

1998

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Ian Weinstein

Fordham University School of Law, iweinstein@law.fordham.edu

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Recommended Citation

Ian Weinstein, *Substantial Assistance and Sentence Severity: Is There a Correlation Substantial Assistance*, 11 Fed. Sent'g Rep. 83 (1998-1999)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/424

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Substantial Assistance and Sentence Severity: Is There a Correlation?

How much more severe are sentences imposed in districts with low substantial assistance rates than those in which the rate is very high? In the aggregate, not at all.

At first blush this may puzzle readers because substantial assistance (SA) departures are very unevenly distributed across districts and SA accounts for nearly two-thirds of all downward departures, almost 7,900 of the 12,000 in fiscal 1996.¹ Although this pattern could result in gross disparities among districts, my analysis of inter-district sentencing patterns reveals no statistically significant correlation between the rate of SA departures and the average length of sentences imposed in a district.

A high rate of SA does not mean that sentences are generally more lenient because SA departures are only one factor in the complex system that determines sentence severity. SA departures are among the most visible mechanisms, but their impact is typically blunted by district-specific practices in which prosecutors and judges respond to each other's choices in ways that even out inter-district differences and mitigate the disparities that might otherwise result from wide variation in SA departures.²

I. Disparity

Substantial assistance departures vary greatly among districts. There is an almost fivefold difference in cooperation rates between the ten highest and ten lowest districts. The average cooperation rate for the ten lowest districts is 7.1%.³ The average cooperation rate for the ten highest districts is 38.1%.⁴ Defendants in the 10 lowest SA districts had about one-fifth the chance of receiving a substantial assistance downward departure at the time of sentence⁵ compared to defendants⁶ in the 10 highest SA districts. There are also 37 districts in the middle, whose rates fall in a band between 15% and 25%.

Despite these variations, Commission statistics for all 94 districts in FY 1996 show no significant correlation between a district's substantial assistance rate and the average lengths of all sentences of imprisonment or the average lengths of narcotics trafficking sentences in a given district.⁷ Analysis of the fifteen highest and lowest SA districts does not change the pattern. Even within those groups, very high and very low SA rates did not correlate with sentence lengths.

II. Comparing Neighboring Districts

A comparison of contiguous districts illustrates the varied combinations of high or low SA rates and lenient or severe sentences. The First Circuit, for example, had an overall SA rate equal to the national average, 19.2%. Within the circuit, the District of New Hampshire had an SA departure rate of 43% (63 of 145 total cases) while its neighbor Maine, with the same number of prosecutions, had a rate of 19.3% (28 out of 145 cases).⁸ Despite its higher SA rate, the mean drug sentence for New Hampshire was 61.2 months compared to a mean of 47.9 months in Maine.

The District of Massachusetts departed for SA in 25.6% of cases (115 out of 450) while neighboring Rhode Island departed in 4.6% of cases (5 out of 108). For this pair, the district with the lower SA departure rate did have a longer mean narcotics sentence: Rhode Island's mean was 76.5 months, Massachusetts was 64.2 months.⁹

The District of Connecticut had an overall SA rate of 10.9%, including a SA rate of 19.2% for narcotics trafficking (15 out of 78 cases). Neighboring Vermont had an overall SA departure rate of 25.8%, including a SA rate of 45.5% in narcotics cases (15 out of 33 cases). Again, the lower rate went with the longer sentence. Connecticut's SA rate is higher than Rhode Island's, yet its mean sentence is much longer, 104.8 months.

The First Circuit thus contains combinations of SA rates and sentence lengths that are very disparate

III. Comparing Same-State Districts

Districts within the same state also show significant variations. The Northern District of Mississippi had an overall SA rate of 29.4% (45 out of 153 cases) with half the narcotics defendants receiving SA departures (30 out of 60 cases). The Southern District of Mississippi had an overall rate of 16.3%. In this district, 36.6% of the narcotics trafficking defendants received SA departures (26 out of 71 cases), but those 26 were almost 80% of all the departures (26 out of 33 cases). Despite these differences, the mean narcotics trafficking sentence was nearly the same: in the Southern District of Mississippi the mean was 101.7 months, while in the Northern District it was 104.6 months.

Illinois has three districts, ranging from a low of 13.4% for the Southern District, to 18.8% for the Northern District, to a high of 32.7% for the Central



IAN WEINSTEIN

Associate Professor of
Law, Fordham University
School of Law

District. In this trio, the district with the lowest SA rate had the middle length narcotics trafficking sentence. The Southern District reported a mean narcotics sentence of 109.5 months, the high SA rate Central District was not far behind with a mean of 98 months, and the Northern District, with its 18.8% SA departures, reported a mean sentence of 119.7 months.

Variations are also found in the West. In Washington, the Eastern District had a substantial assistance departure rate of 4.5% (9 out of 202 cases), while the Western District had a rate of 22% (97 out of 440 cases), but their mean narcotics sentence lengths were almost identical. The Eastern District had 68.3 months and the Western District had 68.4 months.

In these three sets of same-state districts, the SA rates varied considerably but average sentence lengths fell within a narrow range. All these districts could be compared in other ways but they illustrate that quite different combinations of high or low SA rates and relatively severe or lenient sentences can be found in contiguous districts.

IV. Alternative Ways to Mitigate Sentences

Several different mechanisms permit sentence severity to remain independent of the single most common mitigating guideline factor. Perhaps the easiest mechanism to identify in these data is the nationwide tendency of districts to mitigate sentences with either SA departures or other downward judicial departures (judicial departures), but not both.¹⁰ When judges are generous with mitigation through judicial departures, prosecutors scale back; when prosecutors are free with SA departures, judges make less use of the discretion to mitigate by using factors other than SA.¹¹ This pattern mitigates some of the sentencing disparity that would otherwise flow from wide variations in SA rates because judges seem to be balancing prosecutorial use of SA departures with judicial departures.

Comparison of SA downward departures and judicial departures also illustrates the complexity of the system. Unlike SA departures, rates of judicial departures do correlate with lower overall sentences and lower narcotics sentences.¹² The use of judicial departures probably correlates with sentence severity because other downward departures are often not the subject of bargaining between the defendant and the prosecutor, leaving judges with much greater control. When the award and magnitude of a departure is entirely up to the judge, whose intentions remain unknown until the prosecutor has made all of his or her charging and sentencing decisions, the mitigation "goes right to the bottom line" in the sense that it reduces the sentence without any opportunity for

responsive moves by the prosecutor. Thus, judicial departures are more likely to represent a judicial judgment that sentence mitigation is warranted in a given case, rather than a judgment that a particular sentence is warranted because of the prosecutor's SA motion or charging decision.

Judicial sentencing attitudes play out in a more complicated fashion in the arena of SA downward departures. Clearly a judge's own views play the key role in those cooperation sentences where the magnitude of the departure is completely in the judge's discretion.¹³ But because SA downward departures are always the result of bargaining between the defendant and the prosecutor, the magnitude of SA departures can be limited. For instance, prosecutors may agree to move for a departure below the applicable guideline range but not below the mandatory minimum.¹⁴ Defendants who receive departures in some high SA districts may find the benefit lower than average because the government chooses to tie its generous SA departure policy with less generous recommendations as to the magnitude of the SA departure.¹⁵

Controlling the magnitude of departures granted by judges, however, is the more visible but probably the smaller part of the process that tends to even out the sentence impact of inter-district variations in SA departure rates. Other exercises of prosecutorial discretion, besides those addressing the length of the SA departure, are also likely to be important in explaining why SA rates do not predict sentence lengths. The data analyzed here, however, offer little empirical insight into that area, although the mechanisms available to prosecutors are well known. Prosecutors can offer a lenient plea bargain, manipulate the sentence calculations through sentence factor bargaining,¹⁶ omit relevant conduct, or agree not to oppose a defendant's motion for a judicial downward departure.

Each district reaches its own equilibrium in the use of these devices, influenced by the attitudes of and interactions between the bench and U.S. Attorney's Office, and by each district's historical sentencing patterns.¹⁷ Although the interplay is different in each district, the overall effect is to blunt the impact of differences in SA rates.

The fact that inter-district and nationwide statistics suggest that district to district variations do not result in broad sentence disparities does not address the very real individual inequalities that can arise in particular cases. The impact of an SA departure upon an individual defendant's sentence can be dramatic. The average difference between cooperation and non-cooperation sentences in narcotics trafficking cases is more than five years and as the guideline sentences grow, so do the reduc-

tions.¹⁸ Not every defendant, however, who fails to receive a SA departure ends up with a harsher sentence than those who do. The actual sentence imposed depends on a number of prosecutorial and judicial decisions. While the guidelines constrain the choices available, there remain enough different ways to combine those choices and so influence the ultimate sentence that responsibility for sentencing remains with the people making decisions, rather than with the guideline system itself.

Finally, it bears noting that the Commission's statistics and the guidelines themselves make SA departures more readily identifiable targets for claims of disparity than some other causes. The number of departures is easily reported and discussed. Less visible are other common tools used to influence sentence length, including charging decisions, sentence factor manipulation, prosecutorial sentence recommendations and judicial adjustment of the magnitude of departures. While these are harder to capture and quantify, they are usually just as effective in controlling sentence length as the now ubiquitous but perhaps surprisingly under-determinative § 5K1 motion.

Notes

¹ Sentencing statistics for fiscal year 1996 can be found in UNITED STATES SENTENCING COMMISSION 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1997). More detailed district data can be found in UNITED STATES SENTENCING COMMISSION FEDERAL SENTENCING STATISTICS, *Federal Sentencing Statistics by State, 1996 Fiscal Year*, Sentencing Commission home page at <<http://www.ussc.gov>>, index to statistical files at <<http://www.ussc.gov/judpack/jp1996.htm>>, complete set on file and CD with author. All statistics in this article are from those two sources.

² This argument and the statistical analysis which follows are explored in greater detail in Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. (forthcoming 1999).

³ There were 4036 total sentences in those districts and 297 total substantial assistance departures cases in those districts.

⁴ Actually, districts ranked 84 to 93; I excluded the Northern Mariana Islands, the district with the highest rate of cooperation in the nation, because its rate of 85% for 14 cases is completely atypical. There were 3803 cases and 1485 SA departures in those districts.

⁵ The Commission's statistics probably understate the real use of SA departures. For example, the fifth lowest reported rate of cooperation is in the E.D. Va. Apparently most cooperation in that district is rewarded with a sentence reduction pursuant to FED. R. CRIM. P. 35(c) which permits the government to request a post-sentence reduction for post-sentence cooperation. Although judges in that district will not postpone sentences to permit cooperation to mature, they seem to ignore the requirement that 35(c) reductions account only for post-sentence cooperation. Commission statistics do not include such reductions. If the E.D. Va. were excluded as anomalous (although the practice could be common) and the 11th district (W.D. Ar.) were included, the rate is 7.5% (205 out of 3351 cases).

⁶ Those districts account for 9.3% of all sentences (3806 out of 40,879 total sentences imposed).

⁷ The only significant correlation was that both the mean and median for fraud sentences increased as SA increased. This and other

district wide sentencing numbers compare district wide results and do not reveal information about the actual distribution of individual sentences in the district. I am grateful to Greg Drenstedt, M.A., a doctoral candidate in demography and sociology at the University of Pennsylvania, for his work on the analysis of sentencing statistics discussed here.

⁸ In New Hampshire, 53.5% of narcotics defendants received departures (46 out of 86) compared to 33.3% (21 out of 63) in Maine.

⁹ The overall SA rate was 25.6%, with a rate of 37.5% in narcotics trafficking cases (63 out of 168 cases), and an average imprisonment length for narcotics trafficking cases below the averages. The mean sentence length was 64.2 months, compared with a national mean of 86.7 months and the median was 44.5 months, compared with the national median of 60 months. Rhode Island's SA rate of 4.6% includes a rate of 3.9% in narcotics trafficking cases (2 out of 51 cases). The mean sentence length of 76.5 months was closer to, but still below the national mean of 86.7 months and its median sentence length was 60 months, equal to the national median.

¹⁰ The analysis done for this study shows a statistically significant negative correlation ($r = -0.27$ ($p < 0.01$)) between SA and other downward departures. This means that a lower rate of SA will predict a higher rate of other downward departures, and vice versa.

¹¹ Anecdotal support is offered in Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 629 (1998) (in-depth comparison of the districts of Massachusetts and Connecticut, noting that Connecticut prosecutors used SA departures less because their judges departed more for other reasons).

¹² The analysis for this study shows a statistically significant correlation between the rate of judicial departures and the mean for all sentences ($r = 0.34$ ($p < 0.01$)), the median for all sentences ($r = 0.25$ ($p < 0.05$)), the mean for all narcotics trafficking sentences and the median for all narcotics trafficking sentences ($r = 0.33$ ($p < 0.01$)).

¹³ Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1045 (1997) (District Judge, D. Mass comments on failure to control the magnitude of departures).

¹⁴ *Melendez v. United States*, 518 U.S. 120 (1996) (holding that a government motion to depart from the guidelines does not confer authority upon the court to ignore the mandatory minimum; a separate government motion pursuant to § 3553(e) is required).

¹⁵ See, e.g., *United States v. Wallace*, 114 F.3d 652 (7th Cir. 1997) (government recommended three level downward departure for cooperation but the judge departed only one level); *United States v. Jimenez*, 992 F.2d 13 (7th Cir. 1993) (agreement specified that the government would recommend a 25% departure); see generally Saris, *supra* note 15, at 1046-49 (variations in prosecutorial and judicial practices determine magnitude of departures). Because this analysis looks only at overall rates, not individual sentences within each district, it is possible that high SA districts achieve the same average sentence through a distribution of very high and very low sentences, while low SA districts have more sentences in the middle.

¹⁶ See, e.g., *U.S. v. Gonzalez-Bello*, 1998 WL 352941, 11 Fed. Sent. R. 30 (EDNY 1998) (discussing sentence factor bargaining over guideline level adjustments).

¹⁷ Michael Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 361 (1996) (finding that districts that were relatively lenient before the guidelines remain relatively lenient).

¹⁸ SENT. COMM. SUBST. ASS. STAFF STUDY, discussed in 11 FED. SENT. R. no. 1.