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Operation Streamline and the Criminal Justice System

To reduce and deter illegal immigration, the United States Department of Homeland Security (DHS) launched Operation Streamline.[1] Under this program, the federal government prosecutes a large number of people who illegally enter (or leave) the United States, and imprisons them. But prosecuting mass numbers of people, every day, cannot be done without taking shortcuts.

Though journalists and academicians have written articles about whether Operation Streamline is or is not good public policy, what follows is a description of the actual Streamline process from the perspective of a defense attorney who has worked in Yuma and Tucson, where the federal government executes Streamline prosecutions.

Background To Operation Streamline

From approximately the 1970s to the 1990s, the U.S Attorney's office prosecuted people for illegally entering the United States; however, it primarily prosecuted persons with serious felony convictions.[2] People with no, minimal or benign criminal history were, generally speaking, not prosecuted; instead, they were administratively removed from the United States. Gradually, this distinction disappeared, and by the 2000s, even people with non-serious felony convictions were being prosecuted for illegally entering the United States.

Today, this policy—prosecuting everyone regardless of criminal or immigration history—is crystallized in Operation Streamline.[3]

The U.S. Department of Homeland Security first implemented Operation Streamline in Del Rio, Texas, in 2005. Later, due to an increase in illegal immigration, it expanded the program to Arizona.

Representing Defendants Prosecuted Under the Operation

The process begins when the United States Border Patrol arrests a person suspected of illegally entering the United States. However, whether the person is under arrest is of no moment; the agents may question the person about his immigration status, and these statements may be (and are) used to prosecute him because the questioning is near the border and related to a civil matter, not a criminal investigation.[4] After determining the person has no status to remain in the United States, he is taken to the Border Patrol station for processing, where agents fingerprint, photograph and question him again about his immigration status. Based on the information collected, the federal government prepares a criminal complaint against the person charging him with illegally entering the United States.[5] The following day, he, along with many others, is transported to the federal courthouse for prosecution.

In Yuma, Arizona, where I worked for more than two years representing defendants in a Streamline proceeding, the federal government prosecuted as many as 40 people at the same time who were suspected of illegally entering the United States. Though the number of people presented for prosecution varies, the court appoints one defense attorney to represent all 40 defendants, or whatever number of defendants the government presents for prosecution that day.

Because it would be practically impossible for one attorney to speak with each defendant individually, the attorney interviews the group of defendants at once, in a holding cell.[6] Accordingly, the United States Marshals take a group of four to six defendants to the cell, in turns, to talk with the attorney. Then, like an elementary-school teacher, the attorney takes roll of the persons in the room before informing them of the charges.

As is generally acknowledged, the attorney–client privilege is perhaps the most sacred of all legally recognized privileges. As the federal courts have noted, "Its preservation is essential to the just and orderly operation of our legal system."[7] The privilege "requires that clients be free to 'make full disclosure to their attorneys of past wrong-

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doings.'"[8] However, under an Operation Streamline proceeding, the attorney–client privilege becomes impotent.[9] The number of defendants and the room dynamics create a situation in which other defendants hear the conversation between the attorney and a defendant. Information that passes may be embarrassing and harmful to the defendant, but there is little the attorney can do to alter this environment.

In Yuma the number of defendants presented for prosecution never exceeds 40. But in Tucson, the federal government prosecutes approximately 70 defendants every day. Unlike in Yuma, in Tucson, an attorney will never be assigned to represent more than seven defendants at once. But as in Yuma, Tucson defense attorneys only have the morning to meet and advise their clients. The defense attorney meets with his clients in a large courtroom known as the "special proceedings room." He commandeers a table and interviews one client at a time. Despite this more individualized setting, the attorney–client privilege is tenuous at best, because not only is the room employed by other defendants and their defense attorneys, all of whom sit nearby, but the room is also occupied by Border Patrol and U.S. Marshal Agents. There have been times, in fact, when the prosecuting attorney has sat at an adjacent table while the defense attorney spoke to his client.

Though non-citizen clients have a constitutional and statutory right to an interpreter during a court hearing, no such right exists between the defendant and his attorney unless the language barrier impairs their ability to communicate. Because all the attorneys defending clients in a Streamline proceeding speak Spanish, no court interpreter is provided.[10] Accordingly, the responsibility of translating the criminal complaint from English to Spanish falls to the attorney; as a result, each defendant receives a different translation of the criminal charges levied against him, even though they are all charged with the same offense.[11] Moreover, explaining American legal terms to a defendant from another country who has little, if any, formal education is a Herculean task. Legal English is difficult to translate into Spanish, and explaining legal concepts in one morning to someone from another country is complicated, to say the least.

In addition to the advisement of the defendant's criminal-constitutional rights, the Supreme Court has added another responsibility to defense counsel representing non-citizen defendants. In 2010, the Supreme Court held that defense counsel also must advise a non-citizen defendant of the immigration consequences resulting from a criminal conviction.[12] But a great majority of defense attorneys do not practice immigration law. And as Justice Stevens acknowledged, immigration law is "complex" and "a legal specialty of its own."[13] He even conceded that, "Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it."[14] But, for example, there are situations when the immigration judge failed to advise the defendant of possible discretionary relief; under Operation Streamline, investigating this issue could take several days, if not weeks—assuming of course the defense attorney is even aware of this immigration issue—and it could reduce the criminal charges against him.[15]

Even though the Supreme Court recognized the intricacies of immigration law, under these legal circumstances, defense attorneys representing defendants in Operation Streamline must possess knowledge of a field of law outside their practice area. They must adequately advise their client–defendants of the immigration consequences of their criminal conviction, or determine whether the defendant's prior immigration removal violated due process—all in a matter of hours.[16]

The Streamline Court Hearing

Defense counsel must complete the interview-advisement before noon. The actual Streamline hearing begins at 1:30 p.m. It is actually many things: the defendants' initial appearance hearing, their detention hearing, their change of plea hearing, and their sentencing hearing.[17] The defendants are brought into the courtroom handcuffed, wearing feet shackles, and still wearing the same clothes in which they were arrested. The men and women are segregated.

In Yuma, Border Patrol agents—not actual lawyers—called "prosecuting agents" represent the United States. Though not lawyers, these prosecuting agents are allowed to make motions to continue a case, dismiss a case, and recommend a sentence.[18] In cases involving the port of entry, Customs and Border Patrol (CBP) agents fulfill the same function. A court interpreter translates the proceedings from English to Spanish. (If there is a defendant who speaks an Indian dialect, the attorney must, because of logistical constraints, conduct the interview in the presence of the U.S. Marshals, and the defendant(s) will have a separate hearing.)

During the hearing, the magistrate judge informs the defendants of the charges, explains to them their constitutional rights, and asks if they are willing to waive those rights and plead guilty. After the defendants plead guilty, and the allocution occurs, the court imposes a jail sentence.[19] All this is accomplished in approximately two hours. The process is repeated the next day.

In Tucson, where the government is represented by an actual lawyer, the process is even more streamlined—everything is predetermined. In addition to the one hearing, there is a standard plea agreement; the sentence is fixed; and there is no allocution. So even if defense counsel offered mitigating arguments and the defendant addressed the court, their comments would be meaningless, because the sentence is decided in advance by the prosecutor.

Federal Case Law Concerning the Operation

The Ninth Circuit has tackled issues arising from Operation Streamline. In *United States v. Roblero-Solis*,[20] for example, the Ninth Circuit held that the court's questioning of defendants *en masse* violated Federal Rules of Criminal Procedure Rule 11's prescription that the court address the defendant personally.[21] Despite this infirmity, the Ninth Circuit affirmed the defendants' convictions because it found that the defendants had failed to demonstrate that Rule 11 deficiencies amounted to plain error.

In *United States v. Escamilla-Rojas*,[22] the Ninth Circuit, again deciding whether Rule 11 had been violated, held that "a collective advisement followed by individual questioning may be sufficient to determine 'personally' that each defendant understands his rights before pleading" satisfied the requirements of Rule 11.[23]

In *Escamilla-Rojas*, the Ninth Circuit also repudiated two other arguments raised by the defendant. The Ninth Circuit rejected the argument that "the group plea hearing violated her Fifth Amendment right to due process."[24] It found that the plea colloquy

"patently" demonstrated that the defendant was advised of her rights, understood them, and waived them. The court also rejected the defendant's claim that she was denied her right to counsel under the Sixth Amendment issue "because she was unable to stand next to her counsel throughout the entire plea hearing."[25] The Ninth Circuit opined that "temporary separation" between defense counsel and defendant did not amount to a deprivation of counsel.[26]

Though neither the Supreme Court nor the Ninth Circuit has ever addressed whether representing dozens of defendants simultaneously violates the Sixth Amendment's right to effective assistance of counsel, the Louisiana Supreme Court determined that representing 80 defendants was too many cases for one defense attorney. It found that "excessive caseloads and insufficient support with which [indigent defendants'] attorneys must work" are "generally not provided with effective assistance of counsel."[27] As a result, the court held that until the State of Louisiana changed the caseloads, there would be a rebuttable presumption of ineffectiveness. If this were the test in the Ninth Circuit, Operation Streamline would probably flunk because, unlike the Louisiana defense attorneys who were representing 80 defendants but at a different times, a defense attorney in a Streamline proceeding is appointed to represent from a half-dozen to 40 defendants simultaneously.[28]

A Zero-Sum Game

The American public supports greater enforcement of the country's immigration laws. Because of this political pressure, the federal government has increased border security and implemented enforcement programs like Operation Streamline. But when Operation Streamline, with its obsession for speedy dispositions and large numbers of defendants, collides with the criminal justice system, the result is a need to take shortcuts. The shortcuts are numerous: one hearing, group advisements, an impotent attorney–client privilege, the government represented by non-lawyers, fixed sentences, no allocution, defense attorneys representing several defendants simultaneously, and so forth.

Indeed, there is an inverse relationship here: More enforcement means less care in the criminal process; less enforcement means more care in the criminal process. But there is a way to break this zero-sum game and enforce the country's immigration laws and respect the integrity of the federal criminal justice system, and that is for the federal government to engage in intelligent-selective prosecution, as opposed to the *en masse* prosecutions it now conducts.

endnotes

1. www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2005_press_releases/122005/12162005.xml
2. Congress first made it a crime to illegally enter the United States in 1952.
3. www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2007_news_releases/072007/07242007_3.xml
4. *See generally United States v. Moya*, 74 F.3d 1117, 1120 (11th Cir. 1996) ("a secondary interview is part of the border routine and does not require *Miranda* warning"); & *United States v. Galindo-Gallegos*, 244 F.3d 728 (9th Cir. 2001) (*citing Berkemer v. McCarty*, 468 U.S. 420 (1984)).
5. Title 8 U.S.C. § 1326(a) or § 1325(a) are the two federal criminal-immigration statutes used to prosecute people.
6. Whenever there are more than 20 defendants, another defense attorney assists in conducting the interview; regardless, all defendants will be assigned to one defense attorney.
7. *United States. v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997).
8. *Id.*
9. *See Swidler & Berlin v. United States*, 524 U.S. 399 (1998) ("The attorney–client privilege is one of the oldest recognized privileges for confidential communication.").
10. *U.S. v. Lim*, 794 F.2d 469 (9th Cir. 1986) ("A criminal defendant who relies principally upon a language other than English has a statutory right to a court-appointed interpreter when his comprehension of the proceedings or ability to communicate with counsel is impaired. 28 U.S.C. § 1827(d)(1).").
11. Though the court does, later, give the same general advisement to all defendants, it's difficult to know whether the defendant understands it, because counsel cannot sit next to the defendant.
12. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483 (2010).
13. *Id.* at 1480.
14. *Id.* at 1483.
15. *See United States v. Barajas-Alvarado*, 2011 WL 3689244 at *9 (9th Cir. Aug. 24, 2011).
16. Jennifer Lee Koh, Jayashri Srikantiah & Karen C. Tumlin, *Deportation Without Due Process*, National Immigration Law Center, Sept. 8, 2011, available at www.nilc.org/immlawpolicy/arrestdet/Deportation-Without-Due-Process-2011-09.pdf.
17. Because the defendants' charge was alleged unlawful status, the court will order them detained as a potential flight risk, even though federal courts have found that immigration-status alone is insufficient for pretrial detention. *See United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985) (concluding that the fact that defendant is alien "does not tip the balance either for or against detention"); *United States v. Xulam*, 84 F.3d 441, 442-43 (D.C. Cir. 1996) (per curiam) (deportable alien not a flight risk where conditions could be imposed to ensure return to court.).
18. No person may practice law or represent that he may practice law in Arizona unless he is an active member of the bar. Ariz.R.S.Ct. 31(b).
19. Upon completing their sentence, these defendants are turned over to the Immigration and Customs Enforcement (ICE) agency, which either deports or voluntarily removes the person.
20. 588 F.3d 692 (9th Cir. 2009).
21. Rule 11 (b)(1) states that before a court may accept a plea of guilty from a defendant, it must "address the defendant personally in open court." Fed.R.Crim.P. 11(b)(1). "During this address, the court must inform the defendant of, and determine that the defendant understands" his rights, the nature of his charges, and possible penalties he faces, and the effect of his plea. *Id.*
22. 640 F.3d 1055 (9th Cir. 2011).
23. *Id.* at 1060.
24. *Id.* at 1061.
25. *Id.* at 1063.
26. *Id.*
27. *State v. Peart*, 621 So.2d 780, 789, 790 (La. 1993) (effective assistance means the lawyer "not only possess adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients").
28. Depending on whether the defendant signed a plea agreement, it would be possible to collaterally attack the conviction for ineffective assistance of counsel under Title 18 U.S.C. § 2255 (habeas corpus petition). But this has a very high burden of proof and would require the defendant to be in custody; most Streamline defendants get time-served or serve no more than six months in jail.