992 (8th Cir. 2006); *United States v. Silva*, No. 05-3076, 2006 WL 2075652, \*1 (8th Cir. July 27, 2006); *United States v. Gonzalez-Gonzalez*, No. 05-3575, 2006 WL 2241605, \*1 (8th Cir. Aug. 7, 2006).

*See also United States v. Marcial-Santiago*, 447 F.3d 715 (9th Cir. 2006) “In light of Congress’s explicit authorization of fast-track programs in the PROTECT Act, we cannot say that the disparity between Appellants’ sentences and the sentences imposed on similarly-situated defendants in fast-track district is ‘unwarranted’ within the meaning of § 3553(a)(6).” *Id.* at 718. Like the Eighth Circuit, the Ninth Circuit immediately used the *Marcial-Santiago* opinion to dispose of a large number of similar appeals waiting in the pipeline. *See, e.g., United States v. Reyes-Osorto*, No. 05-30461, 2006 WL 1666500 (9th Cir. June 9, 2006); *United States v. Martinez-Huertas*, No. 05-30462, 2006 WL 1876867 (9th Cir. June 29, 2006); *United States v. Castro-Muro*, No. 05-30075, 2006 WL 2063063 (9th Cir. July 26, 2006); *United States v. Cruz-Lemus*, No. 05-50166, 2006 WL 2087516 (9th Cir. July 27, 2006); *United States v. Martinez-De Loza*, No. 05-50246, 2006 WL 2076704 (9th Cir. July 27, 2006); *United States v. Maldonado*, No. 05-10227, 2006 WL 2085401 (9th Cir. July 27, 2006); *United States v. Rondan-Villa*, No. 05-10309, 2006 WL 2136148 (9th Cir. July 28, 2006); *United States v. Hernandez-Toscano*, No. 05-10228, 2006 WL 2136152 (9th Cir. July 28, 2006); *United States v. Ramos-Contreras*, No. 05-30065, 2006 WL 2099778 (9th Cir. July 28, 2006).

*See also United States v. Aguirre-Villa*, No. 05-50978, 2006 WL 2349222 (5th Cir. Aug. 15, 2006).

We agree with the Eighth Circuit’s reasoning in *Sebastian* that to require [a] district court to vary from the advisory guidelines based solely on the existence of early disposition programs

Fifth and Ninth Circuits, have now adopted the stance that because Congress has explicitly approved fast-track programs, the resulting disparities simply cannot be “unwarranted.”<sup>120</sup> Although these circuits have rejected the notion that defendants have an absolute right to receive lower sentences, they have implicitly left the other side of the issue—whether a reduced sentence premised on fast-track disparities could ever be justified—open for debate.

The third approach, adopted by only two circuits, goes one step further and deems the disparities caused by fast-track to be impermissible grounds for reducing an illegal reentry defendant’s sentence. The arguments supporting this approach are exhaustively detailed by the Fourth Circuit in *United States v. Perez-Pena*.<sup>121</sup> Ultimately, the justification for prohibiting sentence reductions boils down to this: “[T]o sentence defendants who have not been offered plea bargains as if they had been offered and had accepted plea bargains would effectively nullify the Government’s discretion to determine which defendants it wishes to receive the benefit of a bargain.”<sup>122</sup> The other appellate court following this hard-line stance against sentence reductions is the Seventh Circuit, although the extent of its prohibition is unclear.<sup>123</sup>

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in other districts would conflict with the decision of Congress to limit the availability of such sentence reductions to select geographical areas . . . .

*Id.* at \*2.

120. The argument rests on the theory that “[t]he command that courts should consider the need to avoid ‘unwarranted sentence disparities,’ . . . emanates from a statute, and it is thus within the province of the policymaking branches of government to determine that certain disparities are warranted, and thus need not be avoided.” *Sebastian*, 436 F.3d at 916. The circuits can therefore dismiss defendants’ claims that courts must grant a variance based on “unwarranted sentence disparities,” because Congress has deemed fast-track disparities “warranted.” *Id.*

121. 453 F.3d 236 (4th Cir. 2006).

122. *Id.* at 243.

123. See *Galicia-Cardenas*, 443 F.3d 553, 555 (7th Cir. 2006) (quoting *United States v. Martinez-Martinez*, 442 F.3d 539, 542 (7th Cir. 2006)).

“Given Congress’ explicit recognition that fast-track procedures would cause discrepancies, we cannot say that a sentence is unreasonable simply because it was imposed in a district that does not employ an early disposition program.” By the same logic, we cannot say that a sentence imposed after a downward departure is by itself reasonable because the district does not have a fast-track program.

*Id.* at 555.

*But Cf. Martinez-Martinez*, 442 F.3d at 543 (recognizing that some courts have reduced sentences and declining to condemn the practice as unreasonable). “That some courts have chosen to avoid disparity does not mean that all district courts are compelled to adjust a sentence downward from the advisory guidelines range in order for that sentence to be reasonable.” *Id.*

See also *United States v. Salazar-Hernandez*, 431 F. Supp. 2d 931 (E.D.Wis. 2006).

[I]n [*Galicia-Cardenas*], the Seventh Circuit vacated a sentence based on fast-track disparity and remanded for re-sentencing “without a credit for Wisconsin’s lack of a fast-track

With the appellate courts split on whether fast-track disparities in illegal reentry cases can justify downward variance from the Guidelines, the issue is ripe for resolution.

### III. ANALYSIS

The two bodies of case law on the fast-track debate inhabit completely separate spheres of analysis. On the one hand, prosecutorial discretion and fast-track programs are perfectly constitutional and Congress apparently found no problem in 2003 with the sentencing disparities resulting from such programs.<sup>124</sup> On the other hand, Congress and the Supreme Court have (more recently) explicitly directed district judges to consider disparities when sentencing federal defendants.<sup>125</sup> How are judges to reconcile these competing interests? At present, it appears courts are avoiding that issue entirely by focusing on only one set of arguments at a time.<sup>126</sup> Before a solution can be reached that promotes *both* goals (sentencing uniformity and the protection of legislative and executive powers), a more comprehensive discussion of the arguments for and against fast-track programs is required.

program.” The court did not explain its decision, merely citing a case decided the day before which held that district courts are not *required* to account for this disparity.

*Id.* at 936.

124. *See, e.g., Perez-Chavez*, 422 F. Supp. 2d 1255; *Melendez-Torres*, 420 F.3d 45; *Morales-Chaires*, 430 F.3d 1124.

125. *See, e.g., Galvez-Barrios*, 355 F. Supp. 2d 958; *Ramirez-Ramirez*, 365 F. Supp. 2d 728; *Delgado*, No. 6:05-cr-30-Orl-31KRS; *Medrano-Duran*, 386 F. Supp. 2d 943; and *Peralta-Espinoza*, 383 F. Supp. 2d 1107. Congress ordered courts to reduce disparities when it passed the Federal Sentencing Act, particularly 18 U.S.C. § 3553(a)(6). The Supreme Court ordered courts to reduce disparities in its opinion in *United States v. Booker*.

126. *See, e.g., Galvez-Barrios*, 355 F. Supp. 2d at 963–64 (noting that sentencing disparities are troubling and using 18 U.S.C. § 3553(a) as justification for reducing defendant’s sentence below the advisory Guidelines range); *Ramirez-Ramirez*, 365 F. Supp. 2d at 731–32 (finding that defendant’s sentence must be reduced to “avoid unwarranted sentencing disparities” under 18 U.S.C. § 3553(a)); *Perez-Chavez*, 422 F. Supp. 2d at 1260–70 (refusing to consider § 3553(a) factors because *Perez-Chavez*’s case was not “unusual,” and holding both that the executive branch controls prosecutorial discretion and that Congress has implicitly sanctioned fast-track disparities through the PROTECT Act); *Melendez-Torres*, 420 F.3d at 53 (dismissing the fast-track disparity argument by stating that the executive branch is best suited to decide the issue); *Morales-Chaires*, 430 F.3d at 1131 (upholding the district court’s refusal to reduce defendant’s sentence, on the grounds that unwarranted sentencing disparities are “but one of several factors for a court to consider in determining a reasonable sentence”); *Sebastian*, 436 F.3d at 916 (holding that sentencing disparities created by fast-track programs cannot be unwarranted because Congress recognized their potential to create disparities and still approved the programs, but not going so far as to prohibit fast-track disparities as grounds for a lower sentence); and *Perez-Pena*, 453 F.3d at 242–43 (reversing a district court’s decision to reduce defendant’s sentence on fast-track disparity grounds, and prohibiting Fourth Circuit courts from granting reductions in the future because it would violate separation of powers).

Perhaps the most troubling aspect of the fast-track debate is the way in which both sides can use the “disparity” argument to their advantage.<sup>127</sup> From the defense perspective, fast-track policies create unwarranted disparities by giving lower sentences to illegal reentry defendants arrested in districts with early disposition programs.<sup>128</sup> From the government’s perspective, fast-track policies actually reduce disparities by increasing the number of illegal reentry prosecutions.<sup>129</sup> Fast-track policies thus narrow the gap between those defendants who are prosecuted and those who are not (specifically, those who are not prosecuted because of scarce resources).<sup>130</sup> Courts have presented yet a third angle on the disparity argument: giving certain defendants lower sentences (in an attempt to reduce disparities) may actually *increase* sentencing disparities, because other defendants nationwide will still be receiving a Guidelines range sentence.<sup>131</sup>

Furthermore, the language of 18 U.S.C. § 3553(a)(6) emphasizes that only *unwarranted* sentencing disparities should be grounds for a non-

127. *See, e.g., Galvez-Barrios*, 355 F. Supp. 2d at 963 (arguing that fast-tracking *creates* disparities between defendants sentenced in different districts). *But see, e.g., Perez-Chavez*, 422 F. Supp. 2d at 1262–63 (arguing that fast-tracking, because it increases overall prosecutions in overburdened districts, actually *reduces* disparities by reducing the number of persons who are not prosecuted at all as a result of limited resources, and that the gap between those who are prosecuted and those who go free is more troubling than the sentencing disparities created by fast-tracking).

128. *See supra* notes 16 and 36 and accompanying text. *See also Galvez-Barrios*, 355 F. Supp. 2d at 963 (“the amount of the fast-track sentence reduction can be substantial”). *See generally* Frank O. Bowman & et al., *Panel II: The Effects of Region, Circuit, Caseload and Prosecutorial Policies on Disparity*, 15 FED. SENT’G REP. 165, 166–67 (2003) (Professor Frank O. Bowman, arguing that local conditions are no excuse to deviate from the law; Assistant Federal Public Defender for the District of Arizona, Jon Sands, arguing that sentencing disparities created by local conditions are warranted).

129. *See, e.g., Alan D. Bersin, Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT’G REP. 254, 256 (1996) (reporting that, directly following the Southern District of California’s adoption of a fast-track program in 1993, “the percentage of felony cases [as a percentage of all cases filed] rose to 55.2%, skyrocketing to 2,250 cases compared with 1,182 during the previous year.”).

130. *See, e.g., Perez-Chavez*, 422 F. Supp. 2d at 1262–64 (fast-track programs “may prevent the even greater disparity that occurs when an offender goes *unprosecuted* because of the lack of prosecutorial resources in a district with a large volume of immigration offenses.”)

131. *See, e.g., Banuelos-Rodriguez*, 173 F.3d at 746 (“A downward departure to correct sentencing disparity brings a defendant’s sentence more into line with his or her codefendant’s [or another similarly situated defendant’s] sentence, but places it out of line with sentences imposed on all similar offenders in other cases . . . . The greater uniformity trumps the lesser disparity”) (quoting *United States v. Mejia* 953 F.2d. 461 (9th Cir. 1991), as amended, Mar. 25, 1992).

*See also generally Duran*, 399 F. Supp. 2d 543 (refusing to grant a downward variance on other grounds, but discussing the division between judges in the Southern District of New York on how fast-track disparities should be treated, and concluding that, so long as the issue remains unresolved, the disparities will only become more pronounced).



Guidelines sentence.<sup>132</sup> The determination of what kinds of disparities are in fact “unwarranted” may be more normative than the case law suggests. The Circuit Courts have been quick to point out that Congress, in enacting the PROTECT Act, implicitly approved such disparities by allowing only certain districts to qualify for fast-track programs.<sup>133</sup> The implication is weak, however, when one considers that the Sentencing Reform Act (which contains 18 U.S.C. § 3553(a)(6)) was also an act of Congress, and (arguably) a more specific one on the issue of sentencing disparities.<sup>134</sup> Ultimately, the determination of whether fast-track disparities are “unwarranted” or “unreasonable” seems to depend on each judge’s personal sense of justice and fair play—hardly a uniform standard.

Another important consideration is the fact that numerous courts cite deference to prosecutorial discretion as a reason for avoiding the fast-track issue.<sup>135</sup> One court warned, “for the Court to depart on this basis is in essence a violation of the doctrine of separation of powers,” because plea bargaining “is the province of the executive branch.”<sup>136</sup> These courts seem to believe that, if they were to find fast-track sentencing disparities “unwarranted,” local prosecutors would then be essentially court-ordered to implement a fast-track program.<sup>137</sup> Any solution to fast-track sentencing disparities thus must take into account the power of the executive branch (specifically, the United States Attorney General) to set nationwide policy governing U.S. Attorneys’ charge-bargaining behavior.

Yet another argument that can be used by both sides of the fast-track debate is the impact such programs have on illegal reentry deterrence. Proponents of fast-track programs argue that early disposition programs

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132. 18 U.S.C. § 3553(a) (“The court, in determining the particular sentence to be imposed, shall consider— . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . .”).

133. See *supra* note 59.

134. See *supra* note 132. See also *Medrano-Duran*, 386 F. Supp. 2d at 946 (“The fast track districts that rely on charge-bargaining use methodologies that permit far greater sentence reductions than contemplated by Congress’ directive in the PROTECT Act and the Sentencing Commission’s policy statement in § 5K3.1.”).

135. See *supra* note 126 (listing just a few of the opinions that have cited deference to prosecutorial discretion as a reason to reject defendant’s request for a lower sentence).

136. *Morales-Chaires*, 430 F.3d at 1129 (citations omitted). A full discussion of separation of powers and the impact that judicially imposed sentence reductions might have on the province of the executive branch is beyond the scope of this Note.

137. This result does not appear to have occurred in any of the districts where courts have found disparities to be unwarranted. Neither the Eastern District of Wisconsin (see *Galvez-Barrios*, 355 F. Supp. 2d 958), nor the Eastern District of Virginia (see *Ramirez-Ramirez*, 365 F. Supp. 3d 728), nor the Middle District of Florida (see *Delgado*, No. 6:05-cr-30-ORL-31KRS) nor the Northern District of Illinois (see *Medrano-Duran*, 386 F. Supp. 2d 943) have made moves to implement fast-track programs in the wake of decisions rendering sentencing disparities “unwarranted.”

*improve* deterrence by increasing the likelihood that illegal reentry offenders will be prosecuted.<sup>138</sup> Opponents, however, could easily claim the reverse effect: faced with shorter sentences if apprehended, more aliens might choose to risk illegal reentry than before.<sup>139</sup> If, as reports suggest, the number of illegal immigrants in districts with fast-track programs continues to climb, opponents of fast-track may have the better of these two arguments.<sup>140</sup> However, the growth in illegal immigration is a complex issue, and it seems too simple to attribute the increased flow of illegal reentrants to fast-track policies alone.

Finally, some observers may find fast-track programs disturbing because they present an abbreviated form of justice.<sup>141</sup> Defendants who plead guilty are receiving shorter sentences, but they are also giving up their right to file pretrial motions, to have an accurate pre-sentence report

138. See *Perez-Chavez*, 422 F. Supp. 2d at 1262 (“Fast-track programs arguably serve the goal of deterrence by expediting the processing of cases, thereby allowing prosecutors to bring more charges against more immigration offenders than would otherwise be possible.”).

139. Fast-track programs may create particularly perverse incentives by attracting illegal reentrants to the very districts where prosecutors and local resources are already overwhelmed by large illegal immigrant populations.

140. See generally Steven A. Camarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005* (2005), <http://www.cis.org/articles/2005/back1405.pdf>. “Between January 2000 and March 2005, 7.9 million new immigrants (legal and illegal) settled in the country, making it the highest five-year period of immigration in American history.” *Id.* at 1. While it is unlikely that the increase in illegal immigration is due entirely to first-time entrants, the percentage of this increase that is due to repeat entrants is not known at this time. “States with the largest increase in immigrants are California, Texas, Georgia, New Jersey, Maryland, North Carolina, Pennsylvania, Washington, Virginia, Arizona, Tennessee, Minnesota, Nevada, New Mexico, South Carolina, and Mississippi.” *Id.* at 2.

On the other hand, the persistent increase in illegal immigration might justify the ongoing use of fast-track programs in order to reduce caseloads and preserve prosecutorial resources in the districts listed above. See *supra* text accompanying note 11.

141. Professor Stephen Legomsky expressed trepidation that a nationwide fast-track program would be trading justice for efficiency on a grand scale. Interview with Stephen H. Legomsky, Charles F. Nagel Professor of International and Comparative Law, Washington University in St. Louis School of Law, in St. Louis, Mo. (Jan. 18, 2006). A full discussion of the concept of “abbreviated justice” and its implications for illegal reentrants is beyond the scope of this Note.

“Trading justice for efficiency” does provide illegal reentry defendants with one significant benefit: rather than waiting months to enter a guilty plea through the normal procedures, fast-track programs expedite the entire process and allow defendants to begin serving their sentences immediately. For example, after the Southern District of California implemented fast-track, the average length of time from filing to disposition in a criminal felony case (of which immigration offenses made up sixty-five percent in 2004) dropped from 4 months in 2001 to 3.3 months in 2004. See Federal Court Management Statistics 2004 District Courts, <http://www.uscourts.gov/cgi-bin/cmsd2004.pl> (choose “California Southern” in the drop-down menu; then click “Generate” button). A similar trend can be seen in New Mexico, where the time period from filing to disposition dropped from 4.5 months to 3.7 months after the district implemented a fast-track program (in New Mexico, immigration offenses accounted for sixty percent of all criminal felony charges in 2004). See *id.* (choose “New Mexico” in the drop-down menu; then click “Generate” button).

prepared about them, and to appear before a jury of their peers and make a case for leniency or even innocence.<sup>142</sup> Perhaps the criminal justice system should not be circumvented in this way.<sup>143</sup> Early dispositions programs are especially troubling when one considers that the participants are illegal aliens, who are likely to have little familiarity with their rights in the American legal system and speak English as a second language or not at all.<sup>144</sup>

#### IV. PROPOSAL

Each branch of the United States Government possesses the ability to resolve fast-track disparities currently endured by illegal reentry defendants. Under the status quo, the solution is left to the judiciary. Defendants in non-fast-track districts must raise the “disparity as grounds for leniency” argument in each illegal reentry case. In those districts where a circuit court ruling has not barred the issue,<sup>145</sup> district judges are theoretically free to impose more lenient sentences whenever they find fast-track disparities to be “unwarranted” under 18 U.S.C. § 3553(a)(6). Parts II and III of this Note demonstrate that the judiciary-based solution is currently failing to resolve district-to-district sentencing disparities. Therefore, a legislative or executive solution is necessary.

The executive branch’s current policy (more specifically, the United States Attorney General’s current policy) is to officially approve any fast-track program that meets the criteria established by former Attorney General John Ashcroft’s 2003 memo.<sup>146</sup> The memo allows only those districts with unusually high illegal reentry caseloads to initiate early disposition proceedings.<sup>147</sup> If the Attorney General were to remove the requirements for implementing such a program (allowing all districts to qualify), greater uniformity could eventually be achieved as ordinary

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142. See *supra* text accompanying note 30.

143. See generally Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005) (discussing the shortfalls of plea bargaining as a method of obtaining justice).

144. As reported by the Federation for American Immigration Reform (FAIR), the 2000 Census revealed that “[m]ore than 10.5 million U.S. residents speak little or no English at home. Nearly one third of those people live in California, where 1 in 9 people over age five has limited proficiency in English.” [http://www.fairus.org/site/PageServer?pagename=research\\_researchb4ea](http://www.fairus.org/site/PageServer?pagename=research_researchb4ea).

145. The Tenth Circuit (*Morales-Chaires*, 430 F.3d 1124), and (arguably) the First Circuit (*Melendez-Torres*, 420 F.3d 45 and *Martinez-Flores*, 428 F.3d 22) have held that fast-track disparities are not grounds for a more lenient sentence than the Guidelines recommend. The issue appears to be undecided in the other ten circuits, however.

146. See *supra* notes 63–65 and accompanying text.

147. See *supra* note 64.

districts adopted fast-track programs of their own.<sup>148</sup> An even better solution would be for the Attorney General to *mandate* the creation of such programs in every district. The PROTECT Act does not prohibit such an action,<sup>149</sup> and the Attorney General certainly has the authority to set nationwide charge-bargaining practices.<sup>150</sup>

Despite the attractiveness of the executive branch solution, a third remedy is even more desirable. A major roadblock to judicial recognition of the fast-track argument was the apparent congressional approval of fast-track disparities under the PROTECT Act.<sup>151</sup> If Congress were to pass a law explicitly denouncing such disparities and directing the Attorney General to promulgate a nationwide fast-track program, most of the concerns raised in Part III of this Note would be alleviated.<sup>152</sup> Thus, the proposal I advance is a nationwide fast-track policy, explicitly sanctioned by Congress and with parameters set by the Attorney General.<sup>153</sup>

The controversy over whether fast-track policies reduce or exacerbate disparities would become moot if every federal district employed an early disposition program. From the defense perspective, the fate of illegal reentry defendants would no longer be determined by something as arbitrary as geography.<sup>154</sup> From the government perspective, a nationwide fast-track policy would allow more prosecutions, and would reduce the government's perceived disparity between those offenders who are punished and those who are not.<sup>155</sup>

148. If all or most districts implemented fast-track policies for illegal reentry offenders, the disparity between those sentenced in fast-track districts and those sentenced elsewhere would narrow. Unfortunately, it is impossible to know which districts would choose to adopt a fast-track policy and when they would eventually do so.

149. See *supra* notes 58–59.

150. See *supra* notes 60–62 and accompanying text.

151. See *supra* note 126.

152. Contrary to what some courts contend this would not be a major about-face for Congress. Congress was in fact so disturbed by sentencing disparities at the time of the PROTECT Act's passage that it ordered a comprehensive report from the United States Sentencing Commission on why such disparities exist. See generally U.S. SENTENCING COMM'N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (IN RESPONSE TO SECTION 401(M) OF PUB. LAW 108–21) (2003), reprinted in 16 FED. SENT'G REP. 137 (2003).

153. A nationwide fast-track policy would extend the following benefits throughout the country:

Given the explosion in the number of illegal reentry cases in certain districts, the lack of resources to handle and prosecute all of these cases, and the need to deter aliens from entering and reentering the United States, the fast-track programs provide a necessary and prudent means to achieve the criminal goals relating to punishment and deterrence of aliens charged with illegal reentry.

Government *Krukowski* Memo, *supra* note 10, at 22.

154. See *supra* note 48 and accompanying text.

155. See *supra* note 130. It is certainly still up for debate whether more prosecutions of illegal reentrants are a good thing.

The debate over whether fast-track disparities are “unwarranted” would also be rendered moot by a nationwide fast-track program. Congressional intent would no longer be in conflict with the factors listed in 18 U.S.C. § 3553(a), and courts would no longer be forced to choose between incompatible arguments.<sup>156</sup> Similarly, courts will no longer be faced with the Hobson’s choice of allowing fast-track disparity to continue, or unconstitutionally encroaching on the sphere of executive power.<sup>157</sup> If Congress directs the Attorney General to promulgate guidelines for a nationwide fast-track program, prosecutorial discretion is preserved.<sup>158</sup>

Unfortunately, a nationwide fast-track policy would not settle the debate about deterrence impacts. However, it may allow for better study on the subject. With only thirteen fast-track programs in place today, the effects such programs have on overall immigration policy could be hard for researchers to isolate. If the entire country were to implement early disposition programs for illegal reentry, the impact could be more easily observed.

Extending fast-track programs nationwide would also fail to alleviate concerns about fast-tracking as a form of “abbreviated justice.”<sup>159</sup> However, plea-bargaining is a highly entrenched element of the American justice system, and it seems unlikely that further entrenchment would have any additional impact.<sup>160</sup>

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156. See *supra* note 126 for a brief synopsis of cases choosing one of several incompatible arguments.

157. See *supra* notes 136 and accompanying text.

158. This assertion may at first blush sound contradictory. How can prosecutorial discretion be protected if Congress is ordering the Attorney General to enact a charge-bargaining policy? The answer lies in how the fast-track programs are administered. Rather than forcing prosecutors to offer fast-tracking to every illegal reentry defendant, the government remains free to extend the benefits of the program at their discretion.

However, although fast-track programs *are* discretionary in the manner described, in practice they have been utilized broadly and uniformly. See U.S. SENTENCING COMM’N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (IN RESPONSE TO SECTION 401(M) OF PUB. LAW 108–21) (2003), reprinted in 15 FED. SENT’G REP. 137, 139 (2003).

159. See *supra* note 141 and accompanying text.

160. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

While confronting a defendant with the risk of more severe punishment clearly may have a “discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable”—and permissible—“attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

*Id.* (citations omitted).

## V. CONCLUSION

Fast-track programs for illegal reentry offenders serve a valuable purpose in the thirteen federal districts where they have been implemented. Early disposition programs have made a noticeable impact both from the defendant's point of view (shorter sentences), and from the government's perspective (more prosecutions at a lower cost). Fast-track policies thus represent a middle ground between law-and-order interests and the rights of the accused. They should be promoted and protected, especially in a post-*Booker* world where the parties are no longer tethered to a mandatory Guideline scheme. Unfortunately, the sentencing disparities created by the currently employed fast-track programs are unwarranted, and may create perverse incentives for illegal reentrants. In order to both promote fast-track programs *and* reduce the unwarranted sentencing disparities created by them, a nationwide fast-track program should be sanctioned by Congress and promulgated by the Attorney General. This solution will restore sentencing uniformity to the crime of illegal reentry.

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