June 14, 2005

By Hand Delivery

Honorable Lewis A. Kaplan
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

Dear Judge Kaplan:

I write in response to the Government's supplemental, June 10, 2005 memorandum of law in opposition to Mr. Krukowski's request for a non-Guidelines sentence based, in part, on the unwarranted disparities created by the existence of fast-track programs in some districts, but not in the Southern District of New York. ("Govt Memo"). The Government's brief (1) provides a history of fast-track programs and the policy interests served by such programs, (2) sets forth the Attorney General's broad criteria for authorizing fast-track programs, (3) describes, in an appendix, the operation of the fast-track programs that exist in 13 federal districts for illegal reentry cases, and (4) argues that fast-track programs do not create "unwarranted" disparities.

The Government contends that fast-track programs do no create unwarranted sentencing disparities because (a) Congress said so before passing the PROTECT Act, (b) fast-track programs are an important prosecutorial tool and prosecutorial discretion demands that prosecutors, not judges, decide which charges to bring, and (c) fast-track programs, by facilitating the disposition of growing number of illegal reentry cases, provide a necessary means of achieving punishment and deterrence in such cases. Finally, the Government argues that reducing Mr. Krukowski's sentence would result in an unwarranted disparity.

The Government's lengthy submission, however, utterly fails to justify – from the perspective of the individual defendant who is being sentenced – the disparity that follows from the "accident of the judicial district in which the defendant happens to plead." United States v.

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

Bonnet-Grullon, 53 F. Supp.2d 430, 435 (S.D.N.Y. 1999). As a result, the Government cannot show that the "sentence disparities among defendants with similar records who have been found guilty of similar conduct" are "warranted" for purposes of Title 18, United States Code, Section 3553(a)(6). Neither the fact that the Justice Department has approved fast-track programs as an expedient way to dispose of large numbers of cases in certain districts, nor the fact that Congress has endorsed that approach, means that the disparities created by such programs are warranted for purposes of Section 3553(a)(6). Indeed, although left unmentioned by the Government, the Sentencing Commission has recognized that implementation of fast-track programs in some districts but not others "has the potential to create unwarranted sentencing disparities." U.S. Sentencing Comm'n, Report to Congress: Downward Departures from the Federal Sentencing Guidelines, 66 (Oct. 2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf.

For the reasons that follow, we submit that the Government's position is fundamentally flawed, and that this Court has the authority – indeed, a statutory obligation – to make its own determination of whether the disparities that result from fast-track programs are "warranted" for purposes of Section 3553(a)(6).

I. Why Fast-Track Programs Exist: To Permit the Prosecution of Additional Immigration Offenses

The Government's submission documents the vast number of illegal aliens who cross our nation's southwest border, and notes that the criminal justice system is unable to handle the many thousands of immigration violations that occur at the southwest border each year. (Govt Memo at 2-3). The Government explains that fast-track programs, designed to accelerate the disposition of immigration violations in southwest border districts,[1] were deemed a partial solution to that problem and first implemented in the Southern District of California. The fast-track program, which allows defendants to obtain a lower sentence but requires them to waive important rights (including the right to be indicted by a Grand Jury, to file pretrial motions, to have a jury trial, to review a presentence report, and to appeal the sentence) permits the Government to prosecute far greater numbers of illegal reentry cases. (Govt Memo at 4-5, 9-10). Supporting this contention, the Government notes that in the Southern District of California, the number of Section 1326

[1] As used here, "southwest border districts" includes the Southern District of California, the District of Arizona, the District of New Mexico, and the Southern and Western Districts of Texas. This is consistent with geography and with the GAO's use of that phrase in its 1997 Report "Illegal Immigration, Southwest Border Strategy Results Inconclusive; More Evaluation Needed," which is cited at page 6 of the Government's submission.

cases filed in that district jumped from 240 in 1994 (before fast-track was adopted) to 1,334 in 1995 (after fast-track was adopted), and to 2,059 in 2003.

Other districts along the southwest border followed the Southern District of California's lead and adopted fast-track programs of their own. The government argues that these programs permitted a significant increase in the number of illegal reentry prosecutions, and the defense has little reason to doubt that contention.

Over time, however, many non-southwest border districts also adopted fast-track programs for expediting illegal reentry cases. According to the Government, there are now 13 districts with fast-track programs, including the Districts of Idaho, Nebraska, North Dakota, and Western Washington. In its submission, the Government provides no data concerning the volume of illegal immigration cases in these non-southwest border districts. Nor does the Government explain what differentiates these districts from many others, including those, like the Southern District of New York, which process far more illegal reentry cases.[2] The Government's submission certainly cannot support a conclusion that fast-track programs exist only in the districts that are most-overburdened by illegal reentry cases.[3]

---

[2] The Federal Judicial Statistics Resource Center publishes district-by-district statistics for federal arrests, prosecutions, and convictions, by broad offense category. One of the categories is "immigration." In 2002, the most recent data set available, the Southern District of New York sentenced 127 defendants in immigration cases. In comparison, the District of Idaho sentenced 41 such defendants, the District of Nebraska sentenced 44, the District of North Dakota sentenced 19, and the District of Western Washington sentenced 25. While this category does not isolate "illegal reentry" offenses, it is a safe bet that the Southern District of New York has more than twice as many illegal reentry cases as the Districts of Idaho and Nebraska, and as many as four times the number as the Districts of North Dakota and Western Washington. See http://fjsrc.urban.org/noframe/dist/dist_intro2.cfm (permits user to click on any district).

[3] The September 22, 2003 Memorandum from then-Attorney General John Ashcroft (attached as Exhibit 1 to the Government's submission) does not support such a conclusion. That memorandum explains that fast-track programs are based on the premise that defendants who promptly agree to participate will save the government scarce resources. Thus, the Memorandum suggests that approval of fast-track programs will be reserved for "exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases." Id. But the Government discloses no data showing that, in fact, approval has been reserved for districts with materially greater numbers of

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

III. The Operation of Fast-Track Programs: The Sentence Mr. Krukowski Would Face in a Fast-Track District

The Government's submission includes an appendix (Appendix A), which provides information about the operation of the fast-track programs in the 13 districts where they exist for illegal reentry cases. In general, the programs give defendants, who agree to plead guilty at the outset of the case and waive various appellate rights (thereby saving the Government significant time and energy), the opportunity to plead to a lesser charge or to plead guilty with an agreed-upon downward departure of between 1 and 4 offense levels, depending on the offense level and the defendant's criminal history category. Eight of the districts rely exclusively on downward departures; the remaining five rely on charge-bargaining to achieve similar sentencing reductions.

In this case, Mr. Krukowski's advisory Guidelines range is 24 to 30 months, based on Offense Level of 13 (after an 8-level enhancement under U.S.S.G. § 2L1.2(b)(1)(C) and a 3 point reduction for acceptance of responsibility) and a Criminal History Category of IV. Based on the information disclosed by the Government, Mr. Krukowski would face a lower sentence than that recommended by the Guidelines if he participated in all but two of the 13 districts with fast-track programs. (And in one of the remaining two, his sentenced would be capped at 24 months.) The following table sets forth what Mr. Krukowski's sentence would be in each of the 13 districts with fast-track programs.

---

illegal reentry cases. See United States v. Perez-Chavez, No. 2:05-CR-00003PGC, 2005 U.S. LEXIS 9252, *35-36 (D. Utah May 16, 2003) ("The short term problem is the mystery surrounding how the Justice Department decides which districts will qualify for fast-track programs. The Attorney General has announced general "principles" . . . but these principles are pitched at such a high level of generality that they reveal little about how decisions are actually reached.") The existence of programs in districts such as the Districts of Idaho, Nebraska, North Dakota, and Western Washington, further undermines any such claim.

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

Table 1: Mr. Krukowski's Sentencing Range in Fast-Track Districts

District	**Fast-Track Resolution**	**Sentencing Range or Maximum**
District of Arizona - Tucson Division	3-level USSG § 5K3.1 Departure	15 to 21 months
District of Arizona - Phoenix/Yuma Divisions	1-level USSG § 5K3.1 Departure	21 to 27 months
Central District of California	Plead to one/two counts of 8 U.S.C. § 1325	6- or 24-month maximum sentence
Eastern District of California	4-level USSG § 5K3.1 Departure	12 to 18 months
Northern District of California	Plead to two counts of 8 U.S.C. § 1325	No Help: 30-month sentence
Southern District of California	Plead to 18 U.S.C. §§ 911, 1001, or 1546	2 to 8 months, 6 to 12 months, or 12 to 18 months (depending on plea)
Idaho	2-level USSG § 5K3.1 Departure	18 to 24 months
Nebraska	2-level USSG § 5K3.1 Departure	18 to 24 months
New Mexico	1-level USSG § 5K3.1 Departure	21 to 27 months
North Dakota	4-level USSG § 5K3.1 Departure	12 to 18 months
Oregon	Plead to one count of 8 U.S.C. § 1324	6 month maximum sentence
Southern District of Texas	2-level USSG § 5K3.1 Departure	18 to 24 months
Western District of Texas (Pecos, Del Rio, and El Paso Divisions)	1-level USSG § 5K3.1 Departure	21 to 27 months
Western District of Washington	Plead to two counts of 8 U.S.C. § 1325	24-month sentence

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

Mr. Krukowski illegally reentered the United States at the U.S.-Mexican border in San Diego, California, located in the Southern District of California. Had he been arrested and prosecuted there, he would have qualified for a Guidelines sentence of somewhere between 2 to 8 months and 12 to 18 months, depending on which lesser charge prosecutors agreed to offer him. Table 1 also reflects that Mr. Krukowski would have fared better even in districts – such as the Districts of Idaho, Nebraska, North Dakota and Western Washington – with far fewer cases than the Southern District of New York.

III. Fast-Track Programs Create "Unwarranted Disparities Among Defendants With Similar Records Who Have Been Found Guilty of Similar Conduct."

That Mr. Krukowski would face lower sentences, in some instances substantially lower, had he been convicted in a district with a fast-track program confirms that the operation of fast-track programs results in significant "sentencing disparities among defendants with similar records who have been found guilty of similar conduct," for purposes of Title 18, United States Code, Section 3553(a)(6). The question is whether these disparities are "warranted." The fact that fast-track programs may constitute good public policy because they permit additional offenders to be prosecuted does not render these disparities "warranted" from the perspective of the individual defendant. A number of courts, both in written opinions and unpublished orders, have already held that such disparities are unwarranted. See, e.g., United States v. Delgado, No. 6:05-cr-30-Orl-31KRS, Slip Opinion at 3-4 (M.D. Fla. June 7, 2005) (Ex. 9 to Government submission) (citing two other recent Middle District of Florida decisions granting departures based on fast-track disparities); United States v. Ramirez-Ramirez, 365 F. Supp.2d 728, 731-32 (E.D. Va. 2005); United States v. Galvez-Barrios, 355 F. Supp.2d 958, 960 (E.D. Wis. 2005). Other district courts have reached different results, although they did so before considering the information that the Government provided last week at the Court's direction.

A number of Southern District judges have expressed concern about the disparities created by fast-track programs, although they have yet to depart on that basis. See United States v. Martes, 04 Cr. 1081 (SAS), Sent. Tr. at 12, 18-18 (Exhibit. A) (imposing non-Guidelines sentence of 16 months, below range of 30 to 37, based on other § 3553(a) factors, but noting concern about unexplained disparities created by fast-track programs, including in "landlocked districts"); United States v. Emmence, 04 Cr. 533 (KMW.), Sent. Tr. 17 (Mar. 16, 2005);[4] see

[4] In Emmence, Judge Wood found that there "would be an appearance of unfairness and disparity if this defendant had a light criminal record," but decided, for other reasons, not to depart. It is unclear what basis the Government has for concluding that Judge Wood "does not

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

also United States v. Perez, 04 Cr. 376 (RJH), Tr. 14-15 (Apr. 14, 2005) (concluding that, while not itself for a departure ground, "the evident disparities that do exist decrease somewhat the importance of this policy of consistency underlying the guidelines in this type of case," and imposing non-Guidelines sentence of 51 months, where range was 77 to 96); United States v. Garcia, 04 Cr. 1013 (RHJ) (imposing 38-month sentence, where Guidelines range was 46 to 57).

A. Congress' Authorization of Fast-Track Programs in the PROTECT Act of 2003 Does Not Render Fast-Track Disparities "Warranted."

The Government argues that this Court should conclude that the disparities created by the existence of fast-track programs are warranted because "Congress has already determined that fast-track programs do not create an unwarranted disparity." (Govt Memo at 12). The Government's position, however, is not grounded in the language of any statute. Instead, it is based on inferences drawn from the fact that Congress, in passing the PROTECT Act of 2003, granted the Attorney General the authority to create fast-track programs and instructed the United States Sentencing Commission to create a policy statement authorizing downward departures pursuant to such authorized programs. The Sentencing Commission complied with this directive by promulgating Guideline §5K3.1, "Early Disposition Programs," which provides that, "Upon motion of the Government, the court may depart downward not more than 4 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."

The Sentencing Commission also expressed serious concern about the *unwarranted* disparities that result from fast-track programs. As the Commission explained:

> The statutory requirement that the Attorney General approve all early disposition programs hopefully will bring about greater uniformity and transparency among those districts that implement authorized programs. Defendants sentenced in districts without authorized early disposition programs, however, can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.

Report to Congress: Downward Departures from the Federal Sentencing Guidelines at 66-67.

---

appear to have analyzed the issue to the same degree as Judge Rakoff." (Govt Memo at 25).

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

The fact that Congress authorized fast-track programs (years after they were created) does not preclude this Court from reaching its own decision regarding whether the geographic, inter-district sentencing disparities that result from such fast-track programs are "warranted" for purposes of Section 3553(a)(6).[5] Indeed, this Court is statutorily obligated to make that determination under the plain language of Section 3553(a). Even had Congress made an explicit finding that fast-track programs create only "warranted" geographic sentencing disparities – which it did not – the Government cites no authority that would support its position that such a finding would bind this Court's determination of the issue under Section 3553(a)(6).

In support of its position, the Government cites Judge Cassell's opinion in United States v. Perez-Chavez, No. 2:05-CR-00003PGC, 2005 U.S. LEXIS 9252, *35-36 (D. Utah May 16, 2003). (Govt Memo at 13). We submit that Perez-Chavez was wrongly decided. The PROTECT Act provided statutory validation for fast-track programs, and required the Sentencing Commission to integrate such programs into the framework of the then-mandatory Guidelines regime. But it does not follow, as Judge Cassell found, that a district court's Section 3553(a)(6) finding that the geographic disparities resulting from such programs is "unwarranted" would "ignore the recent congressional directive . . . that only the Attorney General can authorize fast-track programs." Id. There is simply nothing in the PROTECT Act that trumps this Court's consideration of whether such geographic disparities are "warranted" under Section 3553(a)(6).

Accordingly, Congress' passage of the PROTECT Act cannot be interpreted as the final word on whether sentencing disparities cause by the piecemeal operation of fast-track programs in some districts but not others result in unwarranted disparities under Section 3553(a)(6).

---

[5] The Government contends that Congress "made clear its determination that certain programs, such as an illegal reentry program, did not create 'unwarranted' sentencing disparities," by citing to legislative history for the PROTECT Act. (Govt Memo at 12). But the legislative history cited (a proposed Guidelines "Policy Statement" that never made its way into U.S.S.G. § 5K3.1) states only that the formalization of fast-track programs will help "avoid unwarranted disparities within a given district." The legislative history includes no congressional statement that resultant inter-district, geographic disparities are "warranted," and the Sentencing Commission has already expressed its view that such disparities are "unwarranted."

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

B. A Finding That Fast-Track Programs Result in "Unwarranted" Disparities Would Not Intrude on the Exercise of Prosecutorial Discretion.

The Government repeats, in various formulations, that "decisions regarding what criminal charges to file against defendants is within the complete discretion of the Executive Branch." (Govt Memo at 14, 18-19). We do not dispute that general statement of principle. But a finding that fast-track programs create unwarranted sentencing disparities for purposes of Section 3553(a)(6) would not violate that principle.

The Government can and will decide which charges to bring against individual defendants. And in five of the 13 districts with fast-track programs, it appears that charge-bargaining is the mechanism for disposing of such cases; 8 districts rely exclusively on departures. Once the Government makes the decision about which charges to bring, however, it is for the district court judge to determine what sentence would be "reasonable," based on the statutory maximums (and mandatory minimums), and a consideration of all of the factors set forth in Section 3553(a). These factors, of course, include consideration of the applicable Guidelines range with appropriate departures (§ 3553(a)(4)), as well as "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct" (§ 3553(a)(6)).

Permitting the sentencing judge to render its own decision about what sentence is "reasonable" based on all of the Section 3553(a) factors does not intrude on prosecutorial discretion. Nor does the fact that fast-track programs result from an exercise of prosecutorial discretion mean that sentencing judges cannot find that the disparities created by such programs are "unwarranted."

The Government cites the Second Circuit decisions in United States v. Stanley, 928 F.2d 575 (2d Cir. 1991) and United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir. 2000), in support for its argument that sentencing disparities resulting from the exercise of prosecutorial discretion are not "unwarranted." (Govt Memo at 15-17). But both decisions, which concerned whether disparities created by prosecutorial discretion could be a ground for a downward departure from the Guidelines, are inapposite.

In United States v. Stanley, the Second Circuit considered whether "the sentencing judge may depart downward from the guideline range because of a disparity in sentence between defendants who have engaged in similar conduct but are charged with different offenses as a result of plea bargaining decisions by the prosecutor." Id., 928 F. 2d at 576. The district court

had found that the United States Attorney's Office in the Eastern District of New York had routinely allowed defendants who agreed to plead guilty to avoid § 924(c) charges (which require a mandatory, consecutive five-year sentence), but charged those who went to trial with § 924(c). The district court departed downward, pursuant to U.S.S.G. §5K2.0, on the ground that the Sentencing Commission "did not foresee that the [relevant guideline] would be applied only to defendants who refused to plead guilty to the underlying narcotics offense and thereby creates the disparity." Id. at 579-80. The Second Circuit reversed. The Court noted that "[e]liminating unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, is unquestionably a principal congressional goal both for the Sentencing Commission . . . and . . . for the sentencing judge." Id. at 580 (internal citations and quotation marks omitted). The Court concluded, however, that "'the method chosen by Congress to avoid unwarranted disparities is a guidelines system . . . [that] permits the sentencing judge to depart from the recommended range in unusual circumstances.'" Id. (quoting United States v. Joyner, 924 F.2d 454, 460 (2d Cir. 1991)). Accordingly, the Court held that a guidelines departure was only permitted if the identified "disparity" was not adequately considered by the Commission, or, even if it was so considered, was present in an individual case 'to such a degree as to have been beyond the Commission's consideration." Id. In that case, the Second Circuit held that because the Sentencing Commission was well aware of disparities resulting from plea bargaining, there was no basis for departing from the applicable guidelines range. Id. at 582-83.

Similarly, in Bonnet-Grullon, the Second Circuit confronted defendant's contention that this Court "erred in concluding that it had no authority to depart in order to avoid disparity with lower sentences imposed in the Southern District of California" in illegal reentry cases. Bonnet-Grullon, 212 F.3d at 697. The Second Circuit rejected defendant's argument that the Supreme Court had implicitly overruled Stanley in United States v. Koon, 518 U.S. 81 (1996), and concluded that there was nothing atypical or unusual about the illegal reentry defendants such that their cases fell outside the "heartland" of the illegal reentry guidelines. Id. at 705-07. The Court concluded further that the Sentencing Commission had effectively proscribed consideration of the "regional variations in prosecution policy," based on the "content and evolution of the guideline that is expressly applicable, . . . by the structure and theory of the Guidelines as a whole, and by the Commission's policy statements with respect to plea agreements and the proper judicial deference to be accorded to matters of prosecutorial discretion." Id. at 707. Accordingly, the Circuit held that this Court had correctly decided that it lacked the authority to depart under §5K2.0 based on disparities created by fast-track programs.

Mr. Krukowski does not seek a departure from the applicable guidelines range, pursuant to U.S.S.G. §5K2.0, on the ground that the piecemeal operation of fast-track programs in some

districts but not others results in disparities that have not adequately been taken into account by the Sentencing Commission.[6] Rather, he asks the Court to impose a non-Guidelines sentence below the now-advisory Guidelines range based on a consideration of all of the Section 3553(a) factors. As a result, the Second Circuit's holdings in Stanley and Bonnet-Grullon are inapposite.

The Government argues repeatedly that fast-track programs are an important tool in fighting crime and protecting the community and, thus, a proper exercise of prosecutorial discretion. But that is not disputed. What is disputed is the notion that the efficacy of fast-track programs precludes a finding by a sentencing court that they result in unwarranted disparities for purposes of Section 3553(a)(6). Moreover, this Court's exercise of its congressionally-mandated duty to consider "the need to avoid unwarranted sentencing disparities" will not "remove a prosecutorial tool from the Government," as the Government contends. (Govt Memo at 20). Instead, it will allow judges to sentence individual defendants based on a consideration of each of the Section 3553(a) factors.

III. Imposing a Non-Guidelines Sentence Would Not Result in Unwarranted Disparities.

The Government's final argument is that if this Court imposed a non-Guidelines sentence based, at least in part, on the need to avoid unwarranted disparities created by fast-track programs, that sentence would itself create unwarranted disparities both within the district and with other districts, because some other district judges have refused to impose non-Guidelines sentences on that basis. The Government's argument proves far too much.

As noted above, the district courts are split on whether the operation of piecemeal fast-track programs creates unwarranted disparities in sentencing that can be remedied when applying the Section 3553(a) factors. The Government finds the disparities that result from this split to be "unwarranted," and cautions that the disparity will only grow over time (presumably as district courts continue to reach different conclusions on the issue). (Govt Memo at 21-22). But the disparity that results when different judges reach different conclusions when applying Section 3553(a) is inevitable. It is no more an argument for imposing a Guidelines sentence than it is for imposing a non-Guidelines. Indeed, the only way to avoid such disparities – and the result that the Government advocates at the direction of the Attorney General in all sentencings – is simply

---

[6] That argument, however, may have added force given the Sentencing Commission's recent statement that operation of these fast-track programs "has the potential to create unwarranted sentencing disparities." See Report to Congress: Downward Departures from the Federal Sentencing Guidelines, at 66.

Re: United States v. Zbigniew Krukowski
04 Cr. 1308 (LAK)

to continue to treat the Guidelines as if they were mandatory, notwithstanding the Supreme Court's holding in United States v. Booker. See Booker, 125 S. Ct. 738, 756-57 (2005). That approach is now contrary to law.

IV. Conclusion

This Court should conclude now, as it did in Bonnet-Grullon, 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." Id., 53 F. Supp.2d 430, 435 (S.D.N.Y. 1999). The Government's submission does nothing to change that conclusion. For the reasons stated above and for the reasons stated in defendant's March 14, 2005, we urge the Court to impose a sentence of 366 days' imprisonment.

Respectfully submitted,

Sean Hecker
Attorney for Zbigniew Krukowski

cc: Reed Brodsky
Assistant United States Attorney