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LAW SUMMARY

Fast-Track Sentencing: A Potential Solution to the Divisive Discretion

ELIZABETH WEBER*

I. INTRODUCTION

There are currently an estimated eleven million illegal immigrants in the United States,¹ and certain immigrant-dense regions have buckled under the weight of illegal aliens.² Fast-track programs, first established by proactive federal prosecutors and later sanctioned by Congress, were designed to more efficiently prosecute aliens who had illegally reentered the country.³ These programs expedited prosecution by guaranteeing a defendant a lighter sentence in exchange for pleading guilty and forgoing certain procedural formalities.⁴

However, the Department of Justice (DOJ) did not authorize fast-track programs in all federal districts, leaving defendants in non-fast-track districts complaining of unequal treatment between themselves and similarly situated defendants who could receive shorter prison terms.⁵ Defendants in non-fast-track districts asserted the unequal treatment warranted lower sentences for themselves, and a split developed among the federal circuit courts of appeals as to whether a district court in a non-fast-track district could grant a lower sentence based on the sentencing disparity.⁶ A recent change in the DOJ's policy regarding authorization of fast-track programs offers a quick-fix to this problem: let every defendant charged with a certain crime, regardless of location, be eligible for a lighter, fast-track sentence.⁷

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1. Editorial, *GOP Candidates' Immigration Fantasies*, L.A. TIMES, Feb. 1, 2012, <http://articles.latimes.com/2012/feb/01/opinion/la-ed-immigration-20120201>.

2. See KEVIN F. MCCARTHY & GEORGES VERNEZ, IMMIGRATION IN A CHANGING ECONOMY: CALIFORNIA'S EXPERIENCE (1997) (describing immigrant's fiscal burden on the state of California); see also *infra* notes 58-62 and accompanying text (explaining the impact of illegal immigrants on the criminal system).

3. See *infra* Part II.C. Fast-track programs are also commonly known as "early disposition programs." See *United States v. Jimenez-Perez*, 659 F.3d 704, 706-08, 710 (8th Cir. 2011).

4. See *infra* Part II.C.

5. See *infra* Part II.D.

6. See *infra* Part II.D.

7. See *infra* Part III.B.

This Summary examines the current federal sentencing regime, the establishment of fast-track programs, and the resulting circuit split regarding whether a judge can grant a defendant a more lenient sentence based on the lack of availability of a fast-track option in that jurisdiction.⁸ Further, it discusses more recent developments regarding the circuit split and how the new DOJ policy purports to resolve the issue.⁹ Finally, this Summary argues that while this change does solve the sentencing disparity problem, it conflicts with the congressional policy underlying the official sanction of fast-track programs.¹⁰

II. LEGAL BACKGROUND

The starting point in determining any particular defendant's prison sentence is the Federal Sentencing Guidelines (Guidelines), which suggest a sentencing range based on the particular crime and the defendant's criminal history.¹¹ The lower sentences offered to fast-track defendants depart from the Guidelines; the departure is granted by prosecutors, rather than by the sentencing judges, and is only available to defendants in authorized jurisdictions.¹² Some background on the current federal sentencing scheme is helpful to appreciating the potential disparity problem created by these programs. Thus, this Part explains what is perhaps this country's most significant federal sentencing legislation, the Sentencing Reform Act of 1984,¹³ and describes the Supreme Court of the United States' adverse reaction to the new system.¹⁴ It then recounts the creation of fast-track programs, from their inception in the Offices of the United States Attorneys to Congress's authorization of the programs several years later. After describing the circuit split on whether district judges may grant lighter sentences based on this sentence disparity,¹⁵ this Part considers an analogous circuit split and how it was resolved.¹⁶

A. Federal Sentencing Reform

Prior to 1984, federal judges, following a "medical" model of sentencing,¹⁷ possessed wide sentencing discretion limited only by statutory maxi-

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part IV.

11. See *infra* notes 27-31 and accompanying text.

12. See *infra* Part II.C.

13. 18 U.S.C. § 3553(b) (2006); see also *infra* Part II.A.

14. See *infra* Part II.B.

15. See *infra* Part II.D.

16. See *infra* Part II.E.

17. Founded on the belief that "criminal deviance could be treated like any other disorder," the "medical" model aimed to individualize sentences "according to the symptoms and pathology of the offender" much like medical treatments are formu-

mums and minimums.¹⁸ The advent of the parole system coupled with this broad judicial discretion made the federal sentencing system an uncertain one.¹⁹ While a court's sentence would effectively determine the minimum or maximum sentence for a prisoner, the parole board had authority to determine the actual release date.²⁰ The uncertainty and arbitrariness of sentencing caused by this indeterminate system sparked a great deal of criticism, eventually leading to the Sentencing Reform Act of 1984 (the SRA).²¹

Congress sought to accomplish two primary goals with the SRA: (1) "honesty in sentencing," and (2) the elimination of unwarranted sentencing disparity.²² The goal of "honesty" was to ensure that "the sentence imposed by the judge [would] be the sentence actually served."²³ To achieve this, Congress abolished the parole system for federal prisoners.²⁴ To remedy the problem of inconsistency in sentences,²⁵ Congress created the United States

lated for a specific patient. Frank O. Bowman, III, *The Failure of Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1318, 1321 (2005).

18. *Id.* at 1322; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

19. Stith & Koh, *supra* note 18, at 226-27. Proponents of the parole system believed that a parole official's power to determine a prisoner's release date would be a powerful incentive to the prisoner to rehabilitate himself. *Id.* at 227.

20. *Id.* at 226-27.

21. Tom McKay, Note, *Judicial Discretion to Consider Sentencing Disparities Created by Fast-Track Programs: Resolving the Post-Kimbrough Circuit Split*, 48 AM. CRIM. L. REV. 1423, 1425 (2011). One federal judge was especially critical of the sentencing power entrusted to him, calling it "terrifying and intolerable for a society that professes devotion to the rule of law." Stith & Koh, *supra* note 18, at 228 (internal quotations omitted).

22. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988). These goals represent the unusual bipartisan coalition behind the legislation, with liberals concerned about the lack of equality from wide judicial discretion and conservatives upset with "perceived undue leniency in sentencing." James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 271-72 (1999).

23. S. REP. NO. 98-225, at 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3239. According to Congress, "[p]risoners' morale [would] probably improve when the uncertainties about release dates are removed," and "[p]ublic respect for the law [would] grow when the public knows that the judicially-imposed sentence announced in a particular case represents the real sentence." *Id.* However, since the SRA still allows for credit towards the sentence for good behavior, the sentence imposed by a judge is still not necessarily the sentence served. *See* 18 U.S.C. § 3624(b) (2006).

24. S. REP. NO. 98-225, at 56.

25. For an example of the disparity criticized by Congress, the average national sentence for a federal bank robbery offense was eleven years in 1974, yet, the average in a federal district in Illinois was only half of that. *Id.* at 41.

Sentencing Commission (the Commission) to establish federal sentencing policies.²⁶

As originally enacted, the SRA mandated, with a few exceptions, that a defendant's sentence fall within a range determined by the Sentencing Table prescribed by the Commission's Guidelines.²⁷ The Commission created the table using empirical data regarding past sentencing practices.²⁸ To calculate an appropriate Guidelines sentence, a sentencing judge would consult the Commission's Sentencing Table based upon an "offense level"²⁹ and the defendant's "criminal history category."³⁰ Thus, instead of giving judges free rein to sentence defendants based on their own individualized assessments of each case, the Guidelines required sentences within a predetermined range based on data of past sentencing practices.³¹

B. Judicial Reaction to the Sentencing Reform Act and the Guidelines

As intended, the SRA severely limited judicial discretion in sentencing for nearly two decades.³² However, the Guidelines became advisory in 2005 after the Supreme Court of the United States struck down their mandatory aspect as unconstitutional in *United States v. Booker*.³³ In *Booker*, the defendant's conviction of possession with intent to distribute cocaine yielded a maximum Guidelines sentence of 262 months.³⁴ At the sentencing hearing,

26. 28 U.S.C. § 991.

27. 18 U.S.C. § 3553(b) (stating that "the court *shall* impose a sentence of the kind, and within the range" mandated by statute (emphasis added)), *invalidated by* *United States v. Booker*, 543 U.S. 220 (2005). A sentence could depart from the Guidelines upon consideration of any aggravating or mitigating circumstances that the court found the Guidelines did not take into account. *Id.*

28. *Kimbrough v. United States*, 552 U.S. 85, 96 (2007). The goal of the Guidelines were to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2011) [hereinafter GUIDELINES MANUAL], available at http://www.uscc.gov/guidelines/2011_Guidelines/Manual_HTML/index.cfm.

29. An offense level is determined from the underlying conviction and is adjusted based on factors such as the victim, any obstruction of justice on part of the defendant, or the defendant's acceptance of responsibility. GUIDELINES MANUAL, *supra* note 28, § 1B1.1(a).

30. *Id.* The Sentencing Table is a grid wherein the "offense level" is placed on the vertical axis, the "criminal history category" is on the horizontal axis, and the appropriate range is where the two intersect. *See id.* § 5A.

31. *See Kimbrough*, 552 U.S. at 96; *see also Rita v. United States*, 551 U.S. 338, 349 (2007) (explaining how the Commission "modif[ied] and adjust[ed] past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like").

32. *See supra* notes 27-31 and accompanying text.

33. 543 U.S. 220, 245-46 (2005).

34. *Id.* at 227.

the district court judge determined, by a preponderance of the evidence, that the defendant possessed additional cocaine³⁵ and obstructed justice; considering these new circumstances, the district court calculated an enhanced Guidelines range of 360 months to life in prison.³⁶

The Court held that imposing the enhanced sentence violated the defendant's Sixth Amendment right to a trial by jury.³⁷ To comply with the Sixth Amendment, the Court concluded that any facts supporting an enhanced sentence must be either admitted by the defendant or proved to a jury beyond a reasonable doubt.³⁸ Because the Guidelines allowed a judge, rather than a jury, to find facts that would raise a defendant's maximum sentence, the Court severed the mandatory aspect of the sentencing statute, holding that a sentencing court must merely consider the Guidelines range as one factor among many in determining a sentence term.³⁹

Booker further defended the trial judge's discretionary power in sentencing by excising an amendment to the SRA that required departures from Guidelines sentences to be reviewed de novo.⁴⁰ As the Court noted, the motivation behind the amendment had been "to make Guidelines sentencing even more mandatory than it had been," and after holding the Guidelines to be advisory, this justification "ceased to be relevant."⁴¹ In lieu of the de novo standard, the Court held that appellate courts should review sentencing decisions under the deferential reasonableness standard that existed before the amendment.⁴²

After the *Booker* Court described the Guidelines as a factor in sentencing, *Rita v. United States* shed light on the legal weight of the Guidelines by holding that a sentence within the Guidelines is presumed reasonable on review.⁴³ The Supreme Court of the United States concluded that a "within-Guidelines" sentence reflects the fact that both the Commission and the sentencing judge reached the same sentencing conclusion in a particular case, warranting the reasonable presumption.⁴⁴ However, this presumption only applies when an appellate court is reviewing a sentence; the Court later made clear in *Gall v. United States* that the district court judge, in considering sec-

35. Specifically, the defendant was found to possess 566 additional grams of cocaine. *Id.*

36. *Id.*

37. *Id.* at 226-27.

38. *Id.* at 244.

39. *Id.* at 227, 245.

40. *Id.* at 260-61 (severing the de novo review standard codified in 18 U.S.C. § 3742(e) (2006)).

41. *Id.* at 261.

42. *Id.*

43. 551 U.S. 338, 347 (2007).

44. *Id.* at 347 (reasoning that the "double determination" by the judge and the Commission "significantly increases the likelihood that the sentence is a reasonable one.").

tion 3553(a) factors, “may not presume that the Guidelines range is reasonable.”⁴⁵ While *Rita*’s holding is only applicable when the Commission and a district judge are in an agreement, the Court acknowledged there would be times when a Guidelines sentence should not apply.⁴⁶ Just a few months later, the Court in *Kimbrough v. United States* squarely confronted the issue about what a district court is authorized to do when it does not agree with the Commission.⁴⁷

In *Kimbrough*, the Guidelines suggested a sentence of 228 to 270 months for a defendant who had been convicted of multiple offenses, including possession of crack cocaine.⁴⁸ However, the United States District Court for the Eastern District of Virginia deemed the suggested range to be “greater than necessary” and only sentenced him to 180 months.⁴⁹ In imposing the downward sentence, the judge considered the “disproportionate and unjust effect that crack cocaine guidelines have in sentencing.”⁵⁰ For example, had *Kimbrough* possessed cocaine in powder form instead of crack, the Guidelines range would have only been 97 to 106 months.⁵¹ The United States Court of Appeals for the Fourth Circuit vacated the sentence on the grounds that it was per se unreasonable for the district court to impose a sentence outside the Guidelines based on a disagreement with the sentencing imbalance between crack and powder cocaine offenses.⁵²

On appeal, the government argued that Congress, through the Anti-Drug Abuse Act of 1986, “[i]mplicit[ly]” require[d] the Commission and sentencing courts to apply the ‘100-to-1 ratio’” for crack and powder cocaine offenses,⁵³ warranting a necessary disparity arising from the sentences.⁵⁴ The Supreme Court of the United States rejected the government’s claim and declined to find an implicit congressional directive behind the Guidelines’ sen-

45. 552 U.S. 38, 49-50 (2007).

46. *Rita*, 551 U.S. at 351 (suggesting a Guidelines sentence should not apply if the court finds that “the case at hand falls outside the ‘heartland’ to which the Commission intends individual Guidelines to apply”).

47. *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

48. *Id.* at 91-92.

49. *Id.* at 92-93. The district court’s language reflects what is commonly referred to as the “parsimony principle,” which requires a sentence be “not greater than necessary to accomplish the goals of sentencing.” *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008); *see also* 18 U.S.C. § 3553(a) (2006). The parsimony principle is considered the overarching principle behind a judge’s discretionary sentencing. *See Rodriguez*, 527 F.3d at 228.

50. *Kimbrough*, 552 U.S. at 93 (quoting Joint Appendix, Vol. 1, *Kimbrough*, 552 U.S. 85 (No. 06-6330), 2007 WL 2219925, at *72).

51. *Id.*

52. *Id.*

53. The 100-to-1 ratio adopted by Congress “treated every gram of crack cocaine as . . . equivalent . . . [to] 100 grams of powder cocaine” for purposes of setting the minimum and maximum sentences for cocaine trafficking offenses. *Id.* at 96.

54. *Id.* at 102.

tences.⁵⁵ Further, the Court refused to give much deference to the Commission's Guidelines in this case because the Commission had abandoned its characteristic institutional role by not accounting for "empirical data and national experience."⁵⁶ The Court held it is not unreasonable for sentencing courts to vary from Guidelines based on a disagreement with the Commission's policy.⁵⁷

As these recent cases illustrate, the Supreme Court of the United States has been reluctant to dilute judicial discretion in sentencing, and the *Kimbrough* Court's refusal to find an implicit directive makes clear that any congressional limit to judicial discretion in sentencing must be express.

C. Establishment of Fast-Track Programs

Long before any congressional authorization, the Offices of the United States Attorneys implemented fast-track sentencing programs in the mid-1990s to cope with an overwhelming volume of immigration-related cases.⁵⁸ As an example of this heavy caseload, consider the 29,939 illegal aliens removed in 1990, 11,569 of which were due to criminal convictions.⁵⁹ By 1996, those numbers had risen to 68,657 aliens removed and 36,909 removals due to criminal convictions.⁶⁰ Of course, the number of illegal aliens arrested would have been much higher; for example, it has been estimated that half a million illegal aliens are arrested and detained in the Southern District of

55. *Id.* at 103 (concluding that "[d]rawing meaning from silence [would be] particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms").

56. *Id.* at 109 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007), *vacated*, 552 U.S. 1306 (2008)). Rather than basing the sentences for cocaine offenses on research, the Commission employed the 100-to-1 ratio from the Anti-Drug Abuse Act. *Id.* at 96-97. After promulgating these Guidelines, the Commission concluded that use of the ratio created a disparity that "fails to meet the sentencing objectives[.]" *Id.* at 97 (quoting U.S. SENT'G COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 91 (2002), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf). It sought to amend the Guidelines, but Congress repeatedly rejected the Commission's proposals. *Id.* at 99.

57. *See id.* at 111.

58. Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 FED. SENT'G REP. 311, 311 (2009). The sudden influx of immigration cases was partly due to the increase in the Border Patrol's budget and partly because of expanded applicability of illegal re-entry offense to more defendants. *Id.*

59. IMMIGR. & NATURALIZATION SERV., U.S. DEP'T OF JUST., 1996 STATISTICAL YEARBOOK OF IMMIGRATION STATISTICS 171, *available at* <http://www.dhs.gov/files/statistics/publications/archive.shtm#1>.

60. *Id.*

California each year.⁶¹ Due to the sheer volume of aliens arrested, prosecutions were rare, and felony cases were often pled down to misdemeanors carrying minimal penalties.⁶²

To expedite these cases, United States Attorneys, predominately in districts near the southwestern border, began developing fast-track systems.⁶³ The program executed in the Southern District of California dealt primarily with aliens charged under 8 U.S.C. section 1326 for illegal re-entry.⁶⁴ It used a “charge bargaining” program wherein prosecutors would substitute an illegal entry charge punishable up to twenty years with one carrying a maximum penalty of only two years.⁶⁵ However, the reduced sentence required the defendant to:

- (1) waive indictment; (2) forego motions; (3) waive presentence report; (4) stipulate to a particular sentence . . . ; (5) submit to immediate sentencing; (6) waive all sentencing appeals; (7) consent to the entry of an order . . . removing defendant from the United States upon conclusion of his or her prison term; and (8) waive all appeals of the removal order.⁶⁶

The prompt guilty plea and immediate deportation, without the threat of a prolonged hearing and appeals process, “fast-tracks” a defendant through the judicial system, allowing prosecutors to focus their time and resources on other cases.⁶⁷

In the Southern District of California, the fast-track program proved successful with 1334 cases filed under section 1326 during the program’s first year, compared to the 240 cases filed the previous year.⁶⁸ Though sentencing discretion is traditionally placed with the judiciary, the courts did not seem to

61. Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 287 (1998). It should be noted that the criminal caseload rate in the Southern District of California is higher than in any other district. *Id.* About half of all illegal aliens caught in the country are apprehended in that district. *Id.*

62. *Id.* at 287-88.

63. *United States v. Jimenez-Perez*, 659 F.3d 704, 706 (8th Cir. 2011). It is estimated that about half of the ninety-four judicial districts had some form of a fast-track program by 2003. U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 64 (2003), [hereinafter REPORT TO CONGRESS], http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Departures/200310_RtC_Downward_Departures/departpt03.pdf.

64. Bersin & Feigin, *supra* note 61, at 301.

65. *Id.*; see 8 U.S.C. § 1326(a)-(b) (2006).

66. Bersin & Feigin, *supra* note 61, at 301.

67. *See id.*

68. *Id.* at 302.

mind such bold prosecutorial discretion in these cases.⁶⁹ When the United States Court of Appeals for the Ninth Circuit rejected a petitioner's claim that the fast-track program discriminates based on race and deprived him of effective counsel, it praised the program for "benefit[ing] the government and the court system by relieving court congestion."⁷⁰

In 2003, Congress formally authorized fast-track programs in the Prosecutorial Remedies and Other Tools to End Exploitation of Children Act (the PROTECT Act).⁷¹ While the PROTECT Act was part of an initiative designed to curtail a purported increase in Guideline departures,⁷² in section 401(m)(2)(B) of the Act, Congress directed the Commission to promulgate "a policy statement authorizing a downward departure of not more than [four] levels if the [g]overnment files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney[.]"⁷³ It is ironic that Congress authorized fast-track sentencing in an act that is clearly devoted to reducing downward departures, but legislative history indicates Congress intended this authorization to decrease intradistrict disparity between the defendants who were charged and the criminals who were not due to administrative restraints.⁷⁴

Because Congress required the Attorney General to authorize each fast-track program,⁷⁵ then-Attorney General John Ashcroft issued a memorandum

69. See *United States v. Estrada-Plata*, 57 F.3d 757, 761 (9th Cir. 1995) ("Like the district court, we find absolutely nothing wrong (and, quite frankly, a great deal right) with such a practice.").

70. *Id.*

71. PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

72. See 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement by Sen. Hatch) (discussing how "courts, unfortunately, have strayed further and further from this [Guidelines] system"); see also 149 CONG. REC. S5130 (daily ed. Apr. 10, 2003) (statement by Sen. Sessions) (indicating that "[t]he Feeney amendment was designed to deal with a growing problem of Federal judges downward-departing from the mandates of the sentencing guidelines and thereby giving lighter sentences than should be given to criminals").

73. PROTECT Act, § 401(m)(2)(B).

74. 149 CONG. REC. H2420 (daily ed. Mar. 27, 2003) (statement by Rep. Feeney) (noting that authorization of these programs is needed to "avoid unwarranted sentencing disparities within a given district").

75. The language of the PROTECT Act did not actually require the Attorney General to authorize the fast-track programs; it just stipulated that any program to grant a downward departure be authorized by the Attorney General. PROTECT Act, § 401(m)(2)(B). The Attorney General issued a separate memorandum also requiring the Attorney General's approval for any fast-track program that relied upon "charge bargaining" – a program whereby the government charged a lesser offense in exchange for a guilty plea. Memorandum Regarding Policy on Charging of Criminal Defendants from John Ashcroft, Attorney Gen., to all Fed. Prosecutors (Sept. 22, 2003), available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

directing all United States Attorneys to “ensure that ‘fast-track’ programs are implemented only when warranted.”⁷⁶ The most critical requirement was that the district must face an exceptionally high volume of a specific class of offenses, excluding crimes of violence that constrain the judicial and prosecutorial resources.⁷⁷ Additionally, the Attorney General required that the program itself include certain elements, including stipulating to a factual basis and waiving rights to pre-trial motions and post-conviction challenges.⁷⁸ In accordance with its role, the Commission promulgated U.S.S.G. section 5K3.1, which allowed a downward departure up to four levels through a fast-track program.⁷⁹ By 2010, at least eighteen districts granted downward departures pursuant to section 5K3.1.⁸⁰

D. Sentencing in Non-Fast-Track Jurisdictions: A Circuit Split

Because defendants in non-fast-track districts could not receive the same downward departure available to their counterparts in districts with a fast-

Charge bargaining is distinct from “downward departure” fast-track programs, which reduce the defendant’s offense level but still charge the defendant with the same offense. McKay, *supra* note 21, at 1436.

76. Memorandum Regarding Department Principles for Implementing an Expedited Disposition or “Fast-Track” Prosecution Program from John Ashcroft, Attorney Gen., to all U.S. Attorneys (Sept 22, 2003), *reprinted in* 21 FED. SENT’G REP. 318, 319 (2009).

77. *Id.* Proposals for implementing fast-track programs also require a demonstration that the specific class of cases is one that is highly repetitive and substantially factually similar and that a reduction of such cases in favor of state prosecution is unavailable. *Id.*

78. *Id.* at 320. However, the defendant is not required to waive his right to challenge a conviction based on ineffective assistance of counsel. *Id.*

79. GUIDELINES MANUAL, *supra* note 28, § 5K3.1. The Commission practically replicated the language used by Congress in the PROTECT Act. *See id.* (“Upon motion of the Government, the court may depart downward not more than [four] levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.”). In a report filed by the Commission, it claimed that the reason for using the same language as section 401(m)(B) of the PROTECT Act is that “[t]he Department of Justice requested that the Commission implement [Congress’s] directive . . . in a similar unfettered manner by merely restating the legislative language.” REPORT TO CONGRESS, *supra* note 63, at 66.

80. *See* U.S. SENTENCING COMM’N, STATISTIC INFORMATION PACKET, FISCAL YEAR 2010, FIRST CIRCUIT 12-17 (2010), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2010/1c10.pdf. While this figure may seem low, this only includes programs that provide for a downwards departure pursuant to section 53K.1; it does not account for the many fast-track programs authorized by the Attorney General which utilize a charge-bargaining process like the one described from the Southern District of California. *See id.*; *see also supra* notes 65-66 and accompanying text.

track program, inconsistencies developed in the sentences imposed.⁸¹ Courts ordered different prison terms for two defendants convicted of the same crime and possessing the same criminal history; defendants in non-fast-track districts usually received a Guidelines sentence, while fast-track defendants enjoyed a lighter one.⁸² Defendants in non-fast-track districts began to claim that this disparity was “unwarranted,” pointing to 18 U.S.C. section 3553(a)(6), which requires courts to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”⁸³ These defendants argued that, with the discretion authorized by *Booker*, sentencing courts could depart from the Guidelines based on this disparity.⁸⁴ Prior to *Kimbrough*, almost every circuit had held that the disparity between fast-track and non-fast-track districts was not “unwarranted” because Congress, “by directing that the Sentencing Commission provide for guideline departures in certain judicial districts [in the PROTECT Act], ‘concluded that the advantages stemming from fast-track programs outweigh[ed] their disadvantages, and that any disparity that results from fast-track programs is not ‘unwarranted.’”⁸⁵

1. Anti-Discretionary Circuits

In its opinion in *United States v. Gomez-Herrera*, the United States Court of Appeals for the Fifth Circuit became the first circuit to readdress the issue of fast-track disparity after the *Kimrough* decision.⁸⁶ The defendant in *Gomez-Herrera* pleaded guilty to illegal reentry following removal pursuant to 8 U.S.C. section 1326 in a district without a fast-track program.⁸⁷ The sentencing court imposed a Guidelines sentence despite the defendant’s argument that he should receive a downward departure because of the disparity

81. See *United States v. Sebastian*, 436 F.3d 913, 916 (8th Cir. 2006), *abrogated* by *United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011).

82. See *id.* at 914.

83. See *United States v. Andújar-Arias*, 507 F.3d 734, 738 (1st Cir. 2007), *abrogated* by *United States v. Rodríguez*, 527 F.3d 221 (1st Cir. 2008); *Sebastian*, 436 F.3d at 915.

84. See *Andújar-Arias*, 507 F.3d at 737-38; *Sebastian*, 436 F.3d at 915.

85. *Sebastian*, 436 F.3d at 916 (quoting *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1263 (D. Utah 2005)); see also *Andújar-Arias*, 507 F.3d at 742; *United States v. Vargas*, 477 F.3d 94, 98-100 (3d Cir. 2007); *United States v. Perez-Pena*, 453 F.3d 236, 243 (4th Cir. 2006); *United States v. Castro*, 455 F.3d 1249, 1252-53 (11th Cir. 2006); *United States v. Martinez-Martinez*, 442 F.3d 539, 542 (7th Cir. 2006); *United States v. Marcail-Santiago*, 447 F.3d 715, 718 (9th Cir. 2006); *United States v. Hernandez-Cervantes*, 161 Fed. App’x 508, 512 (6th Cir. 2005).

86. 523 F.3d 554 (5th Cir. 2008).

87. *Id.* at 556.

between districts employing fast-track programs and those that do not.⁸⁸ On appeal, the defendant maintained that the Supreme Court's decision in *Kimbrough* overruled Fifth Circuit authority and authorized sentencing in disagreement with policy choices of the Guidelines.⁸⁹ The Fifth Circuit disagreed, holding that "*Kimbrough*, which concerned a district court's ability to sentence in disagreement with Guideline policy, [did] not control this case, which concerns a district court's ability to sentence in disagreement with Congressional policy."⁹⁰ To support its conclusion that fast-track disparity was an issue of congressional policy, the court noted that the text of the PROTECT Act clearly limits fast-track departures to programs authorized by the Attorney General.⁹¹

After determining that *Kimbrough* did not control this case, the Fifth Circuit held that the sentencing disparity could not be labeled as "unwarranted."⁹² Falling back on its line of pre-*Kimbrough* cases, the court declined to call a disparity "unwarranted" "when the disparity was specifically authorized by Congress in the PROTECT Act."⁹³ The court reasoned that the "government's decision to offer a fast-track plea offer is no different from the Attorney General's prosecutorial discretion regarding whether to prosecute, what charge to file, whether to offer a plea agreement," none of which have been found to beget unwarranted disparities in sentencing.⁹⁴

The United States Court of Appeals for the Eleventh Circuit, in *United States v. Vega-Castillo*, also declined to overturn its precedent that sentencing courts are not required to depart from Guidelines based on the limited availability of fast-track sentencing programs.⁹⁵ The defendant in *Vega-Castillo* appealed his sentence after the district court refused his request to mitigate fast-track disparity by granting its own downward departure.⁹⁶ The Eleventh Circuit held that its prior precedent rule did not authorize overturning the circuit's previous cases on fast-track disparity because those cases did not directly conflict with the Supreme Court's holding in *Kimbrough* regarding the crack/powder cocaine disparity.⁹⁷ Further, the Eleventh Circuit maintained that this was an issue regarding a court's discretion to disagree with congressional policy, as distinguished from a court's discretion to disagree

88. *Id.* at 556-57. The defendant also proffered several other reasons for a downward departure to no avail. *Id.*

89. *Id.* at 559.

90. *Id.*

91. *Id.* at 560-61.

92. *Id.* at 562.

93. *Id.*

94. *Id.* at 561.

95. 540 F.3d 1235, 1236-38 (11th Cir. 2008) (per curiam).

96. *Id.* at 1236.

97. *Id.* at 1238-39. Under the Eleventh Circuit's prior precedent rule, the court could only overturn prior precedent en banc or by a conflicting Supreme Court decision. *Id.* at 1236.

with Guidelines policy, which was addressed in *Kimbrough*.⁹⁸ Similarly, in *United States v. Gonzalez-Zotelo*, the United States Court of Appeals for the Ninth Circuit interpreted the PROTECT Act as illustrating that fast-track disparity is a matter of congressional policy and refused to overturn its precedent based on *Kimbrough*, holding that sentencing discrepancy originating from fast-track programs is not unwarranted.⁹⁹

2. Pro-Discretionary Circuits

In contrast to the Fifth, Eleventh, and Ninth Circuits, the First Circuit overturned its precedent in *United States v. Rodríguez*, holding that a sentencing court commits error when it does not consider disparity incident to the absence of a fast-track program.¹⁰⁰ In *Rodríguez*, the defendant pleaded guilty to illegal reentry following removal in a non-fast-track district and argued for a below-Guidelines sentence based on the inequality in sentencing between defendants in fast-track districts and those in non-fast-track districts.¹⁰¹ The First Circuit called attention to recent Supreme Court jurisprudence that “emphasiz[ed] the breadth of a district court’s discretion to deviate from a defendant’s [Guidelines sentence].”¹⁰²

Rather than distinguishing *Kimbrough* because it involved the crack/powder cocaine ratio, the court believed that the Court’s approach in *Kimbrough* “plainly ha[d] wider implications” affecting a number of its earlier cases.¹⁰³ The First Circuit’s pre-*Kimbrough* cases had only evaluated the issue of whether a particular disparity could be a relevant consideration under a subsection of section 3553(a).¹⁰⁴ However, *Kimbrough*, as the First Circuit interpreted it, undermines those cases by “counsel[ing] a new and different approach to section 3553(a)” that requires a sentencing judge to “engage in a more holistic inquiry” and reflect on all factors in section 3553(a) together.¹⁰⁵ According to the court, the overarching principle of the sentencing statute, found in section 3553(a), is to “impose a sentence sufficient, but not greater

98. *Id.* at 1239 (citing *Gomez-Herrera*, 523 F.3d at 563).

99. 556 F.3d 736, 740 (9th Cir. 2009). While the Fifth, Ninth, and Eleventh Circuits seem to be in agreement that fast-track programs are a matter of congressional policy, the Government eventually realized this was a losing argument and stopped trying to argue in these cases that the “congressional policy concerning fast-track programs prohibited the exercise of a district court’s discretion.” *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 150 n.8 (3d Cir. 2009).

100. 527 F.3d 221, 231 (1st Cir. 2008).

101. *Id.* at 223.

102. *Id.* at 225 (citing *Gall v. United States*, 552 U.S. 38, 48-51 (2007); *Kimrough v. United States*, 552 U.S. 85, 101-02, 109-11 (2007)).

103. *Id.* at 226.

104. *Id.* at 227-28; see, e.g., *United States v. Andújar-Arias*, 507 F.3d 734, 736 (1st Cir. 2007), *abrogated by Rodríguez*, 527 F.3d 221.

105. *Rodríguez*, 527 F.3d at 227-28.

than necessary to accomplish the goals of sentencing.”¹⁰⁶ In view of the goals of sentencing, the court held that consideration of fast-track disparity is not barred by section 3553(a) and refusal to consider such disparity is procedural error.¹⁰⁷

The *Rodriguez* court also emphasized the similarities between the crack/powder ratio discussed in *Kimbrough* and fast-track departure: they had “been both blessed by Congress and openly criticized by the Sentencing Commission,”¹⁰⁸ and neither “exemplif[ies] the . . . Commission’s exercise of its characteristic institutional role.”¹⁰⁹ Finding the government’s “implicit congressional directive”¹¹⁰ argument in fast-track sentencing cases similar to the government’s argument in *Kimbrough*, the court refused to conclude that the PROTECT Act restricted a district court’s sentencing discretion, either expressly or implicitly.¹¹¹ Without an “unambiguous congressional directive,” the court concluded sentencing judges are not barred from considering this disparity.¹¹²

The United States Court of Appeals for the Third Circuit, in *United States v. Arrelucea-Zamudio*, aligned itself with the First Circuit’s pro-discretion stance.¹¹³ The defendant in *Arrelucea-Zamudio* pleaded guilty to illegal reentry and argued for a downward variance based on the lack of availability of fast-track sentencing.¹¹⁴ On appeal of a within-Guidelines sentence, the court was not persuaded by the analyses of this issue in the Fifth, Ninth, and Eleventh Circuits and found “[f]ocusing on congressional policy here [was] illusory.”¹¹⁵ In the opinion of the court, the lack of any explicit congressional restraint on judicial discretion in downward departures for those in non-fast-track districts was dispositive.¹¹⁶ Additionally, the court noted that the Commission has even speculated about a potential unwarranted disparity based on geography caused by its fast-track departure policy.¹¹⁷

106. *Id.* at 228 (quoting *Kimbrough*, 552 U.S. at 101) (internal quotations omitted).

107. *Id.* at 229, 231.

108. *Id.* at 227.

109. *Id.* at 227 (quoting *Kimbrough*, 552 U.S. at 109) (internal quotations omitted). Like the crack/powder ratio, the Commission formulated the fast-track departure guidelines without taking into account “empirical data and national experience.” *Id.* (quoting *Kimbrough*, 552 U.S. at 109) (internal quotations omitted).

110. *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 151 (3d Cir. 2009).

111. *Rodriguez*, 527 F.3d at 229-30.

112. *Id.* at 230.

113. *Arrelucea-Zamudio*, 581 F.3d at 150.

114. *Id.* at 144.

115. *Id.* at 150.

116. *Id.* at 151.

117. *Id.* at 153.

Ultimately, the Third Circuit held that “a district court [may] consider a variance on the basis of [the] fast-track argument.”¹¹⁸

The circuit split on the issue evened up when the Sixth Circuit joined the First and Third Circuits in holding that sentencing courts have discretion to consider the disparity in sentencing between similarly situated defendants due to the existence or non-existence of fast-track programs.¹¹⁹ Following the reasoning of the First Circuit, the Sixth Circuit concluded that *Kimbrough* undermined any claim of an implicit directive from Congress on sentencing matters, and it remanded the case so that the sentencing court could take into account the fast-track sentencing disparity argument.¹²⁰

The fundamental distinction in the pro-discretionary view adopted by the First, Third, and Sixth Circuits and the anti-discretionary view advocated by the Fifth, Eleventh, and Ninth Circuits is whether the disparity resulting from selective deployment of fast-track programs is unwarranted. The classification of the disparity as warranted or unwarranted depended on the circuit’s interpretation of section 401(m)(2)(B) of the PROTECT Act and whether an implied congressional directive to the Commission can bind district courts. The split left district court judges in other circuits with the uncertainty created by the circuits’ mixed messages.

E. The Resolution of an Analogous Circuit Split

The distinction between Guidelines and congressional policy is also a critical inquiry in another area of judicial discretion: career-offender sentencing. Similar to how Congress directed the Commission to promulgate fast-track Guidelines in the PROTECT Act, section 994(h) of the SRA instructed the Commission to establish guidelines specifically for career-offenders – defendants with multiple prior felony convictions.¹²¹ In response, the Commission set out a sentencing policy for career-offenders in section 4B1.1 of the Guidelines.¹²²

After the Supreme Court of the United States’ expansion of judicial sentencing discretion in *Kimbrough*, the circuits split on whether a district court may depart from the Guidelines if it disagrees with the career-offender Guidelines.¹²³ In *United States v. Vasquez*, the Eleventh Circuit held that it

118. *Id.* at 156.

119. *United States v. Camacho-Arellano*, 614 F.3d 244, 250-51 (6th Cir. 2010).

120. *Id.* at 249-50.

121. 28 U.S.C. § 994(h) (2006) (“The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant . . . has been convicted of a felony . . . and . . . has previously been convicted of two or more prior felonies”).

122. See GUIDELINES MANUAL, *supra* note 28, § 4B1.1.

123. See *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009) (“[T]he Supreme Court has consistently reaffirmed that *all* of the sentencing guidelines are advisory’ . . . [and t]hat holds true for the career-offender provisions” (quoting *United*

was reasonable for a district court to refuse to consider its disagreement with the Guidelines' increased penalties for career offenders when imposing a repeat drug offender's sentence.¹²⁴ The court reasoned that because section 4B1.1 reflects Congress's policy of harsher punishment for recidivist drug offenders, it is impermissible to vary from these Guidelines.¹²⁵

When *Vazquez* was pending on appeal to the Supreme Court of the United States, then-Solicitor General Elena Kagan recommended that the Court vacate the Eleventh Circuit's judgment and remand.¹²⁶ She admitted that the Eleventh Circuit's holding that a "sentencing court cannot disagree with the policy of the career offender guideline . . . is inconsistent with [the Court's] conception of the nature of the advisory Guidelines regime under *Booker* and *Kimbrough*."¹²⁷ According to Kagan, the Eleventh Circuit had founded its opinion on the "premise that congressional directives to the Sentencing Commission are equally binding on sentencing courts," which is incorrect.¹²⁸ The Court subsequently vacated judgment and remanded the case.¹²⁹

In light of *Vazquez*, the United States Court of Appeals for the Seventh Circuit – the only other circuit to prohibit variance due to a disagreement with the Guidelines' career-offender policy – held that "district judges are entitled to disagree with the Commission's policy choices" and section 4B1.1 of the Guidelines is not mandatory.¹³⁰ Unlike the courts that decided the fast-track issue, the circuits had harmonized in authorizing district courts to sentence in disagreement with the Guidelines for career-offenders.

States v. Liddell, 543 F.3d 877, 884-85 (7th Cir. 2008)); United States v. Gray, 577 F.3d 947, 949-50 (8th Cir. 2009) (indicating that the sentencing court has authority to consider disagreement with the career-offender Guidelines in varying from the Guidelines); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008) (holding that a disagreement with the career-offender Guidelines policy is a permissible reason to deviate). *But see* United States v. Welton, 583 F.3d 494, 499 (7th Cir. 2009) (holding a sentencing court is required to sentence a career offender within the section 4B1.1 range), *vacated*, 130 S. Ct. 2061 (2010); United States v. Vazquez, 558 F.3d 1224, 1227-28 (11th Cir. 2009) (holding that "the district court properly refused to consider its disagreement with the Guidelines' treatment of career offenders when it imposed its sentence"), *vacated*, 130 S. Ct. 1135 (2010).

124. *Vazquez*, 558 F.3d at 1228.

125. *Id.* at 1227. This idea that, because certain Guidelines merely echo congressional policy, they cannot provide a basis for departures is the same logic adopted by the Fifth, Ninth, and Eleventh Circuits in fast-track cases. *See supra* Part II.D.

126. Brief for the United States at 17, *Vazquez v. United States*, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 5423020, at *17.

127. *Id.* at 10.

128. *Id.* at 9.

129. *Vazquez*, 130 S. Ct. at 1135.

130. United States v. Corner, 598 F.3d 411, 415-16 (7th Cir. 2010).

III. RECENT DEVELOPMENTS

Recent judicial and administrative developments have furthered the fast-track debate. This Part describes how the Seventh and Eighth Circuits weighed in on the issue, favoring judicial consideration of the fast-track disparity in sentencing a defendant in a non-fast-track district. Next, it explains the DOJ's new policy for authorizing fast-track programs, which is designed to resolve the circuit split on this issue.

A. Circuit Split Favors Discretion to Vary Based on Fast-Track Disparity

With the Seventh Circuit's opinion in *United States v. Reyes-Hernandez*, the circuit split on the fast-track issue tipped in favor of the pro-discretion side.¹³¹ The Seventh Circuit consolidated two cases to review the fast-track issue.¹³² In the first case, the government removed Jaime Reyes-Hernandez, a non-citizen, from the United States after he was convicted of robbery.¹³³ Reyes-Hernandez was discovered after returning to the country illegally, and he pleaded guilty to illegal reentry in violation of 8 U.S.C. sections 1326(a) and (b)(2).¹³⁴ Based on the offense and Reyes-Hernandez's criminal history, the presentence report calculated a Guidelines range of forty-one to fifty-one months, and the sentencing judge imposed a sentence of forty-one months.¹³⁵ The defendant in the second case, Pedro Sanchez-Gonzalez, pleaded guilty to illegal reentry following a conviction of domestic battery.¹³⁶ He received a Guidelines sentence of seventy-seven months.¹³⁷ In both cases, the district court refused to consider departing from the Guidelines despite the defendants' claims that a disparity in sentencing existed due to the district's lack of a fast-track option.¹³⁸

After considering the Court's jurisprudence on judicial sentencing discretion, the Seventh Circuit concluded that "district judges are at liberty to

131. 624 F.3d 405 (7th Cir. 2010).

132. *Id.* at 407.

133. *Id.*

134. *Id.* at 408.

135. *Id.*

136. *Id.*

137. *Id.* at 409.

138. *Id.* at 407. The sentencing judge in Reyes-Hernandez's case cited to a pre-*Kimbrough* case holding that such discrepancies in sentencing were not unreasonable. *Id.* at 408. The judge presiding over Sanchez-Gonzalez's sentencing hearing held that he was bound to pre-*Kimbrough* cases as well. *Id.* at 409. However, he acknowledged that it seemed "unjust to permit sentencing disparities based on the fortuity of the judicial district in which a defendant in an illegal reentry case is charged." *Id.* (internal quotation marks omitted).

reject *any* Guideline on policy grounds.”¹³⁹ This conclusion had been the basis of the court’s recent reconsideration of judicial discretion to vary from career-offender Guidelines in *United States v. Corner*.¹⁴⁰ Given the parallels between *Corner* and the fast-track issue, the court believed *Corner* largely “eviscerate[d] the government’s position” that district courts are bound by Guidelines directed from Congress.¹⁴¹ The Seventh Circuit interpreted the Court’s disposition of *Vazquez* to reflect an understanding that congressional directives to the Commission do not have the same legal force as statutes.¹⁴² The court held that a sentencing judge is permitted to consider a facially obvious disparity, including those caused by a lack of fast-track programs, among the totality of the factors found in section 3553(a) and refusal to do so is error.¹⁴³

The government also argued in *Reyes-Hernandez* that granting judges in non-fast-track districts the ability to consider fast-track disparity in sentencing downward infringes on the principle of separation of powers.¹⁴⁴ The government claimed that because Congress authorized the Attorney General to set up fast-track programs on a district-by-district basis, the departures from the Guidelines offered under the guise of fast-track programs should be a determination for the executive branch.¹⁴⁵ However, the Seventh Circuit rejected this argument, reasoning that consideration of disparate sentencing practices while crafting an appropriate sentence is “an unquestionably judicial function.”¹⁴⁶

The United States Court of Appeals for the Eighth Circuit added to the circuit split by authorizing judicial sentencing discretion in light of the disparity produced from fast-track programs.¹⁴⁷ In May 2010, a police officer arrested Baltazar Jimenez-Perez¹⁴⁸ for failure to possess a valid driver’s license and insurance.¹⁴⁹ Because Jimenez-Perez was an illegal alien and had previously been deported in 2008 after two unlawful drug possession convictions,

139. *Id.* at 415 (quoting *United States v. Corner*, 598 F.3d 411, 415 (7th Cir. 2010) (en banc)) (internal quotation marks omitted).

140. *Id.* at 416; see *Corner*, 598 F.3d at 415-16.

141. *Reyes-Hernandez*, 624 F.3d at 416.

142. *Id.* at 417; see *supra* Part II.E.

143. *Reyes-Hernandez*, 624 F.3d at 421.

144. *Id.*

145. *Id.*

146. *Id.* (quoting *United States v. Rodriguez*, 527 F.3d 221, 230 (1st Cir. 2008)).

147. See *United States v. Jimenez-Perez*, 659 F.3d 704, 71 (8th Cir. 2011).

148. To clarify any potential confusion, “Jimenez” is not a typo; while the appellate opinion refers to the defendant as Jimenez, defendant’s brief refers to him as Jiminez.

149. Brief of Appellee, *Jimenez-Perez*, 659 F.3d 704 (No. 10-3757-EMSL), 2011 WL 1160652, at *3. The officer initiated a routine stop of Jimenez-Perez after being notified of a “reckless driver” and noticing that the car driven by Jimenez-Perez was missing a tire and license plates. *Id.*

he was charged with one count of illegal reentry subsequent to a felony conviction, a violation of 8 U.S.C. section 1326(a).¹⁵⁰

Like many defendants before him, Jiminez-Perez pleaded guilty to this charge and motioned for a downward variance from the Guidelines sentencing range to compensate for the unwarranted sentencing disparity caused by the lack of a fast-track program in his jurisdiction.¹⁵¹ The United States District Court for the Eastern District of Missouri denied the request, explaining that it felt uncomfortable granting a variance based on this consideration without more definitive guidance from the Eighth Circuit on the issue.¹⁵² Consequently, the district court sentenced Jiminez-Perez to thirty months in prison, the minimum Guidelines term.¹⁵³

On appeal to the Eighth Circuit, Jiminez-Perez argued that “the district court procedurally erred by failing to recognize its own discretionary authority to vary downward from [his] advisory Guidelines range to account for a sentencing disparity among illegal reentry defendants caused by the inconsistent availability of ‘[f]ast[-t]rack’ sentencing programs.”¹⁵⁴ While Eighth Circuit precedent clearly permitted a sentencing judge not to vary downward based on inconsistencies created by these programs, Jiminez-Perez urged the court to follow the lead of other circuits and reconsider the issue based on *Kimbrough*.¹⁵⁵ The government maintained that the district court’s failure to consider the disparity created by fast-track programs did not constitute an error according to *United States v. Sebastian* and subsequent Eighth Circuit cases rejecting the same claim made by Jiminez-Perez.¹⁵⁶ It urged the court to follow the Fifth, Ninth, and Eleventh Circuits and hold that fast-track disparities cannot be the basis for downward variance from sentencing guidelines because they are not “unwarranted.”¹⁵⁷

150. *Id.* at 1, 3; see 8 U.S.C. § 1326(b)(1) (2006) (providing that any alien “whose removal was subsequent to a conviction for commission of . . . a felony . . . shall be fined under title 18, imprisoned not more than 10 years, or both”).

151. *Jiminez-Perez*, 659 F.3d at 705.

152. Brief of Defendant-Appellant, *Jiminez-Perez*, 659 F.3d 704 (No. 10-3757-EMSL), 2011 WL 585534, at *5-6 [hereinafter Brief of Defendant].

153. *Id.* at *1.

154. *Jiminez-Perez*, 659 F.3d at 705-06. He also argued that the sentence imposed was substantively unreasonable in that it failed to take into consideration all relevant factors under 18 U.S.C. section 3553(a), namely the need to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” *Id.* at 706 (quoting 18 U.S.C. § 3553(a) (2006)) (internal quotation marks omitted). Because the court disposed of the case on the procedural issue, it declined to discuss the merits of this argument. *Id.* at 706.

155. Brief of Defendant, *supra* note 152, at *8-9.

156. Brief of Appellee, *supra* note 149, at *7-8 (citing *United States v. Gonzalez-Alvarado*, 477 F.3d 648, 651 (8th Cir. 2007), *abrogated on other grounds by* *United States v. Bain*, 477 F.3d 648, 651 (8th Cir. 2008)); *United States v. Sebastian*, 436 F.3d 913, 915 (8th Cir. 2006)).

157. *Id.* at *9-10.

The Eighth Circuit agreed with Jimenez-Perez, as well as the First, Third, Sixth, and Seventh Circuits, that *Kimbrough* made clear that inconsistencies in sentencing would not be *implicitly* authorized by Congress.¹⁵⁸ Therefore, the court found *Kimbrough* had “undermine[d] the rationale” supporting its prior cases “disallow[ing] variances based on the unavailability of [fast-track]” in a district based on Congress’s supposed implied authorization.¹⁵⁹ The court also refused to rely on its pre-*Kimbrough* precedent because those cases had “only inquired whether a district court [could] vary downward pursuant *exclusively*” to section 3553(a)(6).¹⁶⁰ As noted by the First Circuit, this mentality regarding consideration of the factors found in section 3553(a) conflicts with the new “holistic” approach counseled by the Supreme Court of the United States in *Kimbrough*.¹⁶¹ Rather, a sentencing judge should consider any unwarranted disparity caused by fast-track programs in conjunction with all the other factors of section 3553(a).¹⁶² The court determined that the district court’s “fail[ure] to recognize its sentencing discretion” based on this unwarranted disparity was a procedural error,¹⁶³ and it remanded the case for resentencing.¹⁶⁴

B. The Department of Justice’s Solution to Fast-Track Disparity

The DOJ recognized that the circuit split only generated additional disparities in sentencing.¹⁶⁵ After conducting a review on fast-track programs,

158. *Jimenez-Perez*, 659 F.3d at 708-09.

159. *Id.* at 708. See generally *Sebastian*, 436 F.3d 913 (outlining the Eighth Circuit’s previous reasoning for disallowing variance based upon the unavailability of a fast-track program). There had also been a post-*Kimbrough* case that relied on *Sebastian*. See *United States v. Rosario-Moctezuma*, 411 Fed. App’x 942, 943-44 (8th Cir. 2011) (relying on *Gonzalez-Alvarado*, 477 F.3d at 943-44, which relies on *Sebastian*, 436 F.3d at 916). The government argued that this recent decision foreclosed Jimenez-Perez’s arguments, but the appellate court disagreed, finding that *Rosario-Moctezuma* “lack[ed] controlling authority” because it had been unpublished and failed to mention *Kimbrough*. *Jimenez-Perez*, 659 F.3d at 707.

160. *Jimenez-Perez*, 659 F.3d at 710.

161. *Id.* (quoting *United States v. Rodriguez*, 527 F.3d 221, 227-28 (1st Cir. 2008)).

162. *Id.* (quoting *Kimbrough v. United States*, 552 U.S. 85, 108 (2007)).

163. *Id.* at 706.

164. *Id.* at 711. The court did caution that a variance solely on the basis of fast-track could still be deemed unreasonable and advised varying only after “a holistic and meaningful review of all relevant § 3553(a) factors[.]” *Id.* (quoting *United States v. Reyes-Hernandez*, 624 F.3d 405, 421 (7th Cir. 2010)).

165. Memorandum Regarding Department Policy on Early Disposition or “Fast-Track” Programs, from James M. Cole, Deputy Attorney Gen., Dep’t of Justice, to all United States Attorneys (Jan. 31, 2012) (“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

the DOJ revised its fast-track policy in January 2012.¹⁶⁶ The new policy, as outlined in a memorandum issued by Deputy Attorney General James Cole, eliminates the requirement that the district face an extraordinary burden from a particular class of offenses and grants eligibility for fast-track departures to any qualified defendant, regardless of the prosecution location.¹⁶⁷

According to the revised policy, any defendant prosecuted for felony illegal reentry under 8 U.S.C. section 1326 is eligible for consideration of a fast-track program,¹⁶⁸ and any district prosecuting such defendants are required to implement a fast-track program.¹⁶⁹ United States Attorneys still retain prosecutorial “discretion [in] limit[ing] or deny[ing] a defendant’s participation in the fast-track program based [upon] . . . [t]he defendant’s [history of] prior violent felony convictions, . . . [t]he . . . number of prior deportations, . . . [whether] the defendant is part of an independent federal criminal investigation, . . . [and] any other aggravating factors.”¹⁷⁰ The other requirements for a fast-track program remain substantially the same with respect to what the defendant must do in order to receive a departure; however, a defendant must now also “waive [his or her] right to argue for a variance” in sentencing under 18 U.S.C. section 3553(a).¹⁷¹

IV. DISCUSSION

Before the recent change in policy, the fast-track program clearly undermined Congress’s goals of avoiding unwarranted disparity in sentencing between similarly situated defendants and creating a transparent system.¹⁷² Two defendants with identical criminal backgrounds could reenter the country illegally together, and if one was caught and arrested in a non-fast-track district while the other was convicted in district with a fast-track program, they would face different punishments for the same crime. Such disparity was exactly why Congress attempted to practically eliminate judicial discretion with mandatory Guidelines.¹⁷³

The lack of uniformity in the fast-track programs among the districts that employed them creates even more disparity in sentencing. Some districts, such as the Southern District of California, use a charge-bargaining,

are left to impose sentences that introduce additional sentencing disparities.”) [hereinafter Cole Memo], *available at* <http://www.justice.gov/dag/fast-track-program.pdf>.

166. *Id.* at 2.

167. *Id.*

168. *Id.* at 3.

169. *Id.* at 4.

170. *Id.* at 3.

171. *Id.*

172. *See supra* notes 22-26 and accompanying text.

173. *See supra* notes 22-26 and accompanying text.

fast-track program wherein a defendant may plead guilty to two counts of a lesser charge and receive a thirty-month sentence.¹⁷⁴ Other districts just use the downward departures in sentencing, as provided in U.S.S.G. section 5K3.1.¹⁷⁵ Even among the districts providing departures pursuant to section 5K3.1, there is variation because the Guidelines only require that the departure not exceed four levels instead of providing specific departures.¹⁷⁶ For example, in the Western District of Texas, a defendant is only entitled to a one-level reduction by participating in the fast-track program, whereas a defendant in the District of New Mexico receives a two-level reduction, and a defendant in the District of North Dakota is given a four-level reduction.¹⁷⁷

Moreover, the justification for fast-track departures became more obscure when considering in what districts the Attorney General has authorized the programs. Fast-track programs were established to cope with an explosion of immigration-related cases, and Congress, in authorizing departures pursuant to fast-track programs, was motivated by the judicial and prosecutorial strain of these cases in districts along the southwest border.¹⁷⁸ However, fast-track programs in practice have not been so limited. Districts handling a small number of immigration cases such as the Districts of North Dakota, Idaho, and Nebraska have fast-track programs authorized by the Attorney General.¹⁷⁹ On the other hand, districts in Utah, Florida, Nevada, and New York that do handle a significant amount of immigration cases do not have fast-track programs.¹⁸⁰ Because Congress could not have intended this disparate and perplexing deployment of fast-track programs, it was clear that a change was needed.

The DOJ's change in policy attempts to place similarly situated defendants on more equal footing when it comes to potential sentences by allowing any defendant charged with a violation of 8 U.S.C. section 1326 to be fast-track eligible.¹⁸¹ This move aligns with the trend in the circuit courts. With

174. Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517, 529 (2006).

175. *Id.* at 530.

176. *Id.* at 523.

177. *Id.* at 530.

178. 149 CONG. REC. H2420 (daily ed. Mar. 27, 2003) (statement by Rep. Feeney) (noting that programs should be reserved for offenses "whose high incidence[s] within the district [have] imposed an extraordinary strain on the resources of that district as compared to other districts").

179. *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1267 (D. Utah 2005).

180. McClellan & Sands, *supra* note 174, at 531; *see also Perez-Chavez*, 422 F. Supp. 2d at 1267 ("North Dakota may be a 'border state'; but unless it confronts some unheralded flood of illegal Canadian immigrants, it is unclear why it should operate a fast-track program while Utah (which has more illegal re-entry cases to prosecute) does not.").

181. Cole Memo, *supra* note 165, at 2.

the addition of the Seventh and Eighth Circuits, more circuits favor allowing a judicial consideration of the disparity.¹⁸² Thus, most circuits found the disparity to be unwarranted.¹⁸³

Given its recent cases, if the Supreme Court of the United States were to decide this issue, it would likely agree with the pro-discretion faction. Starting with *Booker*, the Court has issued a line of cases that stresses judicial discretion in sentencing.¹⁸⁴ As *Gall* illustrates, the Court has not allowed a district court to assume the Guidelines are reasonable,¹⁸⁵ and under *Kimbrough*, a sentencing judge may find them unreasonable based on a policy disagreement.¹⁸⁶

The similarities between fast-track cases with crack/powder cocaine cases and career offender cases also provide insight on how the Supreme Court of the United States would rule. In all three types of cases, the government argued that any resulting disparity from the Guidelines could not be considered unwarranted because the Guidelines merely reflect congressional directives.¹⁸⁷ The Court in *Kimbrough* quickly rejected this argument, concluding that the Guidelines are not as binding on courts as statutes and rejecting an implied Congressional restriction on judicial sentencing discretion.¹⁸⁸ In *Vazquez*, the Court accepted the Solicitor General's recommendation that judgment should be vacated because it had been based on an incorrect premise that "congressional directives to Sentencing Commissions are equally binding on sentencing courts."¹⁸⁹

In these cases, the Court focused on whether Congress had implicitly sanctioned sentencing disparities. Based on this inquiry, the Court would not likely distinguish fast-track cases from *Kimbrough* simply because *Kimbrough* concerned crack cocaine instead of illegal reentry.¹⁹⁰ Accordingly, the Court likely would have found a disparity in sentences due to fast-track programs to be unwarranted and thus, an appropriate factor for consideration in departing downward.

Congress, on the other hand, may not look so approvingly on the DOJ's change in fast-track policy. By lifting the restriction of the programs to dis-

182. See *supra* Part III.A.

183. See *supra* Part III.A.

184. See *supra* Part II.B.

185. *Gall v. United States*, 552 U.S. 38, 50 (2007).

186. *Kimbrough v. United States*, 552 U.S. 85, 111 (2007).

187. See *supra* notes 53-56, 128, 156-57 and accompanying text.

188. *Kimbrough*, 552 U.S. at 103.

189. *Vazquez v. United States*, 130 S. Ct. 1135 (2010); Brief for the United States, *supra* note 126, at *9. Of course, the propositions in the Solicitor General's brief carry no precedential weight, and the Supreme Court did not adopt those views merely by following the Solicitor General's recommendation; however, the Court's ultimate disposition of the case "indicates receptivity to them." *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010).

190. See *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2008).

tricts experiencing an extraordinary load of illegal reentry cases, the new policy lessens sentencing disparities for similarly situated defendants. This effect advances one of Congress's stated goals in sentencing reform legislation from the 1980s: elimination of unwarranted sentencing disparities.¹⁹¹ However, more recent legislation, including the PROTECT Act, has concentrated on reducing downward departures from the Guidelines.¹⁹²

While Congress may have authorized departures pursuant to fast-track programs in the PROTECT Act,¹⁹³ it only did so after finding that the need to prosecute illegal reentry cases outweighed a desire to curb departures.¹⁹⁴ This justification for downward departures no longer holds up under the new policy. A district like the Eastern District of Missouri, where the defendant in *Jimenez-Perez* was sentenced, can grant downward departures to defendants charged with violating 8 U.S.C. section 1326 despite the fact that immigration cases make up less than three percent of the district's caseload.¹⁹⁵ It is doubtful that there will be any appreciable increase in efficiency in such districts by fast-tracking the few defendants charged under section 1326. The costs of granting departures in sentencing are not outweighed by a corresponding benefit in increased efficiency, and the compromise made by Congress in authorizing fast-track departures will become distorted.

Conceivably, one could argue that the compromise remains balanced: the expense of allowing departures is balanced by the efficiency it brings to certain districts overwhelmed by immigration cases and by the lack of disparity manifested in the selective implementation of fast-track programs. However, a similar harmonious result could be achieved by allowing the courts in non-fast-track districts to use their judicial sentencing discretion to grant departures. As previously discussed, there had been indications that the circuit split would have been resolved in favor of allowing district court judges to grant departures based on fast-track disparity.¹⁹⁶ The judiciary has traditionally held the function of determining sentences¹⁹⁷ and even today, remains the ultimate authority.¹⁹⁸ It may arguably be better to keep such discretion within

191. See *supra* notes 22-26 and accompanying text.

192. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

193. *Id.* § 401(m)(2)(B).

194. See *supra* note 178 and accompanying text.

195. See U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2010), http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Stats_MOE.pdf. Conversely, one may argue that the new policy does not mark the obfuscation of the justification for fast-track departures given the seemingly indiscriminate authorization of fast-track programs before this change. See *supra* notes 178-80 and accompanying text.

196. See *supra* notes 184-90 and accompanying text.

197. See *supra* notes 17-18 and accompanying text.

198. See *United States v. Rodríguez*, 527 F.3d 221, 230 (1st Cir. 2008) ("While the decision to institute a fast-track program in a particular judicial district is the At-

the ambit of the courts that have traditionally been the ones equipped to tailor a sentence for a particular defendant, especially given the recent emphasis on judicial discretion under section 3553(a) in Supreme Court of the United States jurisprudence.¹⁹⁹ Under this approach, the district judges in non-fast-track districts could grant a departure only to those defendants who warrant one based a holistic review of section 3553(a) factors, thereby preventing a blanket reduction in sentences as is authorized under the new administrative policy.

V. CONCLUSION

The limited authorization of fast-track programs left many defendants without a fast-track option complaining of an unwarranted sentencing disparity.²⁰⁰ District court judges had to decide whether they could grant a non-fast-tracked defendant a sentence below the Guidelines to mitigate this disparity. While the Fifth, Ninth, and Eleventh Circuits held such mitigation is not required, the First, Third, Sixth, Seventh, and Eighth Circuits all held that it is error for a district judge not to consider this unwarranted disparity when sentencing.²⁰¹ Rather than allowing the judges in fast-track districts to grant departures at their own discretion, the DOJ issued a new policy that would also allow any illegal alien charged under 8 U.S.C. section 1326 to be fast-tracked under prosecutorial discretion.²⁰² While this is consistent with one goal of federal sentencing legislations, namely, to eliminate unwarranted sentencing disparities,²⁰³ it conflicts with a more recent attempt by Congress to reduce the overall number of Guidelines departures. Further, it eliminates the justification of granting these fast-track departures based on a need to prosecute immigration cases in overwhelmed districts. Rather than authorizing a blanket reduction in sentences by allowing defendants in any district to receive departures, sentencing judges should exercise their discretion and only grant the departures where they are truly warranted.

torney General's, the ultimate authority to grant a fast-track departure lies with the sentencing court.").

199. *See supra* Part II.B.

200. *See supra* Part II.D.

201. *See supra* Parts II.D, III.A.

202. *See supra* Part III.B.

203. *See supra* note 22 and accompanying text.