

Federal Defenders OF NEW YORK, INC.

52 Duane Street-10th Floor, New York, NY 10007
Tel: (212) 417-8700 Fax: (212) 571-0392

David E. Patton
*Executive Director
and Attorney-in-Chief*

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Lanny A. Breuer
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Re: Speech at the American Lawyer/National Law Journal Summit

Dear Mr. Breuer:

As Federal Public Defenders, we read with interest the remarks you made before the *American Lawyer/National Law Journal* Summit in Washington, D.C. on November 15, 2011. We were heartened to see that you believe, as we do, that the significant prison population in both federal and state facilities is a tremendously important issue for all legal practitioners, whether or not they practice criminal law. But we read with some concern your statements regarding sentencing disparities between federal districts, particularly the three districts in which we serve.

In your speech you said:

The data show that the district in which a person is sentenced can have a huge impact on how much time he or she spends in prison. For example, in fiscal year 2010, in the Southern and Western Districts of Texas, judges sentenced defendants to prison terms within the ranges prescribed by the guidelines approximately 71.5 percent of time. At the same time, in the Southern District of New York, judges sentenced defendants to prison terms within guidelines ranges just 32.6 percent of the time. In short, many prosecutors, defense lawyers, and judges agree that more and more, the length of a defendant's sentence depends primarily on the identity of the judge assigned to the case, and the district in which he or she is in.

We write because, as experienced practitioners in the districts you mention, we disagree that the disparities you identify have much at all to do with the sentencing judges involved. Instead, we believe that these disparities have far more to do with the types of cases that arise in each district, and the prosecution policies that local federal prosecutors have chosen to address these cases.

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In the Southern and Western Districts of Texas, a large majority of federal felony prosecutions involve low-level immigration and marijuana-smuggling offenses across the U.S.-Mexico border. According to 2010 statistics from the U.S. Sentencing Commission, these types of cases make up approximately 75 percent of the prosecutions in the Western District, and 85 percent of those prosecuted in the Southern District.¹ By comparison, these types of cases make up only 41 percent of prosecutions nationwide. The cases are conceptually and factually simple, and the sentences called for by the guidelines are low. A simple illegal-reentry case (the majority of the immigration cases in both districts) has a base offense level of 8; a 10-kilogram marijuana smuggling case has a base offense level of 14, compared to level 32 (and a 10-year mandatory minimum) for 10 kilograms of powder cocaine.² And since the charges result in a guilty plea in 99 percent of the cases, the offense level is even lower due to an adjustment for acceptance of responsibility.

Given the large percentage of these low-guidelines cases, it is little wonder that district courts sentence below the guidelines less in the Western and Southern Districts of Texas; when the guidelines are low, there is little need to vary outside of them. Indeed, despite the relatively low variance rates, the median sentence in each of these districts is well below the national median—42 percent lower in the Southern District, and 56 percent lower in the Western District.³ Meanwhile, the greatest disparity between the two districts is in *government-sponsored* below-guideline sentences, particularly in the area of fast-track dispositions (12.8 percent in the Southern District, versus 0.7 percent in the Western District).⁴ This government-sponsored sentencing disparity is far greater than that for non-government sponsored below-guideline sentences,⁵ and it is hard to justify given the very similar caseloads the two districts present. And the disparity in government-sponsored fast-track sentences is much greater when other southwest border districts are considered: fast-track below-guideline sentences account for 42.9 percent of

¹See USSC FY2010 Statistical Packet, Western District of Texas, fig. A & tbl. 1; *Id.*, Southern District of Texas, fig. A & tbl. 1.

²See USSG §2L1.2(a), §2D1.12(c)(4), (c)(14).

³See USSC FY2010 Statistical Packet, Western District of Texas, tbl. 7; *Id.*, Southern District of Texas, tbl. 7.

⁴See USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbl. 26.

⁵The overall difference in rates of government-sponsored below-guideline sentences between the two districts is 11.1 percent (19.0 percent in the Southern District, compared to 7.9 percent in the Western District). For non-government-sponsored below guideline sentences, the difference is less than half of that, 3.8 percent (14.9 percent in the Southern District, versus 11.1 percent in the Western District). See USSC FY2010 Statistical Packet, Western District of Texas, tbl. 8; *Id.*, Southern District of Texas, tbl. 8.

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all sentences imposed in Arizona, and 52.1 percent of all sentences imposed in Southern California.⁶ To our knowledge, the Department of Justice has never explained this significant disparity in sponsoring non-guideline sentences.

In the Southern District of New York, the prosecution picture is quite different. In contrast to the Southern and Western Districts of Texas, only 14 percent of SDNY prosecutions are for immigration offenses.⁷ And the vast majority of those immigration cases involve the heavily criticized 12 and 16-point guideline enhancements that result in much higher sentencing ranges.⁸ It should come as no surprise then that judges in this non-fast track district vary downward from the guidelines at a higher rate than those in the Southern and Western Districts of Texas. Those variances only help to alleviate a substantial disparity that would otherwise exist because of widely disparate prosecutorial practices. Indeed, even with the higher rate of non-guidelines sentences, the median sentence for immigration cases in the SDNY is six months higher than the national median (18 months in the SDNY versus 12 months nationally).⁹

This pattern extends beyond immigration cases in the SDNY. Despite the higher rate of guideline variances that you cite in your speech, the SDNY actually imposes higher median sentences than the rest of the country (36 months versus 30 months).¹⁰ A big reason for the combination of high sentences and high departure rates is the practice in the SDNY of prosecuting many crimes for which the guidelines have been most heavily criticized and in ways that do not address those criticisms. The prosecutions include drug offenses where the guidelines are driven almost entirely by quantity and type of drugs, with little regard for other measures of culpability; fraud offenses with their near exclusive reliance on the amount of money involved; and child pornography possession offenses for which the guidelines ranges for defendants with no criminal history and no contact with children routinely and substantially exceed sentences for defendants convicted of actual sexual assault of children. The combination of high sentences and high departures suggests that rather than fostering sentencing disparity, judges in the SDNY are examining the individual circumstances of the cases presented to them and correcting for sentencing unfairness that would result from strict application of the guidelines. In other jurisdictions, this examination may occur more frequently in the charging and plea-agreement phases of prosecution, in a manner designed to account for common-sense notions of severity and culpability.

⁶See USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbl. 26.

⁷See USSC FY2010 Statistical Packet, Southern District of New York, fig. A & tbl. 1.

⁸See USSG §2L1.2(b)(1)(A), (b)(1)(B).

⁹See USSC FY2010 Statistical Packet, Southern District of New York, tbl. 7.

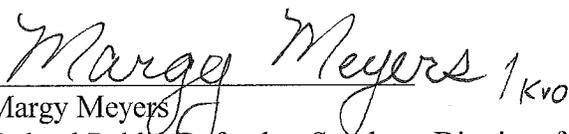
¹⁰*Id.*

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Lastly, prosecution practices in the SDNY also contribute to the racial and ethnic disparities about which you expressed concern. In the SDNY, over 70 percent of federal defendants are black or Hispanic, nearly double the percentage of the general population.¹¹ A large number of those cases are drug and gun possession cases which, absent federal prosecution, would be prosecuted successfully in state court. Those cases are brought from the state system into federal court for the express purpose of imposing higher (and often exponentially higher) sentences. Any serious effort to alleviate high incarceration rates and disparate treatment of racial and ethnic minorities should include an examination of state-federal prosecution practices in the SDNY and elsewhere.

In sum, we share your concerns about unwarranted disparities in federal sentences across the country, and we are encouraged by your willingness to take a hard look at the causes of those disparities. We do not believe, however, that a narrow focus on the rate at which judges depart or vary from the guidelines is a constructive way to address the issue. Indeed, judges often find themselves in the position of correcting for unexplained differences in the prosecutorial practices that bring defendants before them. A Department of Justice policy supporting more rigid adherence to the guidelines without a change in prosecutorial practices would only exacerbate many of the most troubling disparities that exist.

Sincerely yours,



Margy Meyers
Federal Public Defender, Southern District of Texas
Chairperson, FPD Sentencing Guidelines Committee



Henry Bemporad
Federal Public Defender
Western District of Texas



David Patton
Federal Public Defender
Southern & Eastern Districts of New York

¹¹See USSC, *2010 Sourcebook of Federal Sentencing Statistics*, Appendix B.