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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 31, 2012

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Department Policy on Early Disposition or "Fast-Track" Programs

I. INTRODUCTION

In the 1990s, United States Attorneys' Offices and the Department developed early disposition or "fast-track" programs as a matter of prosecutorial discretion to handle increasingly large numbers of criminal immigration cases arising along the southwestern border of the United States. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT Act"), Pub. L. No. 108-066, 117 Stat. 650, Apr. 30, 2003, harmonized these programs with the departure provisions of the federal Sentencing Guidelines. More specifically, the PROTECT Act directed the Sentencing Commission to promulgate a statement by October 27, 2003, authorizing downward sentence departures of no more than four levels as part of an early disposition program authorized by the Attorney General and the United States Attorney. *See* Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).[1]

This memorandum sets forth the revised policy and criteria for fast-track programs. It provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor does it place any limitations on otherwise lawful litigative prerogatives of the Department.

II. REVISED FAST-TRACK POLICIES

As stated above, fast-track programs originated in southwestern border districts with an exceptional volume of immigration cases. They are based on the premise that a defendant who promptly agrees to participate in such a program saves the government significant and scarce resources that can be used to prosecute other defendants, and that a defendant who receives a fast-track departure has demonstrated an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in the Sentencing Guidelines. In that context, these programs address a compelling, and otherwise potentially intractable, resource issue. Indeed, the need for fast-track programs has persisted and, in some districts, intensified.

[1] The requirement that a fast-track program be approved by the Attorney General can be satisfied by obtaining the approval of the Deputy Attorney General. *See* 28 U.S.C. § 510; 28 C.F.R. § 0.15(a).

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On September 22, 2003, then-Attorney General Ashcroft issued a memorandum setting forth the criteria to be used by United States Attorneys' offices (USAOs) seeking to establish fast-track programs.[2] Since this memorandum was issued, the legal and operational circumstances surrounding fast-track programs have changed. Fast-track programs are no longer limited to the southwestern border districts; rather, some, but not all, non-border districts have sought and received authorization to implement fast-track programs. The existence of these programs in some, but not all, districts has generated a concern that defendants are being treated differently depending on where in the United States they are charged and sentenced.

In addition, the Sentencing Guidelines are no longer mandatory,[3] and federal courts of appeals are divided on whether a sentencing court in a non-fast-track district may vary downwards from the Guidelines range to reflect disparities with defendants who are eligible to receive a fast-track sentencing discount.[4] Because of this circuit conflict, USAOs in non-fast-track districts routinely face motions for variances based on fast-track programs in other districts. Courts that grant such variances are left to impose sentences that introduce additional sentencing disparities.

In light of these circumstances, the Department conducted an internal review of authorized fast-track programs. After consultation with the United States Attorneys in both affected and non-affected districts, the Department is revising its fast-track policy and establishing uniform, baseline eligibility requirements for any defendant who qualifies for fast-track treatment, regardless of where that defendant is prosecuted. This outcome is consistent with the Department's position on the Sentencing Guidelines as a means to achieve reasonable sentencing uniformity, and with Attorney General Holder's memorandum on charging and sentencing, which states that persons who commit similar crimes and have similar culpability should, to the extent possible, be treated similarly.[5] This policy does not, however, alter the criteria for prosecutorial discretion on whether to charge a particular defendant, nor does it require prosecuting additional cases.

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[2] Memorandum from Attorney General John Ashcroft, *Department Principles for Implementing an Expedited Disposition or "Fast-Track" Prosecution Program in a District* (Sept. 22, 2003), *available at* http://10.173.2.12/jmd/lib/memo3.pdf.

[3] *United States v. Booker*, 543 U.S. 220 (2005).

[4] *Compare United States v. Gonzales-Zotelo*, 556 F.3d 736, 740-41 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 1235, 1238-39 (11th Cir. 2008); *United States v. Gomez-Herrera*, 523 F.3d 554, 559-64 (5th Cir. 2008) (holding that sentencing disparity resulting from fast-track programs is not "unwarranted") *with United States v. Lopez-Macias*, – F.3d –, 2011 WL 5310622 (10th Cir.); *United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011); *United States v. Reyes-Hernandez*, 624 F.3d 405, 417-18 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614F.3d 244, 249-50 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 149-56 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 226-31 (1st Cir. 2008) (holding that sentencing courts can consider the disparity created by fast-track programs).

[5] Memorandum from Attorney General Eric H. Holder, Jr., *Department Policy on Charging and Sentencing* (May 19, 2010). This memorandum notes that it does not "impact the guidance provided in the September 22, 2003 memorandum and elsewhere regarding 'fast-track' programs. In those districts where an approved 'fast-track' program has been established, charging decisions and disposition of charges must comply with the Department's requirements for that program." Pursuant to today's memorandum, the guidance provided in the September 22, 2003 memorandum regarding fast-track programs is superseded.

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III. NEW REQUIREMENTS GOVERNING UNITED STATES ATTORNEY IMPLEMENTATION OF ILLEGAL REENTRY FAST-TRACK PROGRAMS

Districts prosecuting felony illegal reentry cases (8 U.S.C. § 1326)—the largest category of cases authorized for fast-track treatment—shall implement an early disposition program in accordance with the following requirements and the exercise of prosecutorial discretion by the United States Attorney:

A. *Defendant Eligibility*. The United States Attorney retains the discretion to limit or deny a defendant's participation in a fast-track program based on—

(1) The defendant's prior violent felony convictions (including murder, kidnapping, voluntary manslaughter, forcible sex offenses, child-sex offenses, drug trafficking, firearms offenses, or convictions which otherwise reflect a history of serious violent crime);

(2) The defendant's number of prior deportations, prior convictions for illegal reentry under 8 U.S.C. § 1326, prior convictions for other immigration-related offenses, or prior participation in a fast-track program;

(3) If the defendant is part of an independent federal criminal investigation, or if he or she is under any form of court or correctional supervision; or

(4) With supervisory approval, circumstances at the time of the defendant's arrest or any other aggravating factors identified by the United States Attorney.

B. *Expedited Disposition*. Within 30 days from the defendant being taken into custody on federal criminal charges, absent exceptional circumstances such as the denial of adequate assistance of counsel or a substantial delay in necessary administrative procedures, the defendant must agree to enter into a plea agreement consistent with the requirements of Section C, below.

C. *Minimum Requirements for "Fast-Track" Plea Agreement*. The defendant must enter into a written plea agreement that includes at least the following items—

(1) The defendant agrees to a factual basis that accurately reflects his or her offense conduct and stipulates to the facts related to the prior conviction and removal;

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

(3) As determined by the United States Attorney after taking into account applicable law and local district court practice and policy, the defendant agrees to waive the right to argue for a variance under 18 U.S.C. § 3553(a), and to waive

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appeal and the opportunity to challenge his or her conviction under 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel; and

(4) The United States Attorney shall retain discretion to impose additional procedural requirements for fast-track plea agreements; specifically, the United States Attorney has discretion to require that the defendant agree to enter into a sentencing agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C), and/or to waive a full pre-sentence investigation as conditions of participation.

D. *Additional Provisions of a Plea Agreement*. If the above conditions are satisfied—including those imposed at the discretion of the United States Attorney as provided for in Section C(4)—the attorney for the Government shall move at sentencing pursuant to Sentencing Guidelines Section 5K3.1 for a downward departure from the adjusted base offense level found by the District Court (after application of the adjustment for acceptance of responsibility) as follows:

Four levels for all defendants, except those with a criminal history category VI or with at least one felony conviction for a serious violent offense. For the latter category, if the defendant is not excluded under Section A(1), the government may only offer a two-level departure, with supervisory approval and on a case-by-case basis after considering the interest of public safety.

Districts prosecuting felony illegal reentry cases should implement this new policy no later than by March 1, 2012.[6] This will provide any needed transition, especially for those districts without fast-track programs currently in place.

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

[6] In the interim, authorization for illegal reentry fast-track programs in districts which already have such programs in place is extended to March 1, 2012. Further, the Department has authorized fast-track programs for offenses other than felony illegal reentry. These other programs will continue to be authorized until March 1, 2012. This extension will allow for a substantive review of these programs in due course.