

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UNITED STATES OF AMERICA.

V.

JUAN ORDONES-SOTO

UNITED STATES OF AMERICA,

V.

IGNACIO ONTIVEROS-VASQUEZ

UNITED STATES OF AMERICA

V.

ANGEL HERNANDEZ-GARCIA

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) **CAUSE NO. A-09-CR-590-SS**
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) **CAUSE NO. A-09-CR-592-SS**
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) **CAUSE NO. A-CR-597-SS**
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ADVISORY TO THE COURT

Comes now the United States of America, by and through the United States Attorney for the Western District of Texas and files this Advisory to the Court pursuant to the Court's Order dated February 5, 2010, in the above-styled and numbered causes. That Order directed the United States Attorney to file a response stating the substantive reason(s) each of the above named defendants was prosecuted in the United States District Court for the Western District of Texas, Austin Division. The United States would respectfully show the Court as follows:

As the Court is fully aware, it is well established that "as an incident of the constitutional separation of powers, ... the courts are not to interfere with the free exercise of the powers of the

attorneys of the United States in their control over criminal prosecutions.” *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.1965). In general, the courts accord substantial deference to decisions made in the exercise of prosecutorial discretion, which ordinarily are not subject to judicial review. *United States v. Molina*, 530 F.3d 326 (5th Cir. 2008). Courts “allow the government discretion to decide which individuals to prosecute, which offenses to charge, and what measure of punishment to seek.” (*Id.*) A narrow exception to this principle arises “in those extraordinary cases where it appears the prosecutor is motivated by considerations clearly contrary to the manifest public interest.” *United States v. Hamm*, 659 F.2d 624, 628 (5th Cir. 1981) (en banc). See *United States v. Cowan*, 524 F.2d 504, 512-13.(5th Cir.1975). The Court’s Order of February 5, makes no suggestion that these cases fall within that narrow exception. Absent such extraordinary circumstances this office ordinarily would not have to explain its reasons for prosecuting particular defendants. Nonetheless, because the Court has raised a question on a matter of interest to the public at large, the Government believes that some on-the-record discussion about the rationale for prosecuting these and similar immigration cases serves the public interest.

Each of the defendants listed above was found by agents of Immigration and Customs Enforcement (ICE) while in custody in the Travis County Jail. Each of the defendants was in state custody on a charge of driving while intoxicated. These defendants were identified as part of ICE’s long-standing Criminal Alien Program (CAP), intended to target aliens found in the United States following deportation and removal, and who have been charged with or convicted of crimes in addition to the illegal reentry offense. The program has been extant in one form or another for decades, originating with ICE’s predecessor agency, and in the last several years the ICE Detention and Removal Office (DRO) has made it a priority to identify and seek prosecution of so-called

criminal aliens.

As part of the Southwest Border Initiative of the Department of Justice, and as part of an effort to gain control of the Southwest Border and to deter and punish aliens who enter and reenter the United States in violation of law, the U.S. Attorney's Office for the Western District of Texas has expanded its prosecution of immigration violations in recent years. This has included the prosecution of large numbers of illegal entrants for misdemeanor offenses in the border divisions, particularly as part of Operation Streamline in the Del Rio Division starting in 2005. The office has also prosecuted greater numbers of illegal reentry violations in all divisions in the District, to include a wide spectrum of violators, and not only the "aggravated felons" that were the primary subject of prosecutions for violation of Title 8 U.S.C. §1326 in past years.

In the view of the undersigned, even apart from the strategy described, each of the defendants listed was worthy of federal prosecution on the facts presented. Each defendant had been apprehended on multiple occasions over a number of years and returned to Mexico. Each defendant returned unlawfully and was apprehended again. After voluntary returns to Mexico, each defendant again returned to the U.S. in violation of law and eventually was formally deported and removed from the United States on at least one occasion. And after being deported and removed, each defendant returned again illegally and committed one or more other crimes in the U.S.¹ Specifically, Ordones-Soto was apprehended in the U.S. at least six times, was voluntarily returned at least four times, eventually was deported after being convicted for burglary of a vehicle, and returned illegally

¹ Information about Defendants' histories is contained in ICE investigative reports and the Defendants' Presentence Reports. The ICE reports generally contain more detailed information about Defendants' encounters with immigration authorities than the presentence reports.

yet again, after which he was apprehended driving while intoxicated in Austin.² Ontiveros-Vasquez was apprehended at least eight times being in the U.S. unlawfully, was formally deported and removed on at least two occasions, and was arrested in Austin driving while intoxicated after returning unlawfully.³ And Hernandez-Garcia was apprehended at least twice, deported and

² According to ICE investigative reports and the presentence report, Ordones-Soto, a citizen of Mexico born on January 15, 1981, has the following history:

March 10, 1998: Apprehended by Border Patrol near Laredo, Texas, entering without inspection, and voluntarily returned to Mexico.
 March 31, 1998: Apprehended by Border Patrol near Laredo, TX, after entering without inspection, and voluntarily returned to Mexico.
 March 16, 2001: Apprehended by Border Patrol 27 miles west of Laredo, TX, after entering without inspection, and voluntarily returned to Mexico.
 March 20, 2001: Apprehended by Border Patrol 3 miles southeast of Laredo, TX, after entering without inspection, and voluntarily returned to Mexico.
 September 8, 2002: Arrested in McAllen, TX for burglary of a vehicle.
 February 14, 2003: Pled guilty and sentenced to 270 days deferred adjudication probation for burglary of a vehicle, McAllen, TX.
 February 2, 2005: Apprehended 12 miles west of Laredo, TX, after entering without inspection.
 February 20, 2005: Defendant was formally removed from the U.S. at Laredo, TX.
 October 24, 2009: Arrested and charged with driving while intoxicated in Travis County.
 October 29, 2009: Pled guilty to driving while intoxicated and sentenced to 20 days.
 November 2, 2009: Released into ICE custody.

³ According to ICE investigative reports and the presentence report, Ontiveros-Vasquez, a Mexican citizen born on July 29 or July 31, 1974, has the following history:

August 11, 1998 Apprehended in Austin, TX, as part of Criminal Alien Program.
 February 7, 1999: Apprehended by Border Patrol near Los Indios, TX, after entry without inspection.
 February 19, 1999: Apprehended by Border Patrol near Eagle Pass, TX, after entry without inspection.
 March 1, 1999: Apprehended by Border Patrol 11.8 miles west of Fabens, TX
 March 13, 1999: Apprehended on Bridge of the Americas, El Paso, TX, , presenting a valid Form I-586 in the name of another person for the purpose of gaining entry into the U.S.
 March 14, 1999: Formally removed from U.S. at El Paso, TX.
 October 16, 2007: Apprehended after illegal reentry at Rio Grande City, TX.

removed once, and found driving in Austin with a blood alcohol level twice the legal limit after entering illegally again⁴.

Each of these defendants has clearly demonstrated the following: (1) voluntary removals will not deter them from reentering the U.S. illegally; (2) formal deportation and removal will not deter them from reentering illegally; and (3) they will illegally reenter the U.S. and engage in criminal conduct that poses serious risk of harm to others while they are in the U.S. unlawfully. The undersigned does not believe that any of these defendants merits leniency in the exercise of prosecutorial discretion in prosecuting them for felony immigration violations. Nor does the undersigned believe measuring these prosecutions in terms of costs, including costs of incarceration and court time, dictates a different outcome. The agency, and possibly other prosecutors, have chosen less costly means of dealing with each of these defendants on prior occasions, and in response, the defendants have returned unlawfully and engaged in serious criminal conduct. While

October 18, 2007: Formally removed/deported from U.S. at Hidalgo, TX
 March 12, 2008: Apprehended at or near Laredo, TX after illegal reentry. (Disposition unknown).
 November 1, 2009: Arrested in Austin, TX, charged with driving while intoxicated.
 January 27, 2010: Pled guilty in absentia to DWI, sentenced to 40 days.

⁴ According to ICE investigative reports and the presentence report, Hernandez-Garcia, a citizen of Mexico born on November 9, 1979, has the following history:

July 8, 1998: Apprehended by Border Patrol at Burr Ranch.
 April 19, 2002: Apprehended
 May 13, 2002: Removal/deportation order entered at Oakdale, LA.
 June 4, 2002: Removed/deported at Laredo, TX.
 2005: Illegally reentered at Nogales, AZ (not apprehended)..
 November 14, 2009: Arrested in Austin, TX, and charged with driving while intoxicated.
 November 17, 2009: Released to ICE custody.

others might choose to forbear prosecuting them one more time, the undersigned believes that both Congress (in funding additional prosecutor and agent positions) and the Department of Justice expect this office to go forward with these types of prosecutions. While it is not certain that prosecuting these defendants for felony violations will change their conduct, this prosecutor is unwilling to wait for them to commit even more serious crimes, and possibly harm innocent drivers, passengers, or pedestrians, before charging them with the provable offenses they already have committed. Congress could change the laws or withdraw funding, and the Attorney General could direct this office to address its resources elsewhere. But they have not done so, and accordingly, the undersigned anticipates that the office will continue to prosecute similar violators in all divisions in this District.

Respectfully submitted,

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