



U.S. Department of Justice

Barry R. Grissom
United States Attorney
District of Kansas

*1200 Epic Center
301 N. Main
Wichita, Kansas 67202-4812*

*Suite 290
444 SE Quincy
Topeka, Kansas 66683-3592*

*TEL (316) 269-6481
FAX (316) 269-6484
TDD(316) 269-6586*

*Kansas City Office
Suite 360
500 State Avenue
Kansas City, Kansas 66101-2433*

April 6, 2012

Kansas Federal Criminal Defense Bar

RE: Policies and Procedures Implementing
DOJ "Fast-Track" Program in Kansas
Re-entry After Deportation Prosecutions

As you know, Attorney General Holder earlier this year announced a national "fast-track" prosecution program for 8 U.S.C. § 1326(a) re-entry after deportation cases. That program vests substantial discretion for implementing the program in respective United States Attorneys. This letter outlines how I have decided to administer the program in the District of Kansas consistent with the Attorney General's directive.

Most importantly, the ultimate decision about whether a particular defendant may participate in the program rests with me. My hope is that the policies and procedures set out herein eliminate ambiguity as to which defendants qualify, so that when the U.S. Attorney's office signs off on a "fast-track" plea agreement, it will neither surprise nor disappoint anyone – it will be but a formality.

Who qualifies?

To qualify for "fast track" treatment, a defendant's lawyer must write, fax or email the AUSA assigned to the case within 30 days of an initial appearance that his or her client wishes to participate and appears to be eligible to do so. Eligibility policies are set out in more detail below, but to be eligible initially the defendant must have (1) waived the detention hearing and (2) never previously received "fast track" treatment in a § 1326(a) case.

That 30-day notice is extended automatically if the defendant has yet to receive routine discovery in the case, including the criminal history information available to the U.S. Attorney's office. Suffice it to say, AUSAs, working with ICE, will provide discovery in these cases as

early in the process as possible. When in doubt about whether a defendant has met the 30-day deadline, our office will err on the side of allowing defendants to participate if they otherwise qualify.

The following categories more specifically describe the limitations of qualification:

Criminal History: Aliens **do not** qualify for the Kansas fast track program if they have:

1. A prior conviction for murder, kidnapping, voluntary manslaughter, national security or terrorism offense, human trafficking offense, DUI involuntary manslaughter, rape or other forcible sex offenses, sex offenses with children including child pornography, firearms offenses (as defined in U.S.S.G. § 2L1.2, application note 1(B)(v)(I)-(VI)), a drug trafficking offense carrying a penalty under 21 U.S.C. §§ 841(b)(1)(A) or (b)(1)(B), (a defendant with a single drug trafficking conviction carrying a penalty under 21 U.S.C. §§ 841(b)(1)(C) or (b)(1)(D) is limited to a two level reduction), or an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a minimum term of imprisonment of five (5) years or more was imposed, (a defendant with a single drug trafficking conviction for which a sentence of less than five (5) years was imposed is limited to a two level reduction).
2. Two or more prior convictions for “crimes of violence” and/or “controlled substance offenses” as those terms are used in the Career Offender provisions of U.S.S.G. § 4B1.1. (In other words, if the defendant would have qualified for Career Offender status under Chapter 4 of the Sentencing Guidelines had this “instant offense of conviction” been a felony “crime of violence” or “controlled substance offense,” then the alien would not qualify for the program);
3. Three or more prior convictions for “violent felonies” and/or “serious drug offenses” as those terms are used in the Armed Career Criminal Act and applied through the provisions of U.S.S.G. § 4B1.4. (In other words, if the defendant would have qualified for criminal history purposes as an Armed Career Criminal had the current offense been a violation of 18 U.S.C. § 922(g), s/he would not qualify for the program);
4. A defendant with 16 or more criminal history points; or
5. A history of serious violent crime as determined solely by the U.S. Attorney’s office.

Aliens qualify for a **reduced** reduction of two levels under the fast track program, if their criminal history score results in Criminal History Category VI.

Deportations/Removals/Voluntary Returns: Aliens’ fast track eligibility is limited as follows:

1. If the alien has a combination of five or more prior deportations, removals, and/or voluntary returns, the departure is limited to two levels.
2. If the alien has a combination of eight or more prior deportations, removals, and/or voluntary returns, he or she is ineligible for the program.
3. If the alien has a combination of three or more prior deportations, removals, and/or voluntary returns within the year preceding his or her being “found in” the United States, the departure is limited to two levels.
4. If the alien has a combination of three or more prior deportations, removals, and/or voluntary returns within the six months preceding his or her being “found in” the United States, he or she is ineligible for the program.

Supervised Release, Probation or Parole Status:

1. A defendant under a “criminal justice sentence” as defined in U.S.S.G. § 4A1.1 limits the departure to two levels, provided the plea agreement includes a promise by the defendant to stipulate to a violation of supervised release, probation, or parole based on the new conviction in this case.
2. A defendant under a “criminal justice sentence” as defined in U.S.S.G. § 4A1.1 is ineligible for the program if on escape status.

Terms of Plea Agreement

All defendants eligible for the fast track program must agree to a factual basis that accurately reflects his or her offense conduct and to admit he or she was the subject of a previous order of removal, deportation, or exclusion from the United States, and agrees to the reinstatement of that previous order. The defendant must admit he or she has no fear of returning to the country designated in the previous order, will submit no argument asserting an application of the Convention Against Torture or any claim for asylum, and he or she will not contest, either directly or by collateral attack, the reinstatement of the prior order of removal, deportation, or exclusion.

The defendant must agree not to file any motions described in Rule 12(b)(3) of the Fed.R.Crim.P. and must further waive the right to argue for a variance under 18 U.S.C. § 3553(e).

Additionally, the defendant must waive any right to appeal or collaterally attack any matter in connection with the prosecution, conviction, or the components of the sentence imposed, including the length and conditions of supervised release, as well as any sentence

Page 4

Kansas “Fast-Track” Program

imposed upon a revocation of supervised release, except on the issue of ineffective assistance of counsel. This waiver is in accord with what is contained in the standard plea agreements utilized by this District.

The plea agreement will specify the government will move for the four-level downward departure pursuant to U.S.S.G. § 5K3.1 unless known facts limit the departure to two levels, with the caveat that a Criminal History Category VI will always limit the departure to two levels.

The goal of the program is to move re-entry after deportation cases through the system as efficiently as possible. Those defendants who choose to take advantage of this program are rewarded by a shorter incarceration sentence. Questions about the fast track program and its implementation, whether generally or in specific cases, should be directed to Jared Maag, Criminal Chief, at jared.maag@usdoj.gov or (785) 295-2850. He will bring any disputed matters to my attention or that of First Assistant U.S. Attorney Mike Warner for prompt resolution.

Thank you for your patience as we are plowing new ground in this area.

Sincerely,

/s/ *Barry R. Grissom*

Barry R. Grissom
United States Attorney

Copies:

U.S. District Judges, District of Kansas
U.S. Magistrate Judges, District of Kansas
U.S. Probation Office