FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA
321 EAST 2nd STREET
LOS ANGELES, CALIFORNIA 90012-4202
213-894-2854
213-894-0081 FAX

MARIA E. STRATTON
Federal Public Defender
MARILYN E. BEDNARSKI
Chief Deputy

CRAIG WILKE
Directing Attorney
Santa Ana Office
OSWALD PARADA
Directing Attorney
Riverside Office

Direct Dial: (213) 894-6044

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Michael Courlander
Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Courlander:

I submit this letter as my written testimony for the Commission's public hearing, scheduled for September 23, 2003, on implementation of section 401(m) of the PROTECT Act. I understand that the Commission is interested in learning about fast track programs operating within the Central District of California.

There are only two fast track programs of which I am aware currently operating within the Central District of California. The first involves bank teller employees who are accused of embezzling federally insured bank funds during the course of their employment. Going back at least twenty years, the government has offered these employees the option of pleading guilty to an information charging misdemeanor misapplication of bank funds in lieu of being indicted and proceeding to trial on felony embezzlement charges. Generally this type of fast track involves a bank teller defendant who has admitted her (usually the defendants are female) involvement in the offense and has fully cooperated with the government before counsel ever enters the picture. This type of fast track program involves no departures from the Sentencing Guidelines.

The other fast track program operating within this district involves violations of 8 U.S.C. 1326 (alien found illegally in the United States after deportation). This program also involves no departures from the Sentencing Guidelines. Generally these clients have been convicted of at least one aggravated felony so that they face a 16-level adjustment for the offense under the Sentencing Guidelines. This fast track program is relatively new to the district and I would like to describe the "before" and the "after" of the program.

In 1993, when I began my tenure as Federal Public Defender, illegal reentry prosecutions

were just coming into vogue and were still relatively uncommon in this district. Generally clients prosecuted for this offense fit a particular profile: they had already sustained 3-5 prior deportations and they had 5-6 felony convictions in their criminal history, of which at least one was aggravated. This office agitated for years for the fast track program operating in the adjacent Southern District of California. The answer we received was that the USAO conserved its resources by prosecuting only the "worst of the worst." The Guidelines calculations for defendants in our district generally ended up at offense level 24 and criminal history category VI, with a range of 77-96 months. Most cases ended in plea agreements, with the USAO agreeing to recommend to the court a sentence at the low end of the guidelines, 77 months. With few exceptions driven mostly by the practices of individual judges, defendants received sentences of 77 months.

The Central District of California is 60 miles from the Mexican border at its southernmost point. It extends east from the coast to the Nevada/Arizona. Most prosecutions arise out of events occurring in the southernmost area including Orange, Los Angeles, and Riverside counties. As a result, most 1326 defendants were aware of the fast track program in the Southern District of California and could not understand that the only reason they faced 77 instead of 24 months in custody was because they were arrested in Los Angeles instead of San Diego.

This sentencing disparity became an argued, if not accepted, ground for departure in the Central District of California. Few district judges embraced it and in *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000) (en banc), the Ninth Circuit rejected it as a ground for departure under the Sentencing Guidelines.

Coincidentally, the leadership in the USAO changed shortly after *Banuelos* and the current fast track program was implemented. Under the fast track program, defendants who formerly would have been indicted for a single count of violating 8 U.S.C. 1326 instead are charged by way of information with two counts of 13 U.S.C. 1325, one a misdemeanor and the other a felony, for a combined maximum exposure of 30 months imprisonment. No defendants are per se ineligible to receive a fast track disposition, although individual prosecutors have their own guidelines for making offers. For example, some prosecutors exclude those defendants previously convicted of a crime of violence for which a sentence of 3 years or more was imposed. Some prosecutors exclude those convicted of sex crimes. Some exclude those defendants whose deportations occurred when they were juveniles (ironically those defendants then face the more serious prosecution for illegal reentry). Generally, after a complaint has been filed, the prosecutor will exercise his or her discretion to offer a fast track disposition to the defendant. The defendant executes a waiver of time to permit the negotiations to go forward. However, the disposition must be worked out before the deadline by which an indictment must be filed. When a disposition is reached, the defendant executes a waiver of indictment, an information is filed, and the defendant is arraigned on the information and enters a plea of guilty the same day. In the plea agreement, the defendant gives four important concessions: he consents to immediate sentencing to 30 months imprisonment without the benefit of a presentence report; he waives appeal of the sentence and conviction; he waives his right to discovery; and he waives all downward departure arguments.

The government also gives concessions: it gives up the right to charge the more serious felony of illegal reentry after deportation and therefore the opportunity to obtain a sentence of imprisonment that is greater than 30 months. If accepted by the court, the agreement is binding under F.R.Crim.P.11(e)(1)(C).

When USAO initially announced this program to the court and defense counsel, it was touted as a benefit to those prosecuted under the program because it lowered the maximum possible sentence they could receive. However, the USAO was also very candid in notifying court and counsel that under the fast track, the government anticipated that it would double or triple the number of illegal reentry/improper entry prosecutions in the district. The speed with which the cases were supposed to proceed through the system would allow the government to bring more of these cases with the same amount of resources available to it. The Office of the Federal Public Defender opposed the fast track if it meant, as it did, that more individuals would be prosecuted under the statutes. It was a Sophie's Choice, a public policy dilemma for some, but an ethical dilemma for defense counsel who can consider only the best interests of the individual client represented: is it better to limit the number of prosecutions (with the heavier exposure to imprisonment) to the "worst of the worst" -- those defendants who pose a danger to society? Or is it better to institute a fast track that lowers the exposure for most individuals but expands the pool of defendants to include those who never would have been previously prosecuted?

Now what we see is that defendants prosecuted under the fast track do not fit the profile of traditional "dangers" in the sense that they pose a threat of violence to the community. Most of our 1325 clients have one or two prior deportations; most were brought to this country as children from Mexico, either illegally or as permanent resident aliens. Most come from families where all other family members are or have become U.S.citizens. Those with children have U.S. citizen children and/or spouses. Many do not speak Spanish and have no immediate family members in Mexico. They were educated in U.S. schools. They often live in poverty in this country; mental illness and family dysfunction is exacerbated by their poverty. They develop drug addictions which prompt criminal activity like property offenses and misdemeanors in order to obtain money to fuel the addictions. In short, they do not fit the stereotype of illegal aliens who come to this country to take unfair advantage of our economy and community by commiting crime. They were raised here like the native born and are true strangers to their country of birth. They return to this country. And no amount of imprisonment can keep them from their families or their adopted culture. It is a reality that judges, prosecutors, and defense counsel must factor into the equation when determining a fair disposition, if consideration of the individual is still a part of setting the criminal sanction.

The fast track has increased the number of illegal reentry/improper entry cases prosecuted in the Central District, while lowering the maximum penalty for most of those prosecuted. (Those defendants who are not offered a fast track are indicted for violating 8 U.S.C. 1326 with the higher maximum penalty and sentencing range.) The program reaches more defendants than were previously prosecuted in the Central District. It lessens sentencing disparities in the Central and Southern Districts of California. It seems arbitrary to those who are not permitted to participate;

it seems fairer to those who are. It places all power in the hands of the government and takes all sentencing discretion away from the district judges who decide the sole question of whether or not to accept the binding plea agreement. Because the program is a function of prosecutorial discretion, the court does not have the authority to question or remedy the government's refusal to offer a fast track disposition to a defendant nor to impose less than 30 months if it accepts the guilty plea pursuant to the agreement.

Thank you for the opportunity to address you on this important issue.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender