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IMPROVING THE SEVENTH CIRCUIT’S APPROACH TO ILLEGAL REENTRY PROSECUTIONS WITH A CONSTRUCTIVE DISCOVERY STANDARD AND FAST-TRACK SENTENCING

STEVEN MROCZKOWSKI*


INTRODUCTION

Immigrants founded the United States of America.¹ Religious oppression, taxation without representation, and other abuses by the Crown drove the Founding Fathers from mother England to the virgin shores of what would become America’s eastern seaboard.²

Over the years, people the world over have made their way to the United States.³ There exists a constant influx, both legal and illegal, of

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³ BOUVIER, supra note 1, at 13–26.
bodies across American borders. As of the year 2008, for example, the Department of Homeland Security (DHS) estimated that approximately 12.6 million legal permanent residents called America home. Such a statistic is not very controversial: legal immigrants have every right to be in the United States under current legislation. Statistics about illegal immigrant populations are more striking. As of January 2009, the DHS claimed that nearly 10.8 million unauthorized immigrants had found their way into, and settled in, America.

The battle against illegal immigration has traditionally taken place in the civil context, through deportation (now removal) hearings. Those not legally present in the United States are removed. The power to exclude is deeply rooted in American jurisprudence. Over one hundred years ago, the Supreme Court in *Chae Chan Ping v. United States* held that “[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States.” This power, the Court went on, is “a part of the sovereign powers delegated by the Constitution.”

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9 130 U.S. 581, 609 (1893).

10 Id.; see also Kanstroom, supra note 8, at 1899 n.58. Since *Chae Chan Ping*, the Supreme Court has addressed the power of exclusion on several occasions. The
The more recent trend, however, is to control immigration through the use of the criminal justice system. The trend began in the 1980s and continued in the 1990s. From 1996 to 2006, the number of immigration prosecutions quadrupled as compared to the previous decade. Using 2004 as an example of this burgeoning trend, the statistics speak volumes: United States magistrates and district court judges convicted approximately 31,000 non-citizens of immigration crimes. Since 2004, federal immigration prosecutions represent the largest category of federal criminal prosecutions at nearly 32% of the total. According to recent reports, the trend continues in spite of a new (perhaps significant to note, Democratic) presidential administration.

This Note examines how prosecutors use discretion to prosecute immigrant-defendants in the Seventh Circuit under 8 U.S.C. §§ 1326(a)(2), (b)(1), and (b)(2). Under these sections of the Immigration and Nationality Act, reentry is a felony for previously deported aliens who have committed a combination of misdemeanors, or certain felonies, resulting in previous removal.

historical development of the power of exclusion is beyond the scope of this Note. For more, see generally Kanstroom, supra note 8, at 1899–1905.

11 Chacón, supra note 7, at 137.


14 Chacón, supra note 7, at 139; see also TRAC, Graphical Highlights: DHS Criminal Enforcement Trends (2005), available at http://trac.syr.edu/tracins/highlights/v04/dhstrendsG.html.


16 Chacón, supra note 7, at 139 n.23.

17 Id. at 139 n.24.


19 Id. at § 1326(b).
A circuit split exists concerning the meaning of § 1326’s found-in language.\(^{20}\) When aliens illegally reenter the United States, they are violating § 1326. But, in order to prosecute them, the government must find them first. The circuit split revolves around the diligence that must be used by federal law enforcement and immigration authorities to discover § 1326 violators. Some circuits apply a constructive discovery standard: a § 1326 found-in violation is complete upon actual discovery or when federal authorities, through the use of reasonable diligence, could have known that the alien’s presence was illegal.\(^{21}\) Other circuits adhere strictly to an actual discovery standard: the completion of the crime is the exact date on which federal authorities discovered the alien’s presence.\(^{22}\)

The Seventh Circuit is on the wrong side of the federal circuit split with respect to § 1326’s found-in language. Its application of an actual discovery standard fosters great potential for the abuse of prosecutorial discretion, as well as unwarranted sentencing disparities. These issues usually arise in two contexts: first, where illegal immigrants are convicted of state crimes after illegal reentry but before federal authorities learn of their presence. In this scenario, an alien may lose the opportunity to serve concurrent sentences due to untimely prosecution of the illegal reentry crime.\(^{23}\) Second, the statute of limitations may have tolled while the alien was serving his sentence in state custody; thus the period for prosecution has technically ended, but under an actual discovery standard, prosecutors are able to charge defendants outside of the statutory period.\(^{24}\)

\(^{20}\) Compare United States v. Rivera-Ventura, 72 F.3d 277, 282 (2d Cir. 1995) (holding that an alien is found when he is discovered by or, with reasonable diligence, could have been discovered by law enforcement) with United States v. Are, 498 F.3d 460, 466–67 (7th Cir. 2007) (holding that an alien is found only when actually discovered, regardless of diligence used).

\(^{21}\) See, e.g., Rivera-Ventura, 72 F.3d at 282.

\(^{22}\) See, e.g., Are, 498 F.3d at 466–67.

\(^{23}\) See generally United States v. Lechuga-Ponce, 407 F.3d 895, 897–98 (7th Cir. 2005).

\(^{24}\) See generally Are, 498 F.3d at 466–67.
Additionally, sentencing across federal circuits, including the Seventh, is inconsistent. This is due to the limited availability of early disposition programs (also known as fast-track programs) in some federal districts that allow for expedited prosecution of immigration crimes. Even though Illinois ranks fifth among states for illegal immigrant population, the United States Attorneys’ offices in districts in the Seventh Circuit have not put early disposition programs in place. As a result, a § 1326 defendant’s sentence could vary by not just months, but years, depending only on where the defendant is convicted because some judges allow downward departures based on sentencing disparities, and some do not.

Through an analysis of recent case law, this Note examines how and why courts in the Seventh Circuit continue to support the potentially abusive use of prosecutorial discretion as well as inconsistent sentences for § 1326 defendants. The cases United States v. Carrillo-Esparza, United States v. Villegas-Miranda, United States v. Medrano-Duran, United States v. Gordon, and United States v. Are, represent this circuit’s approach to § 1326.

The Seventh Circuit should change its approach in two ways. First, it should apply a constructive discovery standard to § 1326’s

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26 See id.
27 See DHS, Estimates of Unauthorized, supra note 6, at 4, Table 4.
28 See BLACK’S LAW DICTIONARY 469 (8th ed. 2004) (“Downward departure. In the federal sentencing guidelines, a court’s imposition of a sentence more lenient than the standard guidelines propose, as when the court concludes that a criminal’s history is less serious than it appears”).
30 590 F.3d 538 (7th Cir. 2010).
31 579 F.3d 798 (7th Cir. 2009).
32 386 F. Supp. 2d 943.
33 513 F.3d 659 (7th Cir. 2008).
34 498 F.3d 460 (7th Cir. 2007).
found-in language. This standard discourages untimely prosecution, and places the burden of conviction where it should be—on the government. This Note does not argue that prosecutors should reward aliens who are able to evade government detection. Those evading detection will not avoid prosecution simply by flying under the government’s radar. They are aided by a constructive discovery standard only to the extent that the government could have found them, but chose not to act and unfairly delayed prosecution. If prosecutors were diligent, but the alien was still able to avoid detection for the statute of limitations period, a conviction is still possible thanks to the fleeing-from-justice doctrine, which prevents tolling during episodes of active flight.

Second, United States Attorneys’ offices located in districts in the Seventh Circuit should implement an early disposition program for § 1326 prosecutions. Additionally, judges should grant downward departures to eliminate sentencing disparities among non-fast-track and fast-track district defendants. Doing so can harmonize sentencing of § 1326 defendants, so that the amount of time spent in prison is not left up to the fortuity of where a defendant is convicted. This solution serves both prosecutors and defenders: it provides for a unified discovery standard for a federal criminal statute and thereby fosters predictability; and it provides for more consistent sentencing in the Seventh Circuit while freeing up prosecutorial resources, which might increase conviction rates circuit-wide.

I. STATUTE AT ISSUE: 8 U.S.C. § 1326(a)(2), (b)(1)–(2)

The statute at issue in this Note is the Immigration and Nationality Act. Specifically implicated is the language of 8 U.S.C. § 1326(a), which provides in pertinent part that “any alien who (1) has been

35 See United States v. Rivera-Ventura, 72 F.3d 277, 282 (2d Cir. 1995).
denied admission, excluded, deported, or removed . . . and thereafter (2) enters, attempts to enter, or is at any time found in, the United States . . . shall be fined under title 18 or imprisoned not more than [two] years, or both.”39

Subsection (b) of § 1326 allows for heightened sentencing of certain categories of aliens, thereby removing them from the scope of criminal sanctions provided for in subsection (a). Those

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony) . . . shall be fined under title 18, imprisoned not more than 10 years, or both; [and those] (2) whose removal was subsequent to a conviction for commission of an aggravated felony . . . shall be fined under such title, imprisoned not more than 20 years, or both.40

For § 1326 violations, an indictment must be handed down “within five years next after such offense shall have been committed.”41 The five-year statute of limitations shall not be extended “except as otherwise expressly provided by law.”42

II. SEVENTH CIRCUIT TREATMENT OF § 1326

A. Found-in Language: The Seventh Circuit’s Use of the Actual Discovery Standard

With respect to § 1326 prosecutions, the Seventh Circuit uses an actual discovery approach to cases of surreptitious entry and cases of

39 Id. at § 1326(a)(1)–(2).
40 Id. at § 1326(b)(1)–(2).
entry by way of official port or border station. Surreptitious entries are those where the alien crosses into the United States via some means of unofficial entry and goes undetected by federal authorities. A defendant may argue that there is a significant difference between those who enter secretly and those who enter via an official port of entry. He may further assert that where an alien enters at an officially recognized port, the Government must be charged with constructive knowledge of the alien’s presence.

However, an alien is charged with a § 1326 violation because his presence is illegal, no matter how he achieved it. Thus, secret entry versus official port entry is an artificial distinction: a deportee who reenters the United States by presenting an invalid green card but uses his real name still deceives immigration officials as to the legality of his presence and has violated § 1326.

1. A Note on Surreptitious Entry: United States v. Gordon

The Seventh Circuit clarified the artificial distinction that some defendants make between surreptitious entry and entry by way of an official entry port in United States v. Gordon. Defendant Gordon entered the United States in 1974. He was deported in 1990 after he was convicted on multiple charges of home invasion robberies. Gordon returned to the United States in November of 1995 from Mexico at the San Ysidro, California, border checkpoint. At the

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43 See generally United States v. Gordon, 513 F.3d 659, 664–65 (7th Cir. 2008).
44 United States v. Acevedo, 229 F.3d 350, 355 (2d Cir. 2000).
45 Gordon, 513 F.3d at 663.
46 Id.
47 Acevedo, 229 F.3d at 355.
48 513 F.3d at 660.
49 Id.
50 Id.
51 Id.
checkpoint, Gordon produced his invalid green card and was allowed entry.\textsuperscript{52}

Gordon committed the crimes of home invasion and armed robbery in the year 2000 and was convicted of these crimes on August 8, 2001.\textsuperscript{53} He entered Illinois Department of Corrections’ custody on August 10, 2001.\textsuperscript{54}

An Immigration and Customs Enforcement (ICE) agent interviewed Gordon on August 21, 2006.\textsuperscript{55} During the interview, Gordon admitted to having reentered the United States illegally by presenting his invalid green card at the San Ysidro border checkpoint.\textsuperscript{56} On May 9, 2006, he was indicted for a § 1326 found-in violation.\textsuperscript{57}

Gordon moved to dismiss the indictment based on the tolling of the five-year statute of limitations.\textsuperscript{58} He argued that his entry was not surreptitious and therefore, the government should have known of his illegal presence in 1995.\textsuperscript{59} The court rejected Gordon’s argument. It noted that:

Gordon entered through a recognized port by means of an authentic but invalid green card that concealed the illegality of his return to the United States . . . Accepting the district court’s finding that Gordon knew that his green card was invalid, Gordon’s presentation of that green card, combined with his non-disclosure of his prior deportation to the immigration officials at his reentry, does more than merely

\begin{itemize}
  \item[52] Id.
  \item[53] Id.
  \item[54] Id.
  \item[55] Id.
  \item[56] Id.
  \item[57] Id. at 661.
  \item[58] Id.
  \item[59] Id.
\end{itemize}
suggest that his reentry into the United States was surreptitious.\footnote{60}

The court reasoned that charging immigration authorities with constructive knowledge of Gordon’s illegal presence would encourage aliens to “subtly fly under the government’s radar.”\footnote{61} Once five years from their date of entry had passed, they would no longer be subject to § 1326 prosecution.\footnote{62}

In the Seventh Circuit, logical extension of the actual discovery standard renders a distinction based on surreptitious versus official port entry irrelevant.\footnote{63} Even if aliens enter at official ports and reveal their true identity and the illegality of their presence, they are still subject to prosecution under § 1326.\footnote{64} This remains true even if the government fails to discover, for whatever reason, the alien’s illegal presence until a date substantially after the alien’s entry.\footnote{65}

2. Galvanizing the Actual Discovery Standard: *United States v. Are*

In *United States v. Are*, the Immigration and Naturalization Service (INS) deported defendant Are in 1996 following a conviction for conspiracy to import heroin.\footnote{66} Two years later, Are attempted to enter the United States through a New York airport.\footnote{67} He was detained and immediately sent back to his home in Nigeria.\footnote{68} Less than six months after his failed reentry in New York, Are slipped into the

\footnote{60} Id. at 663–64.  
\footnote{61} Id. at 664.  
\footnote{62} Id.  
\footnote{63} Id. at 665.  
\footnote{64} Id. at 665–66.  
\footnote{65} Id. at 665.  
\footnote{66} 498 F.3d 460, 462 (7th Cir. 2007).  
\footnote{67} Id.  
\footnote{68} Id.
United States.69 Are evaded immigration authorities until late 2003, when he was arrested in Chicago.70 The Chicago Police Department took a fingerprint sample from Are, which was sent to the Department of Homeland Security.71 On December 10, 2004, a Deputy United States Marshal completed a report on Are, which traced him to an address in the Chicago suburbs.72 Federal authorities arrested Are on June 20, 2005, and a grand jury indicted him for the offense of being found-in the United States on September 1, 2005, nearly seven years after his surreptitious reentry.73

“The district court dismissed the indictment as untimely under the five-year limitations period imposed by 18 U.S.C. § 3282,” applying a “constructive knowledge standard” to determine when the statutory period had tolled on Are’s found-in offense.74 The court concluded that even though the indictment was issued less than two years after DHS learned of Are’s illegal presence, DHS had constructive knowledge of Are’s presence before September 1, 2000.75 The district court judge reasoned that federal immigration authorities should have known of Are’s presence before that date because they (at that time, the Immigration and Naturalization Service, INS) had started an investigative file on Are in 1998.76

The investigative file contained an Investigative Preliminary Worksheet on Are that indicated only Are’s name, his presumed location in Chicago, and a checked box that indicated that the case was “placed in progress.”77 A separate document in the file alluded to a confidential informant’s tip to the INS that Are was living in Chicago

69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
76 Id.
77 Id. at 463.
with his wife as of September 25, 1997. The district court found that two other documents existed that should have alerted federal authorities to Are's presence prior to September 2000. The documents revealed that on December 21, 1998, the probation officer filed a Violation of Supervised Release form in the Eastern District of New York. Additionally, a December 29, 1998, arrest warrant was issued in connection with Are's violation of supervised release. With the above information, the district court held that a diligent investigation would have led to Are's discovery before September 1, 2000. As a result, the indictment issued after that date was issued more than five years after the § 1326 offense was committed and was untimely.

The Court of Appeals rejected the district court's application of a constructive discovery standard. The Court held that an alien is found in the United States at the precise moment in time when federal authorities discover the illegal alien's presence. The court reasoned that offenses are completed when each element has occurred. While it noted that "the Seventh Circuit has yet to squarely address the issue of when the statute of limitations for a § 1326(a)(2) 'found-in' offense begins to run," it did note that the found-in offense had already been characterized as a continuing offense in the Seventh Circuit.

In United States v. Lopez-Flores, we held that "in the case of surreptitious reentry . . . the 'found-in' offense is first

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78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 See id. at 464–65.
85 Id. at 464.
86 Id. at 463 (citing Toussie v. United States, 397 U.S. 112, 115 (1970)).
87 Id. at 464; see United States v. Lopez-Flores, 275 F.3d 661, 663 (7th Cir. 2001).
committed at the time of the reentry and continues to the time when [the defendant] is arrested for the offense.” Treating the “found-in” version of § 1326(a)(2) as a continuing offense “is a logical consequence of its language,” which punishes any deportee who “enters, attempts to enter, or is at any time found in, the United States . . . The point of using a word such as ‘found’ in section § 1326(a)(2) is to avoid any need to prove where and when the alien entered; the offense follows the alien . . . [B]ecause the “found in” version of section § 1326(a)(2) is a continuing offense, the date on which the immigration agency “should have discovered” the alien is simply irrelevant.88

The Are court reasoned that its interpretation “only makes sense given the straightforward language and manifest purpose of the statute.”89 However, the court failed to elaborate on what this manifest purpose is. The court instead compared § 1326 violations to other continuing offenses, such as conspiracy, escape, and failure to report to prison, where “the limitations period does not begin to run until some affirmative event puts an end to the defendant’s continuing criminal conduct.”90

The Are court thus galvanized the Seventh Circuit’s approach: the limitations period starts when the alien surrenders or is arrested by immigration authorities, not when authorities should have, or could have, known of the alien’s illegal status in the United States and his whereabouts.91 Of all federal circuits to address this issue, only the Fourth Circuit explicitly joins the Seventh Circuit in its approach.92

88 Id. (emphasis in original).
89 Id. at 466.
90 Id.
91 Id.
92 See United States v. Uribe-Rios, 558 F.3d 347, 349–50 (4th Cir. 2009). The First Circuit is leaning toward an actual discovery standard, but has not yet officially adopted it; see United States v. DeLeon, 444 F.3d 41, 52 (1st Cir. 2006) (declining to acknowledge the validity of an actual knowledge standard, but holding “more narrowly that for statute of limitations purposes in § 1326 prosecutions, there can be
B. § 1326 Sentencing in the Seventh Circuit

Sentencing issues in § 1326 prosecutions typically arise in two contexts. First, some § 1326 violators lose the opportunity to serve concurrent sentences. This situation typically arises where an alien illegally reenters the United States undetected by federal authorities and commits a state crime. The alien is sentenced, serves his time, and is indicted for a § 1326 violation close to, if not on the very day of, his release from state custody. In these circumstances, defendants argue for downward departures based on the lost opportunity to combine sentences.

Second, federal circuits in which some districts use an early disposition program allow for downward departures for violators that comply with district guidelines. These departures are valid even though particular defendants may qualify for much higher sentences due to criminal history points. Sentences are generally longer in districts without an early disposition program for § 1326 defendants. However, in some circuits, including the Seventh, sentencing judges are attempting to narrow the wide sentencing inconsistency gap by allowing downward departures based on what defendants would have
been sentenced in a fast-track district.\textsuperscript{100} This practice is not consistently applied, however. As a result, some sentencing judges depart from the guidelines and some do not, subjecting defendants charged in the same circuit to arbitrary sentence disparities.\textsuperscript{101}

1. \textit{United States v. Villegas-Miranda}

In \textit{United States v. Villegas-Miranda}, the court indirectly addressed Villegas-Miranda’s argument that he deserved a downward departure of his § 1326 sentence because he had already served a prison sentence in state custody.\textsuperscript{102} Villegas-Miranda emigrated from Mexico to the United States in 1990 and quickly developed a criminal record.\textsuperscript{103} In June 2002, he was found, prosecuted under § 1326, and deported to Mexico.\textsuperscript{104} Villegas-Miranda reentered the United States without detection.\textsuperscript{105} On May 6, 2006, he was arrested for domestic battery and sentenced to thirty months’ imprisonment.\textsuperscript{106} Villegas-Miranda was supposed to be paroled from state custody on February 9, 2007, but he was held on a federal immigration detainer until February 12, 2007, when federal authorities charged him with illegal reentry pursuant to § 1326.\textsuperscript{107}

Villegas-Miranda’s Sentencing Guidelines range was seventy-seven to ninety-six months’ imprisonment.\textsuperscript{108} During his sentencing hearing, Villegas-Miranda argued that the district court should grant a

\begin{footnotes}
\item[100] \textit{Id.}
\item[102] 579 F.3d 798, 800 (7th Cir. 2009).
\item[103] \textit{Id.} at 800.
\item[104] \textit{Id.}
\item[105] \textit{Id.}
\item[106] \textit{Id.}
\item[107] \textit{Id.}
\item[108] \textit{Id.}
\end{footnotes}
downward departure of at least nine months.\textsuperscript{109} He argued that if the government had charged him with illegal reentry when he was arrested on May 6, 2006, or any reasonable time prior to his release from state custody, the district court would have been able to sentence his state and federal offenses concurrently.\textsuperscript{110} Since the government did not do so, he argued that he lost the opportunity to serve his state and federal sentences concurrently.\textsuperscript{111} The sentencing judge did not address his concurrent sentences argument and sentenced him to ninety months’ imprisonment.\textsuperscript{112}

On appeal, the court vacated Villegas-Miranda’s sentence and remanded the case for re-sentencing; it ordered the district court to address his concurrent sentences argument.\textsuperscript{113} The court quickly focused its opinion. It noted that sentencing decisions themselves are reviewed for reasonableness, but procedures are reviewed under a non-deferential standard.\textsuperscript{114} A within-Guidelines sentence is presumed reasonable, and typically, a sentencing court need not discuss each factor listed in the United States Sentencing Guidelines § 3553(a).\textsuperscript{115} The court only needs to articulate reasons for its sentencing decision and address all of a defendant’s principal arguments that “are not so weak as to not merit discussion.”\textsuperscript{116}

The government argued that Villegas-Miranda’s concurrent sentences argument was so weak as to not merit discussion because it is not an argument of recognized legal merit and it lacked a factual basis.\textsuperscript{117} However, the court, siding with Villegas-Miranda, observed that “[s]everal circuits have recognized that a district court has the

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 804.
\item Id. at 801.
\item Id.
\item Id. at 802 (citing United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005)).
\item Id. at 801.
\end{enumerate}
\end{footnotesize}
authority to issue a below-Guidelines sentence based on the delay between the time federal immigration officials discovered that a defendant illegally reentered the United States and the time that the government charged him with illegal reentry.”

The Villegas-Miranda court observed that the Seventh Circuit “has not definitively ruled on whether a district court may give a defendant a lesser sentence based on his opportunity to receive his federal time concurrent with his state time.” As Villegas-Miranda’s argument on appeal was a procedural one, the court took no position on its merits. Nevertheless, dicta points toward Villegas-Miranda’s argument for downward departures.

The court opined that the purpose of Sentencing Guidelines § 5G1.3, which allows courts to impose federal and state sentences concurrently, is to prevent a defendant from serving duplicative sentences for the same criminal act. The government pointed out that in § 1326 cases, defendants are typically imprisoned in state court for offenses unrelated to their reentry prosecution. Thus, allowing defendants to serve concurrent sentences in these cases does not further congressional policy behind the Sentencing Guidelines. Nevertheless, the Villegas-Miranda court remarked that “this idea has

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118 Id. at 802; see United States v. Barrera-Saucedo, 385 F.3d 533, 537 (5th Cir. 2004) (holding that it was “permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody); accord United States v. Sanchez-Rodriguez, 161 F.3d 556, 562 (9th Cir. 1998) (en banc). Some courts allow downward departures but require some form of negligence or malfeasance on the prosecution’s part. See United States v. Los Santos, 283 F.3d 422, 428–29 (2d Cir. 2002) (holding downward departure permissible where defendant can show that delay in prosecution was in bad faith or longer than reasonable); see also United States v. Saldana, 109 F.3d 100, 104 (1st Cir. 1997) (careless or innocent delay that resulted in sentencing consequences so unusual and unfair that downward departure was warranted).

119 Villegas-Miranda, 579 F.3d at 802.

120 Id. at 803.

121 Id.

122 Id.

123 Id.
not prevented our sister circuits from allowing sentencing courts to reduce a defendant’s sentence to credit him with state time served, nor does it directly conflict with the Guideline’s policy statement.” The court also stated that given its acceptance in sister circuits, a downward departure argument is reasonable and may be legally meritorious.


Recently, as evidenced by United States v. Medrano-Duran, sentencing judges have granted downward departures from Guidelines ranges due to the unwarranted disparity that arises among defendants in early disposition districts and those where fast-track programs are not yet available.

Medrano-Duran came to the United States in 1997. From his arrival until 2004, he engaged in criminal activity, served time in Cook County Jail, and was ultimately deported in early 2004. In October 2004, he was found in Mount Prospect, Illinois, and was arrested for illegal reentry. Medrano-Duran pleaded guilty in April 2005.

Under the Sentencing Guidelines, Medrano-Duran’s criminal history category of IV and his offense level of twenty-one (thanks in large part to his criminal past), qualified him for an advisory Guideline sentence of fifty-seven to seventy-one months. Medrano-Duran sought a downward departure from the advisory range by arguing that the unavailability in the Northern District of Illinois “of an early disposition or ‘fast track’ program for persons charged with illegal re-

124 Id.
125 Id.
126 386 F. Supp. 2d 943, 944 (N.D. Ill. 2005).
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
entry created an unwarranted sentencing disparity that the [c]ourt should take into account.” Medrano-Duran claimed that the existence of the sentencing disparity directly contravened Sentencing Guidelines § 3553(a)(6)’s guiding consideration for sentencing judges, which provides that a court is to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”

The government countered that the sentencing disparity could not be considered unwarranted because Congress had specifically approved the institution of fast-track programs at the Attorney General’s discretion. The court noted that in promulgating the Sentencing Guidelines, Congress placed no express restriction on the types of limitations that may be deemed unwarranted.

Then, the court examined the sentencing ranges that Medrano-Duran would be subject to in several fast-track districts. The Western District of Texas would offer a one-level downward departure that would reduce his range to fifty-one to sixty-three months. In the districts of New Mexico, Nebraska, and Idaho, the Southern District of Texas, and some divisions of the District of Arizona, he would be entitled to a two-level downward departure and a resulting range of forty-six to fifty-seven months. In other divisions in the District of Arizona, Medrano-Duran would be entitled to a three-level downward departure and a sentencing range of forty-one to fifty-one months. In the Eastern District of California and the District of North Dakota, he would receive a four-level downward departure and a reduced range of thirty-seven to forty-six months. Finally, in the

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132 Id.
133 Id. at 945 (citing 18 U.S.C. § 3553(a)(1)–(7)).
134 Medrano-Duran, 386 F. Supp. 2d at 946.
135 Id.
136 See id. at 947.
137 Id.
138 Id.
139 Id.
140 Id.
most lenient fast-track districts, Medrano-Duran would be subject to a thirty-month sentence.  

While the court did not question the prosecutor’s ability to use discretion when charging criminals, it did provide an example that showed the unwarranted disparities caused by the lack of a § 1326 fast-track sentencing program:

. . . [P]rosecutors were to determine as a matter of policy to handle all theft of government property cases under 18 U.S.C. § 641 by permitting defendants to plead guilty to a statutory misdemeanor, thus capping their sentence at one year[,] a particular defendant who was similarly situated to the others but fortuitously was not offered such a bargain would have a strong claim that the resulting disparity was unwarranted. A similar fortuity exists in Medrano-Duran’s case. Medrano-Duran is situated similarly to illegal re-entry defendants in, say, the Western District of Washington, but due to the fortuity of where he was found by the authorities after illegally returning to the United States, under the government’s argument he is or should be stuck with a Guideline-determined sentence. As other judges have stated, “it is difficult to imagine a disparity less warranted than one that depends on the judicial district where the defendant happens to be found.”

The government also argued that Medrano-Duran was not similarly situated to fast-track defendants because he did not formally waive his right to appeal or file pretrial motions. However, the court rejected this argument: “it hardly makes sense to penalize Medrano-

141 Id.
143 Medrano-Duran, 386 F. Supp. 2d at 948.
Duran for failing to meet the requirements of a program that was never available to him.”

Lastly, the government argued that “giving a particular defendant like Medrano-Duran a lower sentence creates more disparity, not less, because it makes sentences differ among judges in a particular district.” While this may technically be true, the court found that the creation of disparity “depends on one’s frame of reference.” Reducing Medrano-Duran’s sentence based on fast-track disparities reduces overall disparity when viewed on a national, and not just a district-wide, level.

The court held that based on the above reasons, “the disparity between Medrano-Duran and illegal re-entry defendants in districts with early disposition programs was an unwarranted disparity among similarly situated defendants within the meanings of [Sentencing Guidelines] § 3553(a)(6).” As a result, the Court reduced his advisory Guideline range by three levels. Instead of fifty-seven to seventy-one months, Medrano-Duran now faced forty-one to fifty-one months.

The Seventh Circuit’s approach to § 1326 is problematic in two ways. First, the its use of an actual discovery standard to determine the completion date of a § 1326 violation allows the government to unfairly delay prosecution. For violators covered under subsections (b)(1) and (2), this use of prosecutorial discretion can result in significantly increased time in prison due to a lost opportunity to serve concurrent sentences.

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144 Id.
145 Id.
146 Id.
147 Id.
148 Id.
149 Id.
150 Id. at 949.
152 See United States v. Campbell, 667 F. Supp. 2d 993, 997 (E.D. Wis. 2009) (noting that “courts may, pursuant to their general sentencing discretion under 18
Second, the Seventh Circuit’s approach to § 1326 sentencing results from the absence of an early disposition program to expedite convictions and standardize procedure for dealing with violators. Even though the Seventh Circuit is home to a significant population of illegal immigrants, United States Attorneys’ offices have failed to take advantage of fast-track programs available to them. As a result, § 1326 violators are subject to a wide range of prison time based on where they are prosecuted and the sentencing judge’s willingness to depart from Sentencing Guidelines in order to comport with fast-track district sentencing patterns.

The recent case United States v. Carrillo-Esparza is an example of the Seventh Circuit’s approach to sentencing. Typically, courts take a hard-line approach to sentencing § 1326 defendants. But, in Carrillo-Esparza, the court left the door slightly ajar for § 1326 defendants because its harsh denial of a downward departure was based on procedure and not substance. The Court did not dispel downward departures altogether. It merely placed the burden on defendants to raise all arguments in front of the sentencing judge.

Without binding appellate direction to the contrary, a district court may have room to maneuver when sentencing § 1326

U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), reduce a sentence so as to make it fully concurrent”); United States v. Jimenez-DeGarcia, 256 F. App’x 830, 833 (7th Cir. 2007) (holding that defendant was not entitled to sentence reduction even if government delayed his prosecution until after his state sentence).

See DHS, Estimates of Unauthorized, supra note 6, at 4, Table 4.


590 F.3d 538 (7th Cir. 2010).

See id. at 540–41 (refusing downward departure in spite of prosecutorial delay and concurrent sentences arguments).

Id.

Id.

See United States v. Sanchez-Gomez, No. 08 CR 609, 2009 WL 310901, at *3 (N.D. Ill. Feb. 9, 2009) (noting that neither the Seventh Circuit nor the Supreme Court has taken a specific stance on how to address inter-district sentencing disparities resulting from fast-track sentencing programs).
violators. They might refuse to adhere to strict sentencing guidelines and issue significant downward departures based on fast-track sentencing disparities. *United States v. Medrano-Duran* is but one of many district court cases where the court has done so. It seems as though district judges will continue to use their discretion when sentencing § 1326 violators. Judges have every right to do this; however, it is unfair to defendants since their sentence is solely based on the judge before whom they appear.

III. **ALTERNATIVE APPROACH: CONSTRUCTIVE DISCOVERY STANDARD AND FAST-TRACK PROGRAMS**

Of the eight federal circuits that have specifically addressed the issue, five have adopted a constructive discovery standard to apply in § 1326 illegal reentry cases. The Second, Fifth, Eighth, Tenth and Eleventh Circuits hold, in one way or another, that for statute of limitations purposes, the offense of being found in the United States, in violation of § 1326, is not complete until immigration authorities both discover the illegal alien and know or, with the exercise of diligence typical of law enforcement authorities, could have discovered the illegality of the alien’s presence.

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161 386 F. Supp. 2d. 943 (N.D. Ill. 2005).
162 Norris, supra note 25, at 758–59.
163 The Third Circuit’s approach includes shades of both an actual and a constructive discovery standard. See *United States v. Lennon*, 372 F.3d 535, 541 (3d Cir. 2006) (noting that the government can be imputed with the knowledge of an alien’s presence when he enters at an official port, but also noting that where an alien enters and conceals his identity, the actual date of discovery will be used). The Sixth Circuit has yet to specifically adopt either standard, but it seems to be leaning toward the constructive discovery standard. See *United States v. Dusevic*, No. CRIM 05-80410, 2005 WL 3133507, at *4 (E.D. Mich. Nov. 23, 2005) (citing other circuits that have adopted the constructive knowledge test and finding that the government agents acted “with appropriate diligence, once they learned of [defendant's] presence in the United States”); see also *United States v. Clarke*, 312 F.3d 1343 (11th Cir. 2002); United States v. Bencomo-Castillo, 176 F.3d 1300 (10th Cir. 1999); United
A. Constructive Discovery Standard

The Second Circuit clearly outlined the constructive discovery standard in United States v. Rivera-Ventura. Riveria-Ventura illegally entered the United States via the San Ysidro, California border checkpoint in 1986. Shortly after entry, he was caught and deported by the INS. One year later, Riveria-Ventura again entered the United States illegally, this time near Brownsville, Texas, and once again, the INS caught him shortly after entry and commenced deportation proceedings. Riveria-Ventura moved to transfer venue from Texas to New York; his motion was granted. While he conceded that he was deportable, Riveria-Ventura requested an opportunity to apply for discretionary relief from deportation. He was released on bail pending this request and provided the INS with a false New York address.

A letter informing Riveria-Ventura of his discretionary relief hearing schedule was sent to the false address. He failed to show up for the hearing. The immigration judge ordered that the matter be

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164 72 F.3d 277, 282 (2d Cir. 1995).
165 Id. at 279.
166 Id.
167 Id.
168 Id.
169 Id.
170 Id.
171 Id.
172 Id.
referred back to the INS for resolution. What the INS did to locate Rivera-Ventura is unclear.

Between 1987 and 1994, Rivera-Ventura was arrested several times for driving while intoxicated. He escaped INS detection by giving a false name each time he was arrested. In September of 2004, after notification of Rivera-Ventura’s incarceration for New York drunk driving charges, the INS finally re-arrested him. He was indicted under § 1326(a) for being found in the United States illegally.

During trial, Rivera-Ventura argued that the five-year statute of limitations applicable to § 1326 violations barred his prosecution. The district court disagreed and claimed that although he reentered in 1987, the § 1326 violation was not complete for statute of limitations purposes until 1994, when the INS finally detained him.

On appeal, the court addressed Rivera-Ventura’s argument that a § 1326 found-in offense should not be treated as a continuing offense. The court noted that in the criminal context, statutes of limitations protect defendants from “having to defend themselves against charges supported by facts that are remote in time.” The Court remarked that according to Toussie v. United States, “criminal limitations statutes are to be liberally interpreted in favor of repose.” The limitations period begins to run when the offense is completed.

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173 Id.
174 Id.
175 Id.
176 Id.
177 Id.
178 Id.
179 Id.
180 Id.
181 Id.
182 Id. at 281.
183 Id. (citing Toussie v. United States, 397 U.S. 112, 115 (1970)).
184 Toussie, 397 U.S. at 115.
According to the Rivera-Ventura court, continuing offenses involve prolonged courses of conduct.\textsuperscript{185} The offense is not complete until the conduct has lapsed.\textsuperscript{186} The court continued its analysis of Toussie:

The Toussie Court recognized the obvious “tension between the purpose of a statute of limitations and the continuing offense doctrine,” since the “latter . . . extends the statute beyond its stated term.” Noting that § 3282 states that the five-year limitations period provided therein, “should not be extended ‘except as otherwise provided by law,’” the [Toussie] Court concluded that a crime should not be construed as a continuing offense “unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”\textsuperscript{187}

The court concluded that § 1326(a) found-in violations did not meet the standard articulated in Toussie.\textsuperscript{188} The court reasoned that found-in violations are somewhat complex because they involve the defendant’s conduct, as well as that of federal immigration authorities.\textsuperscript{189} The court articulated the constructive discovery standard with this context in mind:

Thus, since the alien may be in the United States unlawfully after making a surreptitious border crossing that conceals his presence, . . . or after entering through a recognized port by means of spurious documentation that conceals the illegality of his presence, . . . the offense of being “found in” the

\textsuperscript{185} Rivera-Ventura, 72 F.3d at 281.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id.

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United States in violation of § 1326(a) is not complete until the authorities both discover the illegal alien in the United States, . . . and know, or with the exercise of diligence typical of law enforcement authorities could have discovered, the illegality of his presence.\footnote{Id. at 282.}

Ultimately, the court affirmed Rivera-Ventura’s conviction.\footnote{Id. at 285.} It reasoned that even though, for statute of limitations purposes, the government could have been aware of his illegal presence in 1987, Rivera-Ventura knew his presence in the United States was illegal and thus, the steps he took to evade detection constituted fleeing from justice under 18 U.S.C. § 3290.\footnote{Id. at 284.} Therefore, even though the limitations period had tolled, § 3290 allowed prosecution.\footnote{Id.}

\section*{B. Fast-track/Early Disposition Programs}

To date, thirteen districts use fast-track programs to expeditiously handle § 1326 illegal reentry prosecutions.\footnote{Norris, supra note 25, at 757–58.} Fast-track programs are possible thanks to prosecutorial discretion.\footnote{See BLACK’S LAW DICTIONARY 499 (8th ed. 2004) (“Prosecutorial discretion. A prosecutor’s power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court”).} Prosecutors may decide whom, what, when, where, and whether they will bring charges, as long as it is not done in an inherently discriminatory way.\footnote{See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).}

Exercising prosecutorial discretion results in a reduced caseload for each prosecutor.\footnote{See Implementing the Requirements of the PROTECT Act: Hearing Before the U.S. Sentencing Comm’n (Sept. 23, 2003), available at http://www.ussc.gov/hearings/9_23_03/Huff.pdf (testimony of Hon. Marilyn L. Mroczkowski: Improving the Seventh Circuit’s Approach to Illegal Reentry Prose)} Thus, fast-track programs taking advantage of
prosecutorial discretion are particularly useful in instances where caseloads based on one crime are high.198 Those were the circumstances in the Southern District of California when the first fast-track program was born.199 The District was inundated with illegal reentry cases, so the United States Attorneys’ office developed a way to process § 1326 cases more efficiently.200

With respect to § 1326 violations, two forms of early disposition programs exist. First, in districts employing charge-bargaining fast-track programs, the prosecutor allows illegal reentry defendants who fall into the increased sentencing portion of § 1326 due to prior aggravated felony convictions to plead guilty under a different statute that carries a lower statutory maximum sentence.201 Defendants plead guilty to two counts of entry without inspection,202 which carries a maximum six-month sentence for the first offense and a two-year maximum sentence for the second offense.203 Sometimes, prosecutors allow defendants to plead guilty to one count of a § 1326(a) violation of simple illegal reentry, which carries a two-year statutory maximum sentence.204 Either way, the defendant’s interests are served because he receives a significantly reduced sentence in exchange for his cooperation with the prosecutor.205 Prosecutors can use charge-
bargaining as an attractive incentive for guilty pleas, which allows courts to dispose of illegal reentry cases more quickly.\textsuperscript{206} The second option for a fast-track program was created in 2003.\textsuperscript{207} In that year, Congress adopted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, known as the PROTECT Act.\textsuperscript{208} Section 401(m)(2)(B) of the Act instructed the United States Sentencing Commission to adopt “a policy statement authorizing a downward departure of not more than [four] levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney. . .”\textsuperscript{209}

The Sentencing Commission followed Congress’ orders and promulgated the following policy statement in October of 2003:

\textbf{Early Disposition Programs (Policy Statement):}

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.\textsuperscript{210}

Commonly known as downward-departure fast-track programs, defendants may receive a defense reduction of seven levels: four levels for the fast-track departure as authorized by the Guidelines; and three levels for acceptance of responsibility.\textsuperscript{211}

\begin{thebibliography}{99}

\bibitem{206} \textit{Id.}
\bibitem{207} \textit{Id.}
\bibitem{209} \textit{Id.}
\bibitem{210} \textit{U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 cmt. (2005).}
\bibitem{211} See Middleton, \textit{supra} note 201, at 830; see also Sentencing Memorandum for Defendant at 3, United States v. Medrano-Duran, 386 F. Supp. 2d 943 (N.D. Ill. 2005) (No. 04 CR 884) (July 13, 2005) (pointing out that in some districts, such as the District of Arizona, prosecutors reduce a defendant’s offense level an additional three levels for acceptance of responsibility).
\end{thebibliography}
Then Attorney General John Ashcroft responded to Congress by issuing two memoranda to all federal prosecutors. The first memorandum addressed exceptions to what Ashcroft called a prosecutor’s “general duty to charge and pursue the most serious, readily provable offense in all federal prosecutions.” An exception is where the relevant district had implemented an early disposition program. The second memorandum outlined the requirements for implementation of a valid fast-track program, as well as the minimum requirements for fast-track plea agreements.

Districts seeking to institute a fast-track program have to show the following:

1. the district either (i) confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited basis would significantly strain prosecutorial and judicial resources in the district, or (ii) confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;
2. state prosecution of such cases is either unavailable or unwarranted;
3. the specific class of cases are comprised of highly repetitive and substantially similar fact scenarios; and

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213 Id.
(4) the cases do not involve an offense designated by the
Attorney General as a “crime of violence.”\textsuperscript{215}

The following are the minimum requirements for fast-track plea
agreements:

(i) The defendant agrees to a factual basis that accurately
reflects his or her offense conduct;
(ii) The defendant agrees not to file any motions described in
(iii) The defendant agrees to waive appeal; and
(iv) The defendant agrees to waive the opportunity to
challenge his or her conviction under 28 U.S.C. § 2255 [a.k.a.
“habeas petition”], except on the issue of ineffective
assistance of counsel.\textsuperscript{216}

These requirements ensure that fast-track programs involve a
give-and-take process. Prosecutors will reduce sentences in exchange
for conduct on the part of defendants that typically speeds up
prosecution and sentencing.\textsuperscript{217}

IV. A NOTE ON THE SENTENCING GUIDELINES

Before discussing a different approach to the Seventh Circuit’s
§ 1326 prosecutions for illegal reentry, one more background issue
must be developed. The United States Sentencing Guidelines, while no
longer mandatory,\textsuperscript{218} provide guidance for judges. Moreover, the
reasons for their adoption are still relevant, especially when departing

\textsuperscript{215} United States Sentencing Commission, Report to the Congress: Downward
Departures from the Federal Sentencing Guidelines 15–16 (2003), \textit{available at}
http://www.ussc.gov/departrpt03/departrpt03.pdf.
\textsuperscript{216} Norris, \textit{supra} note 25, at 757 n.65.
\textsuperscript{217} \textit{Id.} at 750–51.
from them can further the goals that Congress had in mind during their enactment.\textsuperscript{219}

In 1984, Congress enacted the Sentencing Reform Act.\textsuperscript{220} Congress sought to achieve “honesty in sentencing” and to reduce “‘unjustifiably wide’ sentencing disparity,” which occurred even within the same district.\textsuperscript{221} For example, it was considered problematic that defendants sentenced in one district may be subject to widely inconsistent sentences based on which judge sentenced them.\textsuperscript{222}

National sentencing disparity was also one of Congress’ concerns.\textsuperscript{223} However, differences based on sex, race, and region were the focus.\textsuperscript{224} Disparities caused by the fact that districts across the country experienced different criminal violations with varying frequency was not cause for concern.\textsuperscript{225} Congressional reports noted, though, that regional sentencing differences should not be ignored where similar criminal conduct is a joining factor.\textsuperscript{226}

Under the Sentencing Reform Act, Congress created the United States Sentencing Commission and sought a federal criminal justice system that

\textsuperscript{219} See United States v. Carrillo-Esparza, 590 F.3d 538, 540–41 (7th Cir. 2010); United States v. Villegas-Miranda 579 F.3d 798, 802–03 (7th Cir. 2009).
\textsuperscript{224} Symposium, supra note 222, at 160.
\textsuperscript{225} Id. at 171.
\textsuperscript{226} Id.
(A) assure[d] the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; and

(B) provide[d] certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . .227

In creating the Guidelines, Congress directed the Sentencing Commission to consider “the community view of the gravity of the offense; . . . the public concern generated by the offense; . . . [and] the current incidence of the offense in the community and in the Nation as a whole.”228 In 1989, the Commission’s Guidelines became effective.229

Initially, the Guidelines were mandatory,230 sentencing judges had to adhere to them unless they could establish that a sentence outside of the guidelines was warranted under the framework established in Koon v. United States.231 However, in United States v. Booker, the Supreme

230 Id.
231 518 U.S. 81, 95 (1996) (judges were to consider four questions to determine if an out-of-guidelines sentence was proper:

1. What features of this case, potentially, take it outside the Guidelines’ ‘heartland’ and make of it a special, or unusual, case?
2. Has the Commission forbidden departures based on those features?
3. If not, has the Commission encouraged departures based on those features?
4. If not, has the Commission discouraged departures based on those features?).
Court ruled that mandatory sentencing guidelines violated the Constitution’s Sixth Amendment. Under a mandatory guidelines regime, sentencing judges considered facts often not tried in front of a jury when determining a defendant’s sentence. To remedy this constitutional violation, the Court held that the Guidelines were no longer mandatory. However, judges are not free to ignore the Guidelines; judges still must “...consider the Guidelines ‘sentencing range established for . . . the applicable category of offense committed.’”

The Booker Court strove to uphold as much of the Guidelines as constitutionally possible under its new non-mandatory sentencing regime. In so doing, the Court ratified Congressional purposes underlying the Sentencing Reform Act as well as those enunciated by the Sentencing Commission.

V. CHANGING THE SEVENTH CIRCUIT’S APPROACH

The Seventh Circuit should change its approach to § 1326 violations. First, it should overrule Are and adopt a constructive discovery standard when analyzing a § 1326 found-in date for statute of limitations purposes. Additionally, an early disposition program should be instituted to reduce circuit-wide disparity of § 1326 sentences.

A. Adopting a Constructive Discovery Standard

Problems with the actual discovery standard used by the Seventh Circuit could be rectified by adopting a constructive discovery standard for § 1326 cases.

233 Id.
234 Id.
235 Id. at 259–60 (emphasis added).
236 Id. at 266.
237 See id. at 238–41.
United States Attorneys may have a wealth of information that, with reasonable diligence, would lead them to a § 1326 defendant, but under the actual discovery standard, they have no obligation to analyze the information in order to find a purported violator. The result is that, irrespective of statute of limitations issues, which will be addressed below, many prosecutions are pursued long after they could be sought.\textsuperscript{238}

For those already incarcerated, this creates a high likelihood that they will spend significantly more time in jail due to a lost opportunity to serve concurrent sentences.\textsuperscript{239} The actual discovery standard encourages a prosecutor to delay prosecution, potentially knowing, or at least potentially having strong evidence to suggest, a defendant’s whereabouts.\textsuperscript{240}

In contrast, the constructive discovery standard directly addresses this potential abuse by placing the burden of prosecuting § 1326 violations where the Constitution mandates it to be put: on the prosecution.\textsuperscript{241} If a prosecutor has information that could, using reasonable diligence, lead her to the defendant, then she must pursue it or face the possibility that the statute of limitations will toll and she will not be able to seek the conviction. The public wants criminals brought to justice. While the Department of Justice (DOJ) has discretion to decide whom to prosecute at what time, internal memoranda have supported seeking maximum convictions and sentences.\textsuperscript{242} Why, then, would prosecutors risk losing easy convictions under the guise of using this discretion? It is counter-intuitive. Use of the constructive discovery standard supports

\textsuperscript{238} See generally United States v. Clarke, 312 F.3d 1343 (11th Cir. 2002); United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1998); United States v. Gomez, 38 F.3d 1031 (8th Cir. 1994).
\textsuperscript{240} See generally United States v. Jimenez-DeGarcia, 256 F. App’x 830 (7th Cir. 2007).
\textsuperscript{241} See Tot v. United States, 319 U.S. 463, 466–67 (1943).
\textsuperscript{242} Ashcroft Memo, supra note 212, at 2–4.
principles undergirding the criminal justice system, leads to obtainable convictions being carried through, and on top of that, protects defendants by bringing them to justice more quickly. As a result, should a judge deem it appropriate, a defendant may be able to serve concurrent sentences if charged for more than one crime.243

Moreover, the Seventh Circuit has used language that suggests consideration of facts relevant in a constructive discovery standard analysis. United States v. Are244 is a clear example of this. In Are, the court sought to clarify the circuit’s stance on the constructive discovery standard by explaining the case of United States v. Herrera-Ordones.245 In that case, the Seventh Circuit “rejected the defendant’s constructive knowledge argument as a factual matter,” finding adequate evidence in the record establishing that the INS agents used adequate diligence “after learning of [Herrera-Ordones’s] presence in [the c]ounty [j]ail.”246

In terms of § 1326 prosecutions, the Seventh Circuit claims that the level of diligence used in the prosecution of defendants (at various levels) is simply irrelevant.247 However, it is puzzling why the Are and Herrera-Ordones courts, would even mention the level of diligence that INS agents used to investigate a defendant. The Are court went on to highlight the specific holding of Herrera-Ordones: that in cases dealing with challenges to venue, proper venue “may be laid wherever the alien is located in fact, and as often as he is located, whether or not better coordination and diligence would have alerted federal officials to his presence and status earlier and elsewhere.”248

However, the logic of the Herrera-Ordones holding should not be applied to cases that do not involve specific challenges to venue. The

243 See Villegas-Miranda, 579 F.3d at 803; see also United States v. Campbell, 667 F. Supp. 2d 993, 997–1000 (E.D. Wis. 2009) (generally discussing concurrent sentencing where defendant was incarcerated in state custody before federal prosecution).
244 498 F.3d 460 (7th Cir. 2007).
245 190 F.3d 504 (7th Cir. 1999).
246 Are, 498 F.3d at 465 (emphasis added).
247 Id. at 466.
248 Id. at 465.
Seventh Circuit seems to blur this analytical distinction in its § 1326 cases. If criminal prosecution is barred by the statute of limitations, it is immaterial whether venue is proper and whether the defendant is, in fact, guilty of the alleged conduct. The *Herrera-Ordones* holding is not problematic because it is precise.\(^{249}\) However, while the actual discovery standard is a bright-line rule, in application, it is arbitrary and unjustifiable. One wonders why courts would hold that immigration officials and federal law enforcement should not be required to exercise reasonable diligence in prosecuting defendants. On the other hand, while the constructive discovery standard might be a more labor-intensive way for courts to analyze § 1326 cases, it is a fairer one. As long as prosecutors use diligence in seeking convictions, once the analysis has taken place, the case should be an easy win.\(^{250}\) The issue here is not liability. It is procedural fairness.

Second, an actual discovery standard improperly extends the statute of limitations long past the prescribed period. Because a § 1326 violation is a non-capital offense, the statute of limitations on prosecution is five years.\(^{251}\) Further, because it is relatively settled, at least in the Seventh Circuit, that the found-in offense here is a continuing offense, the statutory period will begin to toll upon the completion of the offense.\(^{252}\)

Language used by the Seventh Circuit suggests that it is troubled by the prospect of § 1326 violators avoiding prosecution by avoiding detection for the statute of limitations period.\(^{253}\) As a result, the Seventh Circuit has inserted a continuing offense analysis into § 1326 prosecutions.\(^{254}\) An alien who illegally reenters the United States prolongs his illegal presence each day he goes undetected, and thus the limitations clock does not toll during this period because the crime

\(^{249}\) See *Herrera-Ordones*, 190 F.3d at 513.

\(^{250}\) The cases cited in this Note support this. They all are cases concerning sentencing; thus, liability has already been proven beyond a reasonable doubt.


\(^{252}\) *Are*, 498 F.3d at 466.

\(^{253}\) See *United States v. Gordon*, 513 F.3d 659, 664 (7th Cir. 2008).

\(^{254}\) *Are*, 498 F.3d at 464–66.

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technically has not ended.\textsuperscript{255} Using an actual discovery standard to address this problem is simply not necessary.

Congress has already addressed criminals fleeing from justice in 18 U.S.C. § 3290.\textsuperscript{256} The statute provides that “[n]o statute of limitations shall extend to any person fleeing from justice.”\textsuperscript{257} In § 1326 found-in prosecutions, it would not be difficult for the government to meet this statute’s requirements through intentional flight to avoid prosecution. Often, aliens enter using false names or false documentation, and they have actual knowledge that their reentry is illegal.\textsuperscript{258} Further, sometimes aliens continue to use different false aliases once they regain entry into the United States.\textsuperscript{259}

All possible factual scenarios that constitute fleeing from justice will not be laid out in this Note. However, the Supreme Court established long ago that fleeing from justice under § 3290 is a broad concept.\textsuperscript{260} Arguably, it would not be difficult for prosecutors to establish that § 1326 defendants were, at least for a time, fleeing from justice, and therefore the statute of limitations was not tolling. Use of an actual discovery standard to address illegal aliens avoiding detection is unnecessary and duplicitous. Courts need not create judicial solutions to practical problems where the legislature has already devised a solution.

As a result, where prosecution occurs more than five years after illegal reentry, it will not be time barred where the alien was fleeing from justice, whether law enforcement used reasonable diligence in

\textsuperscript{257} \textit{Id}.
\textsuperscript{258} See United States v. Herrera-Ordones, 190 F.3d 504, 506–07 (7th Cir. 1999).
\textsuperscript{259} See \textit{id}.
\textsuperscript{260} Streep v. United States, 160 U.S. 128, 133 (1895) (holding that “to constitute fleeing from justice, it is not necessary that the course of justice should have been put in operation by the presentment of an indictment by a grand jury, or by the filing of an information by the attorney for the government, or by the making of a complaint before a magistrate”; all that is needed is flight with the intention of avoiding prosecution); see also 21 AM. JUR. 2D Criminal Law § 266 (2010).
discovery or not. However, injustices arise under the actual discovery standard, where it cannot reasonably be said that a defendant is fleeing justice within the meaning of § 3290. For continuing offenses, the limitations period does not begin to run until an affirmative event puts an end to the defendant’s criminal conduct.\textsuperscript{261} The \textit{Are} court clarified this rule:

\begin{quote}
In conspiracies this is the date the defendant withdraws or is captured, and for escape and failure to report [to prison], it is the date the defendant turns himself in or is caught. Applying a similar statute of limitations trigger to the § 1326(a)(2) “found in” offense would start the limitations period when the alien surrenders or is arrested.\textsuperscript{262}
\end{quote}

\begin{quote}
In \textit{Are}, the court did not address this issue because both dates highlighting the end of criminal conduct offered by the government fell within the statute of limitations period.\textsuperscript{263} The factual elements required to establish the fleeing-from-justice state-of-mind requirement seem to be lacking where a defendant is already incarcerated.\textsuperscript{264} As a result, incarceration could be, and should be, viewed as an affirmative event putting the defendant’s conduct to an end. Defendants previously incarcerated argue for reduced sentences for their § 1326 violations.\textsuperscript{265}

District courts in the Seventh Circuit are unsure how to treat the concurrent sentences reduction argument because the “circuit has not definitively ruled on whether a district court may give a defendant a
\end{quote}

\textsuperscript{261} See United States v. Elliott, 467 F.3d 688, 690 (7th Cir. 2006).
\textsuperscript{262} United States v. Are, 498 F.3d 460, 466 (7th Cir. 2007).
\textsuperscript{263} Id. at 467.
\textsuperscript{264} It is arguable that a defendant does not have the power to flee while in jail, nor does he likely have the intent to attempt to do so. Cf. United States v. Hewecker, 70 F. 59, 60–61 (C.C.S.D.N.Y. 1896) (finding no intent to flee from justice where defendant was imprisoned abroad before untimely charge upon return to United States).
\textsuperscript{265} See United States v. Jimenez-DeGarcia, 256 F. App’x 830, 830 (7th Cir. 2007).
lesser sentence based on his lost opportunity to receive his federal time concurrent with his state time.”266 The governing actual discovery standard is inflexible and those wishing credit for prison time already served, where prosecution seems untimely, are not-ill received by judges, but are disposed of on procedural grounds.267 In Villegas-Miranda, the court took no position on the merits of the defendant’s concurrent time reduction argument, but it held that it needed to be addressed during sentencing:

Given that several circuit courts have held that a sentencing court can downward depart for [the loss of an opportunity to run federal and state sentences concurrently where federal prosecution seems untimely],268 and we have not explicitly ruled on it (and need not rule on it here), a defendant is reasonable to believe that it may succeed, and we find this argument to be legally meritorious.269

The language from Villegas-Miranda has been cited on the district court level to allow for concurrent time reductions.270 If this is not

266 United States v. Villegas-Miranda, 579 F.3d 798, 802 (7th Cir. 2009).
267 Sentencing courts do not have the power to back-date sentences. United States v. Walker, 98 F.3d 944, 945–46 (7th Cir. 1996). However, under Booker, what courts have been doing is using the lost opportunity to serve concurrent sentences as a reduction-worthy fact in some cases.
268 See United States v. Barrera-Saucedo, 385 F.3d 533, 537 (5th Cir. 2004); United States v. Los Santos, 283 F.3d 422, 428–29 (2d Cir. 2002); United States v. Sanchez-Rodriguez, 161 F.3d 556, 562 (9th Cir. 1998); United States v. Saldana, 109 F.3d 100, 104 (1st Cir. 1997).
269 Villegas-Miranda, 579 F.3d at 803 (emphasis added); see also United States v. Lechuga-Ponce, 407 F.3d 895, 898 (7th Cir. 2005) (rejecting defendant’s argument on appeal that he was entitled to concurrent time reduction because, although potentially meritorious, he did not raise it with the district court and it was thus not preserved for appeal).
270 See United States v. Blount, No. 08-CR-263, 2010 WL 313739, at *4 (E.D. Wis. Jan. 20, 2010) (citing Villegas-Miranda, 579 F.3d at 802–03, for the proposition that “a district court may impose a lower sentence based on the lost opportunity to serve federal time concurrent with state time”).
what the Seventh Circuit wants Villegas-Miranda to stand for, it must clarify its position on this issue or face increased tension among district courts.

Given the intra-circuit tension that concurrent time reductions present, the Seventh Circuit or the DOJ needs to act. A clear holding—either abolishing the current policy, but more preferably recognizing the validity and policy of these reductions—is needed. Additionally, requiring a record to be sent to the DOJ when illegal aliens are convicted in state court would not be overly burdensome and, were the Seventh Circuit to adopt a constructive discovery standard, would arguably satisfy reasonable law enforcement diligence.271 Then, immigration authorities and the DOJ could conduct investigations that ultimately would lead to more § 1326 convictions. As this is consistent with federal criminal prosecutorial policy,272 one wonders why it has not been done. What federal law enforcement authorities do with information about suspected violators becomes part of the factual analysis of each § 1326 case under a constructive discovery standard. Where the government is diligent, as it should be, this will lead to a higher conviction rate. Where it is not, defendants will not be forced to suffer due to lackadaisical prosecution. This is precisely why statutes of limitations are in place.273 Defendants should not have to suffer due to slow law enforcement.

A constructive discovery standard protects the few defendants that would suffer from the abuse of prosecutorial discretion under an actual discovery standard. 18 U.S.C. § 3290 allows the government to prosecute beyond five years where the circumstances warrant it, as determined by Congress, not merely an Assistant United States

271 In fact, in some instances, it is actually practiced. See United States v. Jimenez-DeGarcia, 256 F. App’x 830 (7th Cir. 2007) (defendant was charged with state crimes and “[a]lthough Wisconsin promptly notified federal immigration officials of Jimenez-DeGarcia’s presence in the Badger State, he was not indicted on an illegal re-entry charge until sixteen months later,” and the government waited another eight months, until defendant finished serving his state sentence, to arraign him).


Attorney or ICE agent. Placing more of a burden on federal authorities to timely prosecute violators would protect those who are not fleeing justice and merely would seek the opportunity for defendants to serve concurrent sentences. A constructive discovery standard does not seek to overhaul § 1326 prosecutions. It merely seeks to align prosecutorial, defense, congressional, and judicial policies. It is not a best answer, but it is certainly a better one than merely using an arbitrary actual discovery standard.

B. Adopting a Fast-track Program

Districts in the Seventh Circuit should implement early disposition programs to deal with § 1326 prosecutions. Doing so would reduce sentencing disparities within the circuit and would reduce disparities with other fast-track districts, as well as with circuits allowing downward departures based on sentencing disparities.

Under § 3553(a)(6) of the PROTECT Act, only unwarranted disparities are highlighted as cause for concern.274 Because Congress passed laws allowing the development of fast-track sentencing, it cannot be said that disparities resulting from these laws were those that Congress thought would be “unwarranted.”275 However, tension exists because Congress also enacted the Sentencing Reform Act, which specifically condemns unwarranted disparities.276 Moreover, the Booker Court noted that “Congress’ basic goal in passing the Sentencing [Reform] Act was to move the sentencing system in the direction of increased uniformity.”277 Therefore, judges are left with (1) a general act of Congress that fosters disparity, (2) a specific act that tries to eliminate them, and (3) a Supreme Court case highlighting the policy of the disparity-reducing statute, yet allowing for discretion in sentencing. As a result, “whether fast-track disparities are

275 United States v. Sebastian, 436 F.3d 913, 916 (8th Cir. 2006).
276 See Norris, supra note 25 at 769–70.
‘unwarranted’ or ‘unreasonable’ seems to depend on each judge’s personal sense of justice and fair play—hardly a uniform standard.”

Until Congress acts again to completely harmonize § 1326 prosecutions and sentences, courts are left to do as they see fit. The Seventh Circuit cannot solve this national problem, but intra-circuit sentencing is something that it can specifically address. With unclear guidance, some district courts have found that fast-track sentence disparities are unwarranted and have reduced § 1326 violators’ sentences accordingly, while some district courts have held the opposite.

The Seventh Circuit seemed to address this issue in 2007. In United States v. Pacheco-Diaz, the defendant made a concurrent sentences reduction argument. He claimed that his sentence was unreasonable because the district court failed to consider sentence discrepancies existing among non-fast-track and fast-track § 1326 cases. The court was not receptive. It held that a sentencing judge in a district without a fast-track program may not take into account the fact that similar defendants in fast-track districts could receive lower sentences. District courts have recognized and respected this holding, albeit sometimes begrudgingly.

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278 Norris, supra note 48 at 770.

279 For example, compare United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 964 (E.D. Wis. 2005) (finding that “under Booker and § 3553(a)(6), it may be appropriate in some cases for courts to exercise their discretion to minimize the sentencing disparity that fast-track programs create,” then reducing defendant’s sentence) with United States v. Tellez-Boizo, No. 03 CR 54, 2006 WL 3392742, at *3 (N.D. Ill. Nov. 21, 2006) (holding that while disparity with fast-track districts was one reason in factual analysis for sentence reduction, it did not individually warrant reduction in present case).

280 506 F.3d 545, 552 (7th Cir. 2007).

281 Id.

282 Id.

283 See United States v. Sanchez-Gonzalez, No. 08 CR 609, 2009 WL 310901, at *3 (N.D. Ill. Feb. 9, 2009) (recognizing Seventh Circuit’s approach not allowing fast-track disparity reductions, but opining that “[t]his Court continues to believe, as a matter of policy, that it is unjust to permit sentencing disparities based on the

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The Seventh Circuit has very recently blurred its holding in *Pacheco-Diaz*. In *United States v. Ramirez-Silva*, the defendant, in spite of precedent to the contrary, argued that his § 1326(a) sentence was unreasonable due to wide discrepancies in potential jail time between Seventh Circuit defendants and those in fast-track districts. On April 1, 2010, the court handed down its opinion. The court noted that unlike other circuits, the Seventh Circuit has not reevaluated its view of fast-track discrepancies in light of *Kimbrough v. United States*. *Kimbrough* was similar to *Booker* on a basic level. The Court held that the cocaine Guidelines, like the Sentencing Guidelines, were advisory, not mandatory, and that so holding did not create unwarranted sentencing disparities between cocaine and crack cocaine defendants. The Court held that the need to avoid unwarranted sentence disparities is but one factor that district courts must consider in determining a defendant’s sentence.

In *Kimbrough*’s wake, it seems that a reasonable argument against unwarranted sentencing disparities must be considered if raised in § 1326 cases. However, in *Ramirez-Silva*, the court did not address *Kimbrough*. The court cited *Pacheco-Diaz* and went on.

The court’s failure to specifically address fast-track disparities in the wake of the *Kimbrough* opinion is even more confusing given the fact that shortly after recognizing that it had not addressed *Kimbrough*,

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284 No. 09-3365, 2010 WL 1258239 (7th Cir. Apr. 1, 2010).
286 *id.* at 107.
287 *id.* at 108.
288 *Ramirez-Silva*, 2010 WL 1258239, at *3 (“We have not evaluated whether *Kimbrough* compels another look at the issue [of fast-track disparities], but other circuits have required defendants asking for a lower sentence on the basis of a purported fast-track ‘disparity’ to establish that they are similarly situated to defendants in districts with a program and, factually, would have been eligible for fast-track relief. See *United States v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008)”)

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the court laid out several ways in which Ramirez-Silva could have analogized his situation to defendants in fast-track districts:

Ramirez-Silva stated at sentencing only that these programs exist in other districts, but he did not assert that he would have met the eligibility criteria for even one program of those which exist. Counsel failed to explain, for example, (1) the minimum eligibility thresholds set out by United States Attorneys' offices with approved fast-track programs, (2) whether the two months that Ramirez-Silva waited after his indictment before pleading guilty would have put him on a fast-track in any district, (3) whether fast-track defendants must waive their right to appeal, (4) whether there are differences among fast-track districts as to the amount of sentencing consideration given, and (5) whether Ramirez-Silva met any disqualifying criteria (such as his prior conviction for alien smuggling or his violation of supervised release).\(^{289}\)

While the court ultimately rejected Ramirez-Silva’s fast-track disparity argument,\(^{290}\) one wonders whether it would have done so if he had addressed the *court’s own criteria for analogizing to fast-track defendants*. Even if the court still rejected his arguments, it probably would have had to address *Kimbrough*. Nevertheless, district courts in the Seventh Circuit are not in an enviable position. They are left with the holding from *Pacheco-Diaz*, other district courts’ disapproval of it, and a “test” listing ways in which a defendant can argue that he deserves a reduction based on fast-track disparities because he is similar to fast-track defendants and might be entitled to a reduced sentence in a fast-track district. What are defense counsel to do? It seems as though they should search all fast-track districts and find one where their defendant would be subject to a reduced sentence and argue the “test” from *Ramirez-Silva* until the Seventh Circuit revisits

\(^{289}\) *Id.* at *4.

\(^{290}\) *Id.*
the *Pacheco-Diaz* holding and reconciles it with that of the very recent case of *Ramirez-Silva*.

On the other hand, if United States Attorneys in Seventh Circuit districts implement an early disposition program, this confusion would be remedied. Many, if not all districts in the Seventh Circuit would meet the executive branch’s fast-track criteria as outlined below:

[Required Conditions for Implementation of an Early Disposition Program]291

(1)(i) the district . . . confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited basis would significantly strain prosecutorial and judicial resources in the district . . . 292

Illinois alone houses the fifth highest number of illegal immigrants in the United States.293 Implementing a fast-track sentencing program for illegal reentry offenses will allow for a more efficient use of resources in order to pursue more convictions.294 Moreover, it is unclear to what extent the executive branch forces this criteria on fast-track-seeking districts. The Seventh Circuit has erroneously claimed that fast-track programs were designed solely for districts facing highly burdensome volumes of illegal reentry cases.295 This is not the case, however. For example, early disposition programs were approved in the Districts of Oregon, Idaho, Nebraska, and North

291 The criteria outlined are taken from United States Sentencing Commission, *Report to Congress, supra* note 215, at 15–16.

292 *Id.*

293 *See* DHS, *Estimates of Unauthorized, supra* note 6, at 4.

294 *See* Middleton, *supra* note 201, at 832–33 (discussing support for fast-track in Southwest States because the programs allow for more prosecutions using fewer resources).

Dakota. In these districts, each Assistant United States Attorney handles an average of two or three illegal reentry cases each year. Further, an early disposition program was implemented in the Western District of Washington, where the rate of reentry cases per prosecutor per year is a measly 0.58 percent.

(1)(ii) [the district] confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases.

This criterion is related to the first. The sheer population of illegal immigrants in the Seventh Circuit seems to militate in favor of arguing that this criterion be established. A high number of illegal immigrants means that a high number of federal immigration crimes are occurring daily.

(2) state prosecution is either unavailable or unwarranted;

This does not apply because the issue is federal immigration law and no similar state statute penalizes the same crime in this realm.

(3) the specific class of cases are comprised highly repetitive and substantially similar fact scenarios

The most relevant facts in § 1326 cases will be somewhat consistent time and again. A defendant will have illegally reentered the United States without permission from the Attorney General.

296 See United States v. Medrano-Duran, 386 F. Supp. 2d 943, 948 (N.D. Ill. 2005) (the court noted that these statistics were highlighted in the Government’s moving documents).
297 Id.
298 Id.
300 Id.
301 Id.
Justifications for reentry are not germane to criminal liability under this statute. Viewed at the most basic level, courts are concerned with a defendant’s legal status, when the defendant was apprehended by authorities, and whether the defendant had the Attorney General’s permission to reenter.

(4) the cases do not involve an offense designated by the Attorney General as a “crime of violence.”

According to the Attorney General, as listed in 28 C.F.R. § 28.2, § 1326 violations are not considered crimes of violence.

CONCLUSION

Compared to the actual discovery standard, the constructive discovery standard is a more sound approach to § 1326 found-in prosecutions. It places the burden of prosecution on the government, with whom it belongs in criminal cases. Furthermore, a constructive discovery standard might foster higher conviction rates. For the time being it is a win-win solution: defendants are brought to justice more swiftly, which allows for the possibility of serving concurrent sentences, resulting in less time spent in prison; for the government, a constructive discovery standard may yield more prosecutions and arguably more convictions because it places an onus on federal law enforcement to exercise reasonable diligence in pursuing § 1326 defendants.

Additionally, districts in the Seventh Circuit that implement early disposition programs for illegal reentry crimes may secure not only more convictions, but may secure them more quickly, which uses

\[^{302}\text{Id.}\]
\[^{303}\text{See Norris, supra note 25, at 757 n.64.}\]
\[^{304}\text{See Tot v. United States, 319 U.S. 463, 466–67 (1943).}\]
fewer resources.305 Implementing early disposition programs will also take the pressure off of sentencing judges in the Seventh Circuit who are left with inconsistent appellate direction.306

The population of illegal immigrants in the United States has recently grown and may continue to do so in the foreseeable future.307 Thus, immigration crimes will probably remain near the top of federal prosecutions, or at least remain stagnant, for years to come.308 In exchange for slightly reduced jail time, federal prosecutors in this circuit can expedite justice for those charged with illegal reentry and additionally, can charge more defendants. The chance to get a higher conviction rate seems to sound squarely with federal prosecutorial policy.309

305 See Middleton, supra note 202, at 832–33 (discussing support for fast-track in Southwest States because the programs allow for more prosecutions using fewer resources).

306 See discussion of United States v. Ramirez-Silva, No. 09-3365, 2010 WL 1258239 (7th Cir. Apr. 1, 2010) and United States v. Pacheco-Diaz, 506 F.3d 545 (7th Cir. 2007) supra Part V.B.

307 See DHS, Estimates of Unauthorized, supra note 6, at 2.

308 Chacón, supra note 7, at 147.

309 See Ashcroft Memo, supra note 212, at 2–4.