

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

*

SENTENCING MEMORANDUM

07-CR-385

*

Hon. David N. Hurd

MARIO ANTONIO LANDAVERDE

BACKGROUND

Mario Antonio Landaverde is scheduled for sentencing following a plea of guilty on October 30, 2007 to a single count Indictment charging the defendant with illegal entry following his deportation after conviction for a felony, in violation of 8 U.S.C. Section 1326 (a) and (b).

COURT'S SENTENCING POWER POST BOOKER/FANFAN

This court has an unprecedented level of discretion to use when determining an appropriate sentence for Mr. Landaverde. The case law directs the court to give renewed significance to the factors found under 18 U.S.C. 3553(a). The court is no longer bound by the Sentencing Guidelines or the policy statements presented in those guidelines. In the appropriate case, the court can look to the real conduct of an individual and carefully analyze all evidence and circumstances that should be considered, not only that evidence the guidelines call attention to.

I. **Other factors in 18 U.S.C. 3553 are of equal or greater significance than the Sentencing Guidelines.**

The remedial majority in Booker struck those portions of the Sentencing Reform Act that

made the application of the sentencing range, computed using the Sentencing Guidelines mandatory. In so doing, the Supreme Court rendered the Sentencing Guidelines advisory. In U.S. v. Crosby, 397 F.3d 103 (2nd Cir. 2004), the Second Circuit recognizes the increased significance of section 3553(a) factors.

and keeping in mind 18 U.S.C. 3553(a)(6) which sets forth the “the need to avoid unwarranted sentence disparities among defendant’s with similar records who have been found guilty of similar conduct” that “Prior to Booker/Fanfan the section 3553(a) requirement that the sentencing judge ‘consider’ all of the factors enumerated in that section had uncertain import because subsection 3553(b)(1) required judges to select a sentence within the applicable guideline range unless the statutory standard for departure was met. Now, with the mandatory duty to apply the guidelines excised, the duty imposed by section 3553(a) to “consider” numerous factors acquires renewed significance.” Crosby, 397 F.3d 103 (2nd Cir. 2004).

Post Booker, courts must treat the guidelines as just one of a number of sentencing factors, being mindful that the primary goal of the sentencing guidelines is, as set forth in 18 U.S.C. 3553(a)(6), to address “the need to avoid unwarranted sentence disparities among defendant’s with similar records who have been found guilty of similar conduct” . In light of recent case law developments, there remains no legal basis to give any more or less deference to the Sentencing Guidelines as just one factor in the overall analysis pursuant to 18 U.S.C. 3553(a). More importantly, the basic tenet of the guidelines as set forth in Section 3553(a) is that, “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”. (Emphasis added) Section 3553(a)(2) states that such purposes are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and

- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In addition to the Second Circuit, other courts have recognized the “renewed significance” of 3553(a) factors. Judge Adelman, in United States v. Ranum, 353 F. Supp. 2d 984, (E.D. Wis. 2005) with charges identical as those in the instant case, correctly states, “The guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the “heartland.” Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the Section 3553 (a) factors.” Supra at 987. Another words, as Judge Adelman states, “Booker is not an invitation to do business as usual.” Supra at 987. Judge Pratt, in United States v. Myers, 353 F. Supp. 1026 (S.D. Iowa 2005), adopts Judge Adelman’s view because “[t]o treat the guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the guideline range would be presumptively unreasonable in the absence of clearly identified factors . . . [and] making the Guidelines in effect, still mandatory, ” viewing Booker, “as an invitation, not to unmoored decision making, but to the type of careful analysis of the evidence that should be considered when depriving a person of his or her liberty.” Supra, at 1028.

In the past, the court may have been limited in applying a departure based on the policy statements under the guidelines. Under the new advisory system, a “judge who has considered the policy statements concerning departures, need not definitively resolve such questions if the judge has fairly decided to impose a non-guidelines sentence.” U.S. v. Crosby, supra. The court, in the appropriate case, can and should now consider factors the guidelines previously

discouraged. (U.S.S.G. §5H et seq.) Even if those factors are not present to the exceptional standards once required by the guidelines, the court now must consider a lower sentence if appropriately based on those factors. The court is no longer limited by the “zones” in the guidelines. If a sentence of time served is appropriate, regardless of the advisory guidelines, the court has the ability to fashion a sentence that recognizes the “real conduct” of an offense. This approach should not lead to inappropriate sentence disparity, rather, individual justice can be distributed in the appropriate case.

Recently the United States Supreme Court in United States v. Gall, 128 S.Ct. 586 (2007), has in effect given back to the federal judiciary the broad discretion they appropriately enjoyed before the enactment of the sentencing guidelines. In Gall, the defendant pleaded guilty to conspiracy to distribute the controlled substance “ecstasy”. The presentence report recommended a sentence of (30) to (37) months in prison and the Court sentenced the defendant to (3) years probation. Ultimately, the Supreme Court found that the sentenced was justified based on the Court’s application and analysis of the § 3553 (a) factors, and the Court rejected an appellate rule that requires “extraordinary” circumstances to justify a sentence outside the Guidelines range.

In the instant case, as in Gall, the application of the § 3553 (a) factors would justify the imposition of a less severe non-guideline sentence. The flood of letters on Mr. Landaverde’s behalf from family, friends, and counselors, uniformly praise him for his role as a husband, parent, and friend.

DEFENDANT HISTORY AND CHARACTERISTICS

_____Mario Antonio Landaverde, age 38, was born in the Cuscatlan, El Salvador. He has never known his father and his mother, age 72, still resides in Los Angeles. Mr. Landaverde has three brothers, all of whom also reside in Los Angeles. Mr. Landaverde was raised by his mother until age (10), at which time she moved to the United States. Mr. Landaverde then resided with his grandparents until he reunited with his mother in the United States in 1982 at age (13). It appears that Mr. Landaverde began associating with the wrong crowd after arriving in the United States. He began using drugs and alcohol at age (13) and within a few years he was charged with and served time primarily for car theft related offenses.

Mr. Landaverde was deported from the United States in August 1994. He met his wife, Claudia Menjivar in El Salvador in 1993 and they have been together ever since. Their son, Jose Robert Landaverde, was born in El Salvador in 1996 and, in 1998, Mr. Landaverde returned to Los Angeles with Claudia and their son Jose. Mr. Landaverde's daughter, Ashley Elizabeth, was born in the United States in 2002. Mr. Landaverde and Claudia were married in Los Angeles in 2003.

For the last several years, Mr. Landaverde's life has all been about family. In the late 1990's Mr. Landaverde turned over a new leaf and became a family man. He effectively put his criminal past behind him and concentrated on working to provide for his family and being the best father and husband he could be. The letters from family members and friends uniformly describe Mr. Landaverde as being hardworking and an excellent father, husband and friend. His wife, Claudia, describes in her letter what a good father and husband he has been and how he entered the United States to provide a better life for his children. His son, Jose, in his letter

attests to what a good person and father he is and how much he misses him. His mother, Nicolasa, attests to how much his daughter misses him and what a responsible and religious family man he has become. All of their letters refer to the fact that they were moving to Canada so he could find legal employment and they could all reside together peacefully and legally.

Consistent with Mr. Landaverde changing and dedicating his life to his wife and children, he was in the process of undergoing laser treatment to remove tattoos that were a vestige of his criminal past and associations. Mr. Landaverde is a perfect example of how people can make dramatic improvements in their lives for the better, especially when motivated by the necessity of caring and providing for a family that they love.

The several other letters from family friends and members of the church all attest to what a good father and husband Mr. Landaverde is as well as how active he had recently been in the community and the church. These letters speak volumes of how far Mr. Landaverde had come in changing his life and how committed he was to his wife and children.

EDUCATION AND EMPLOYMENT

Mr. Landaverde dropped out of school in the 10th grade. He wishes he never had dropped out of school and would like to go back. He wishes he knew then what he knows now about the importance of education in a persons life. Realizing this, Mr. Landaverde has striven as a parent to emphasize the importance of education and do his best to insure his children stay in school and receive a good education.

Mr. Landaverde was a hard worker. Although being an illegal resident in the United States made it more difficult to find employment, Mr. Landaverde has over the years worked at

several jobs. He off loaded tractor trailers in Los Angeles in 1998-1999, and then worked for Ralph's Supermarkets in Los Angeles from 1999 - 2002. (Counsel has viewed many pay stubs in Mr. Landaverde's immigration file verifying this employment.) While residing in El Salvador, Mr. Landaverde was generally employed working on a bus collecting fares. At the time of his arrest, Mr. Landaverde was relocating to Canada with hopes of finding lucrative employment.

NATURE AND CIRCUMSTANCES OF THE OFFENSE

Mr. Landaverde re-entered the United States after his deportation in March 2007 to be with his family and relocate with them to Canada so he could live and work without being "in hiding" as they were in the United States. When arrested, Mr. Landaverde was on a bus with his family in Malone, NY. It appears undisputed that their destination was Canada. Mr. Landaverde has indicated that under no circumstances will he ever again enter the United States without permission to do so.

CRIMINAL HISTORY CATEGORY

In computing the Criminal History Category, probation has scored three (3) criminal history points for the defendant's June 21, 1993 conviction in the state of California for which the defendant was sentenced to (16) months incarceration. This 1993 conviction is now almost (15) years old and within one year of being too old to be counted for criminal history purposes. Additionally, probation has also scored the defendant two (2) criminal history points for his August 31, 2006 conviction for illegal entry, an additional two (2) additional criminal history points for being on supervised release at the time of the instant offense and one (1) criminal

history point for committing the instant offense within two years of release from the Bureau of Prisons.

The end results is a sum total of five (5) criminal history points attributable to the August 31, 2006 conviction for which he received six (6) months incarceration and another three (3) points for a (15) year old conviction that dates back to 1993 when Mr. Landaverde was 23 years old. (It should be noted as gleaned from immigration documents, Mr. Landaverde was arrested for illegal entry in August 2006 not because of new criminal conduct but rather because he had filed an Application for Temporary Protected Status in February 2005 in an attempt to gain legal status and, thereby, brought himself to the attention of the immigration authorities.) As a result, Mr. Landaverde is scored eight (8) criminal history points and is a Criminal History Category IV.

The United States Sentencing Commission, Guidelines Manual, provides in pertinent part: "There may be cases where the court concludes that the defendant's criminal history category significantly over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes...". It is in cases such as these described where the court should consider a downward departure in the criminal history category pursuant to Sentencing Guidelines Section 4A1.3, and the case law is clear that the courts have the discretion to grant a downward departure when the criminal history over-represents the seriousness of the defendant's criminal history. United States v. Beckham, 968 F.2d 47 (D.C. Cir. 1989), United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991).

The seriousness of Mr. Landaverde's criminal history and the likelihood that he will commit further crimes is significantly over-represented by a category of IV. To better underscore this point, a hypothetical person sentenced under the federal sentencing guidelines who has

served two indeterminate state terms for unrelated violent crimes such as homicide, robbery or burglary would accumulate only (6) points, thereby placing this person in a lower Criminal History Category than the defendant. Surely the defendant's record is far less serious than that of a recidivist robber or burglar, and the danger at this stage of his life that he poses to society upon release is nothing compared to that of such the violence prone recidivist. This is especially true since Mr. Landaverde incurred no criminal convictions between 1993 and his arrest for illegal entry in August 2006. And other than his 1993 conviction at 23 years old, the balance of his criminal history dates back to the late 1980's and 1990 when he was 18, 19, and 21 years old.

Accordingly, an adjustment should be made to bring the defendant's criminal history category more in line with the reality of his criminal history. One of the inherent infirmities of the federal sentencing guidelines in determining the criminal history categories is that a set number of criminal history points is treated the same regardless of the nature of the criminal conduct comprising the criminal history points. Fortunately, despite these inherent infirmities in the guidelines, the courts have the discretion to compensate for these infirmities by downwardly departing to the criminal history categories and/or offense levels that take into account the unique circumstances of each case. The unique circumstances of this case are that Mr. Landaverde's criminal background is not one of a violent or hardened criminal. We would respectfully request that the Court depart at least one (1) level to a Criminal History Category III so as to more fairly represent his criminal history.

FAST-TRACK POLICY DISPARITIES

There are a number of federal districts throughout the country where the United States

Attorney's Office have "fast-track" policies wherein defendant's charged with certain offenses, mostly immigration, are allowed to plead guilty on an expedited basis to substantially reduced charges resulting in substantial reductions in their sentences. In fact, federal districts in three states (California, Texas, and Arizona) account for almost 50 percent of all of these guidelines convictions. For instance, defendant's in both divisions of Arizona (Phoenix and Tucson) charged with illegal entry after deportation for an aggravated felony are allowed a four (4) level reduction for the fast-track plea and the standard three (3) level reduction for acceptance resulting in an offense level of seventeen (17) as opposed (24). At a criminal history category of two (2), this means a reduction in the sentencing range from (41)-(51) to (27)-(33) months. The requirements of the agreement are that the defendant waive the preliminary hearing, waive indictment and plead to an information, and other conditions, but the end result is a substantially reduced sentence compared to what the defendant may have otherwise been facing. In the Western District of Washington, section 1326 illegal reentry cases are offered a plea bargain plea to two (2) counts of Section 1325, with a "stipulated sentence recommendation" to (6) months on the first count and (24) months on the second count, for a total of (30) months. In the Central District of California, a defendant charged with Section 1326 with a (16) level prior conviction where the prior sentence was less than five years (as in the instant case) are offered a plea to two violations of Section 1325 with a sentence of (30) months. A large number of the fast-track offers in these immigration cases come in unlawful re-entry cases with a prior aggravated felony, which policies undermine the guidelines' statutory requirement to reflect proportionality and the Sentencing Commission's goal to assure that similar offenders are sentenced similarly. *See Linda Drazga Maxfield & Keri Burchfield, Immigration Offenses Involving Unlawful Entry : Is*

Federal Practice Comparable Across Districts?, 14 FED. SEN. REP. 260 (Mar./Apr.2002).

Although the guidelines were intended to eliminate disparity in federal sentencing, due to the vast differences in charging and plea practices across the districts, the statistics clearly and unfortunately show that an individual convicted of the same offense conduct, with the same guidelines computation offense level, could and frequently do receive significantly different sentence lengths, not due to the guideline system but rather due to manipulation of charge and plea bargaining. This is wrong. The only explanation tendered for these huge disparities is that certain districts simply have a higher volume of immigration cases to deal with and need to utilize lenient charging and plea policies to efficiently handle the volume. This makes sense and these districts should not be faulted for it; however, to then prosecute and sentence much more harshly a defendant charged with the same exact offense in the Northern District of New York, is completely unjustified and indefensible from the standpoint of fairness and justice, not to mention in direct contravention of the guidelines goal of eliminating sentencing disparity. It is a form of sentencing disparity that results from plea-bargaining policies systematically applied in certain districts. The sentences offered do not come from the prosecutors exercising discretion on a case-by-case basis but rather arise simply from district-wide policies based on community demographics, thereby effectively making location of arrest the key factor impacting the defendant's sentence. *Two individuals, same federal offense, completely different treatment.* This kind of disparate justice should not be allowed to stand.

In United States v. Galvez-Barrios , supra, the Court did just that. Judge Adelman took a stand against the unequal treatment of those similarly situated defendants. He considered and acted on his districts lack of a fast-track program by imposing a reduced sentence. The Court

stated, the “defendant promptly agreed to plead guilty, making it appropriate to reduce the disparity between the guideline sentence and those of the defendants in fast-track districts,” Supra at 964. Accordingly, in United States v. Galvez-Barrios , supra, Judge Adelman in a well reasoned and written decision took into account the double counting inherent in the Section 1326 offense, the specific circumstances of the defendant case, and the lack of a fast-track policies in his district and imposed a sentence of 24 months as opposed to a sentence within the range of 41-51 months without the reductions.

This same issue was addressed by the 2nd Circuit in United States v. Bonnet-Grullon, 53 F. Supp 2d 430 (2nd Cir. 1999). In a pre-Booker decision, the defendant moved for a departure pursuant to U.S.S.G. Section 5K2.0 on the basis that sentencing disparities resulted from different charging practices employed in Southern Districts of California and New York Courts. The defendant’s guideline range was (70) to (87) months and he argued that similarly situated defendant’s who agreed to plead guilty in such cases in the Southern District of California are charged under a statute that allows a maximum sentence of (30) months. The sentencing court denied defendant’s motion for a departure on this basis and imposed a sentence within the guidelines range. On appeal, the 2nd Circuit affirmed, however, the opening and closing language of the Court’s opinion is most telling of the Court’s stance on the issue from a fairness standpoint. The majority opinion by Judge Kaplan begins by stating,

“This case demonstrates the goal of sentencing uniformity which underlay the enactment of the Sentencing Reform Act may and, in some circumstances, is undermined dramatically by the vast scope of charging discretion reposed in federal prosecutors”.

At the end of the Court’s opinion, in Conclusion, the Court stated,

“ The goal of the Sentencing Reform Act, as defendant argues, was to eliminate unwarranted sentencing disparities. This case illustrates the fact that the regime that it enacted is an imperfect means to an end—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. Moreover, the adjustment mechanism contemplated by the Act—the creation of the Sentencing Commission “to provide certainty and fairness in meeting the purposes of sentencing [and to] avoid [] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct” by revising the Sentencing Guidelines as circumstances require— has been paralyzed by the persistence of unfilled vacancies which preclude the Commission from acting.”

Despite the Court’s apparent concession that a real problem exists with sentencing disparities in these types of cases, the Court, with seeming reservation, stated it was restrained by prior case law, most notably United States v. Stanley, 928 F.2d 575 (2nd Cir. 1991), to grant a departure on these grounds. In doing so, the Court interestingly went on to undermine the case law upon which it relied by distinguishing in concept the plea bargaining scenario in Stanley from those in a “fast track” district, insofar as the Stanley scenario at least provides the defendant with a choice, whereas in the “fast track” program the defendant’s fate is determined strictly by where the offense occurred. Nevertheless, the Court ruled that such a departure was not permitted as a matter of law.

Now, however, because of Booker, the imposition of a reduced sentence on these grounds is permitted as a matter of law. As set forth in Section 3553(a), the guidelines range is just one of numerous factors for the court to consider, and it is entitled to no more weight than the factor set forth in Section 3553 (a)(6), being “the need to avoid unwarranted sentence disparities among the defendants with similar records who have been found guilty of similar conduct”. In fact, a valid argument could be made that the need to avoid unwarranted sentencing disparity should be of overriding importance since that was the primary goal of enacting the Sentencing Guidelines.

In the two post-*Booker* cases the Court's found that the enhanced penalties for "aggravated felony" were unjustified and that the court, with renewed discretion at sentencing, could impose a sentence significantly lower than the guideline range. In United States v. Ramirez - Ramirez, 365 F. Supp 2d 728 (E.D.Virginia 2005), the court, in citing the 2nd Circuit case of United States v. Bonnet-Grullon, 53 F. Supp 2d 430 (2nd Cir. 1999), found that the circumstances of defendant's case and the lack of an early disposition program justified a departure from the guideline range of (46)-(57) months to as sentence of (24) months. In United States v. Medrano-Duran, 386 F.Supp. 2d 943, (N.D. Illinois 2005) where the defendant pled guilty to illegal entry after deportation for aggravated felony, the Court found that the lack of an early disposition program in that district justified a departure from a guideline range of (57) -(71) months and imposed a sentence of (41) months. In so doing the Court also cited United States v. Bonnet-Grullon, 53 F. Supp 2d 430 (2nd Cir. 1999) in support of the unwarranted disparity caused by the lack of early disposition programs. The Medrano-Duran court does an excellent job of analyzing the difference between the early disposition programs that are departure based as provided in the PROTECT Act and U.S.S.G. Section 5K3.1 versus the early disposition programs that rely on charge- bargaining. In Medrano-Duran, the Court determined that a three (3) level departure would be warranted, which as noted by the Court, seemed to be the average departure given in districts whose early disposition programs were departure based as provided in the PROTECT Act and Section 5K3.1.

In United States v. Santos, 406 F. Supp 2d 320 (S.D. New York 2005), the defendant similarly pleaded guilty to illegal entry after having been deported for an "aggravated felony". His offense level was after acceptance twenty-one (21) and criminal history was IV, yielding a

guideline range of (57) to (71) months. The Court ultimately departed and sentenced the defendant to twenty-four (24) months, finding that a non-guideline sentence was warranted based on several considerations, including geographical sentencing disparities created by the fast-track, early disposition programs in illegal entry cases in some jurisdictions, inappropriate double-counting of criminal history points, and undue delay in transferring defendant from state to federal custody. As the Court stated in connection with the fast-track departure, **“While fast-track programs may create an efficient solution to an explosion of illegal entry cases in border districts, they nevertheless result in the type of sentencing disparities cautioned against in section 3553(a)(6)”**. Supra at 326. The Court went on to recite the language as espoused by Judge Kaplan in United States v. Bonnet-Grullon, 53 F. Supp 2d 430 (2nd Cir. 1999) 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.** Supra at 435. The Santos court also indicated that from a policy statement standpoint, **“The Sentencing Commission itself has expressed serious concern about the unwarranted disparities that result from fast-track programs”**, and that the disparities created by the existence of fast-track in some districts and not others **“appears to be at odds with the overall Sentencing Reform Act goal of reducing *unwarranted* disparity among similarly- situated offenders.”** Supra, at 326. The Santos court then determines that the average fast-track sentence was reduced four levels and, accordingly, reduced the defendant’s sentence from (21) to (17) months.

We would respectfully request that the Court do the same here. Had this defendant been arrested in a district that has the “fast track” policy there is nothing about his history or the

progress of his prosecution that would preclude him from receiving “fast track” treatment. The defendant certainly pleaded guilty soon after he came into federal custody in this case. He was arrested on August 22, 2007, and pleaded guilty to the one count Indictment on October 30, 2007. The defendant did not delay, no pre-trial motions were filed, and the defendant pleaded guilty and resolved the charges expeditiously for all concerned. Mr. Landaverde met all the conditions for “fast track” eligibility had he been arrested in “fast track” district. Accordingly, we would respectfully request that the Court impose a sentence more in accord with a sentence that would be imposed in a federal district with a “fast-track” program.

Additionally, we would respectfully request that the Court consider the case of United States v. Linval, 2005 WL 3215155, (S.D.N.Y.) decided November 23, 2005. In Linval, which cited the Second Circuit case of United States v. Bonnett-Grullon, supra, the defendant was subject to the (8) offense level enhancement and the Court departed (4) offense levels, finding that “a non-guidelines sentence which addresses the unreasonable sentencing disparities resulting from fast-track programs is sufficient” but not greater than necessary” to punish Linval for the instant offense.” Supra, at Page 6. Similarly, in United States v. Vernal Mark Deans, 03-387 (S.D.N.Y. 2005), Judge Kimba Woods found that most fast-track jurisdictions reduce on average a sentence by (4) offense levels; the Court rejected the Guidelines range of (77) - (96) months and sentenced defendant to (51) months.

Additionally, in United States v. Austin, 2006 WL 305462, (S.D.N.Y.) decided February 6, 2006, and United States v. Santos-Nuez, 2006 WL 1409106, (S.D.N.Y.) decided May 22, 2006, the Court granted the defendant’s request for a non-guidelines sentence based on the Northern District’s lack of fast-track program and the double-counting of criminal history.

Citing the Second Circuit case of United States v. Bonnett-Grullon, 53 F.Supp 2d 430 (S.D.N.Y.1999), (which defendant has cited and discussed in his Sentencing Memorandum), the Court in both cases imposed a non-guideline sentence based on, among other things, the lack of a fast-track program in their district and the unreasonable Guidelines range produced by the double-counting of criminal history.

Consistent with these cases is United States v. Ruiz-Diaz, 2006 WL 1506664, (4th. Cir.2006) decided May 11, 2006, where the Fourth Circuit, in remanding the case for re-sentencing, soundly credited appellant's fast-track argument, stating,

“Had he [defendant] settled in Texas or California, he would have been eligible for a greatly reduced sentence based on the existence of fast-track early disposition programs in those states. However, simply because he made his way to North Carolina, this option was foreclosed to him, though his conduct was no more culpable than an identical defendant who by happenstance settled in a border state.” Supra, at 10.

In United States v. Mejia, 461 F.3d 158, (2nd Cir. 2006), the defendant pleaded guilty to illegal entry after deportation for an aggravated felony. He argued on appeal that the court erred in declining to reduce his sentence to a lesser sentence he could have received in a “fast track” district, and that the longer sentence imposed on him created an unwarranted sentencing disparity within the meaning of 18 U.S.C. Section 3553 (a)(6). After strained and tortured reasoning, the court in Mejia ruled that the sentencing courts refusal to adjust a sentence to compensate for the lack of a “fast-track” program does not render the sentence unreasonable. The Mejia court acknowledges, however, that the inquiry as to whether certain disparities are warranted “is not limited to considerations deemed relevant in the Guidelines or by the Sentencing Commission.

District courts must consider, among other things, the factors enumerated in Section 3553(a), including “the need to avoid unwarranted sentence disparities among defendant’s with similar records who have been found guilty of similar conduct”. 18 U.S.C. § 3553(a)(6). Supra at 162. The court in Mejia then goes on to state that the analysis and reasoning of the *dicta* in Bonnet-Grullon, supra, is persuasive, and yet the Mejia court does nothing to explain how that position can be reconciled with the court in Bonnet-Grullon having utterly denounced as unwarranted the disparity that is created by the lack of “fast-track” policies in certain districts. Supra at 162-163.

The Mejia court talks about how departures pursuant to fast-track programs were intentionally limited to authorized programs for offenses “whose high incidence within the district has imposed an extraordinary strain on the resources of that district compared to other districts,” supra at 163, and this case management concept seems to constitute the entire rationale behind the approval of “fast-track” districts. The fallacy of this position is that there are districts, such as the Northern District of New York, that have a higher caseload of immigration cases and these types of offenses than districts where fast-track has been approved. For instance, for the fiscal years 2004 and 2005, the Northern District of New York had a total of 131 and 115 immigration cases, respectively, which as a percentage of the total criminal cases for those years comprised 25.8 and 23.2, respectively. However, in four districts where the “fast-track” program has been approved by the Attorney General, the number and percentage of total of immigration cases are about the same or significantly lower than in the Northern District of New York. In **Idaho**, for years 2004 and 2005, there were 88 and 61 cases, respectively, for a percentage of total of immigration cases of 33.1 and 27.7, respectively. In **Oregon**, for years 2004 and 2005, there were 133 and 107 cases, respectively, for a percentage of total of immigration cases of 21.1

and 17.2, respectively. In **Nebraska**, for years 2004 and 2005, there were 58 and 66 cases, respectively, for a percentage of total of immigration cases of 7.2 and 8.4, respectively. In **Western Washington**, for years 2004 and 2005, there were 69 and 93 cases, respectively, for a percentage total of immigration cases of 9 and 10.6, respectively. As is evident, despite the government's argument that the disparity caused by lack of "fast-track" in certain districts is justified by the high volume of cases in "fast-track" districts, there is no principled distinction between the case management needs of the Northern District of New York the above cited districts where "fast-track" has been approved.

Moreover, five districts (C.D. California, N.D. California, S.D. California, Oregon and W.D. Washington) have been approved to use the charge bargaining method, as described earlier, which is not a type of program or the type of disparity Congress approved or what the commission promulgated, see PROTECT Act, Pub.L.108-21 Section 401(m)(2)(B) (directing Commission to promulgate "a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such a departure to an early disposition program authorized by the Attorney General and the United States Attorney."); USSG 5K3.1. So while the government can argue that a non-guideline sentence based on "fast-track" caused disparity is contrary to the congressional will, so, too, is the use of the charge bargaining method employed by five districts to manage their immigration case loads, about which the government appears not to complain.

Lastly, there is nothing in the Mejia case that precludes a court from considering "fast-track" sentences in the Northern District of New York pursuant to the parsimony clause of Title 18 U.S.C. § 3553(a), which provides that "the [district] court *shall* [emphasis added] impose a

sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of [§ 3553(a)].” Therefore, pursuant to § 3553(a), the Court is legally bound to impose a sentence which is “sufficient, but not greater than necessary,” to meet the goals of sentencing. It would seem difficult, if not impossible, to reconcile the position that a guideline sentence in the instant case is “sufficient, but not greater than necessary,” to meet the goals of sentencing, while at the same time *a much lower sentence for a similarly situated defendant* in a “fast-track” district is also “sufficient, but not greater than necessary,” to meet the goals of sentencing. Such a position would appear to clearly violate the mandates of the parsimony clause of Title 18 U.S.C. § 3553(a).

Accordingly, we would respectfully request that the Court impose a less severe non-guideline sentence consistent with a sentence that the defendant would receive in a “fast-track” district, as outlined above.

DOUBLE-COUNTING OF CRIMINAL HISTORY

The defendant contends that the advisory Guideline range of (24) to (30) months is unreasonable for several reasons addressed above. An additional reason for the Court to consider as a basis for a departure is that the defendant’s Guideline range is a product of double-counting defendant’s criminal history, by using his prior convictions to enhance not only his criminal history category but also to increase his criminal offense level from (8) to (16). A number of courts have found this double-counting unfair and have departed to compensate the defendant for the unreasonable guideline range it creates. In United States v. Santos, 406 F. Supp 2d 320 (S.D. New York 2005), the defendant was also charged with Title 8 Section 1326 and was subject to a

(16) level enhancement for having been deported for an “aggravated felony.” In Santos, the court found that the double-counting created a advisory guideline range that was unreasonably harsh, and the court granted a three (3) level departure to discount the (16) level enhancement that the double-counting created. In United States v. Galvez-Barrios , 355 F. Supp. 2d 958 (E.D. Wisconsin Feb. 2, 2005), the court also found the (16) level enhancement excessive as it was due to double-counting, and that finding was part of the basis for the court’s decision to depart and impose a sentence of (24) months.

Mr. Landaverde’s guideline range is also a product of double-counting. He is subject to a (8) level enhancement for having been deported after conviction for an illegal entry conviction in 2006 and then, on top of that, the defendant is scored five (5) criminal history points for said conviction. The advisory Guideline range of (24) of (30) months created by this is simply unreasonable given the circumstances of defendant’s case.

CONCLUSION

Mr. Landaverde is a different man than he was (15) years ago. At this juncture in his life he has a wife and (2) children to whom he is completely dedicated. The letters from his wife, son, and numerous friends uniformly praise him as hard working, religious, and a good husband and father.

Mr. Landaverde returned to the United States to find better employment and be with his family. At the time of his arrest Mr. Landaverde and his family were in the process of moving to Canada with hopes that he could find employment and they could reside together as a family without constantly being “in hiding”. Mr. Landaverde is truly remorseful for his actions and he

will never again attempt to enter the United States illegally. As a result of this conviction, Mr. Landaverde will be deported back to El Salvador.

For the reasons cited herein, we would respectfully request that the Court find that the advisory sentencing range is (24) to (30) months is unreasonably harsh. Mr. Landaverde was arrested on August 22, 2007, and has been held on these charges since that time. As of the sentencing date of March 7, 2008, Mr. Landaverde will have been incarcerated on this charge for just almost (7) months.

We would respectfully request that the Court consider and abide by the dictate of Section 3553(a), which requires courts to “impose a sentence sufficient, *but not greater than necessary*, to meet the goals of sentencing. For the above reasons, we would respectfully request that the Court exercise sound judicial discretion and impose a sentence a less severe non-guideline sentence. As the Court is aware, once Mr. Landaverde has finished his sentence in this case, he will be detained for additional time in immigration custody pending the deportation process. We would also respectfully request that the Court recommend that Mr. Landaverde serve his sentence in a facility as close as possible to Los Angeles, California.

Date: February 28, 2008

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Certificate of Delivery

I certify that I have delivered a copy of the foregoing pleading to Assistant United States Attorney Edward Grogan, Esq., at 445 Broadway, Room 218, Albany, New York by email and Senior U.S. Probation Officer, Jay Driscoll, United States Probation Office, 445 Broadway, Albany, New York 12207 by email.

/s/ George E. Baird, Jr.
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