

## New York Federal Prosecutors Do Not Recommend Sentences

*By David Zapp, Esq.*

I don't know where people get the idea that the Southern District of New York prosecutor or an Eastern District of New York prosecutor would recommend or offer a particular sentence. This is simply not true. In fact, it has caused at least one judge some consternation. Below, I quote the language of a Court of Appeals decision from the Second Circuit Court of Appeals (which encompasses both the Southern District of New York and Eastern District of New York judicial districts.) I am addressing this issue because it is frustrating for lawyers to have to defend against baseless allegations by clients who say "Mr. X defendant got a recommendation of so many years, why can't you get me the same recommendation?" If any inmate tells another inmate (at least in New York) that the prosecutor in his case is recommending a particular sentence (please note that the guideline range is another matter) he is lying, does not understand or is being misled by someone.

***United States of America,  
Appellee, v. John DOE,  
Defendant-Appellant.***

*United States Court of Appeals,  
Second Circuit.*

*Argued: May 28, 2003.  
Decided: October 29, 2003.*

"When defendant's counsel suggested that it would be unfair to refuse to impose a below — Guidelines sentence because of the failure of the United States Attorney to recommend a specific sentence, Judge Platt responded:

"I think it's unfair too, but I am not the government. And the government has been taking this unfair position for twenty-two and a half years, as long as I have been on the bench. When I was a prosecutor 40 years ago, we stood up before a judge and said this man deserves this because he's done thus and so. Or this man has done nothing and he deserves that. There is not a man or woman in the prosecutor's office who has the guts to do it today... They first used to tell me it was a departmental policy. I went down and talked to the department and they said there is no such policy. What am I supposed to do?"

"The Assistant United States Attorney told Judge Platt that ... she was "constrained by policies of the United States Attorney's Office for the Eastern District of New York not to make a specific sentenc[ing] recommendation." When Judge Platt continued to press for a specific recommendation and warned that "you know what is going to happen unless you answer," the

Assistant United States Attorney reiterated her office's policy,

"The Assistant United States Attorney for the Southern District of New York, who had participated in the sentencing proceedings, declined to make any specific representations... he "merely requested that the court take its 5K1.1 letter into account as it deemed appropriate."

The appellate court went on to say:

"the United States Attorney has no obligation to provide specific sentencing recommendations for such cooperating witnesses, and has sound reasons to decline to do so. Successful prosecutions frequently depend upon the credibility of cooperating witnesses in the eyes of the jury. This credibility of a cooperating witness is already undermined by the agreement of the United States Attorney to file a 5K.1 letter and by the conceded fact that, unless the United States Attorney is satisfied with the witness's testimony, such a letter will not be written. One of the principal rehabilitating arguments in response to an often withering attack by defense counsel is that the United States Attorney has not obligated herself to make a specific sentencing recommendation and that it is entirely up to the trial judge to decide the sentence to be imposed. If the United States Attorney were to begin making specific sentencing recommendations that were routinely followed, it would naturally invite defense counsel to argue that cooperating witnesses were now being furnished with an even greater incentive to say whatever they believed

necessary to obtain the most lenient recommendation. Such considerations no doubt explain, at least in part, the policy on the part of the United States Attorneys not to recommend specific sentences. While we appreciate the desire of Judge Platt for a specific recommendation, if he feels that he is unable to make an informed judgment on sentences for cooperating defendants without a specific recommendation, then we believe the proper course is to recuse himself from such cases.”

In layman’s terms, this means that prosecutors don’t make recommendations or give promises of sentences for the following reasons: If you are a cooperating defendant this means you might be called upon to testify at a trial. If there is a trial, and you are testifying against someone, the defendant’s attorney will ask you “were you promised any particular sentence for your cooperation here today? Or did anyone make a prediction to you about what sentence you might get in exchange for your cooperation?” You, the testifying defendant, must be able to truthfully answer “NO.” That way, your credibility remains intact.

I hope the language in this opinion clears up any confusion and defense lawyers are not tarred unfairly with accusations of incompetence or laziness that are based solely on inaccurate information provided by other defendants or even by defense lawyers. **Prosecutors in the Eastern District of New York and Southern District of New York do not recommend specific sentences. Period.** And to those that say that prosecutors “predict sentences,” prosecutors would not open themselves up to accusations that they did so especially when they all know

that courts routinely ask defendants in open court whether “anyone has predicted what that sentence might be?” which is then followed up by the court’s statement that “any prediction has no force or validity.”

– David Zapp

## Question from a lawyer

Dear David,

I was told that you successfully defeated a government claim that laundered money in a case you had was narcotics proceeds. Is that a reported case?

Marty

### Answer

No, it was not a reported case but it happened –twice in fact. Once because I had an amenable (read, “older”) prosecutor who chose not to fight because the defendant was getting sufficiently punished, and once because the government had non specific evidence plus I had a great judge. It was in Miami, Judge Adalberto Jordon, presiding. The judge ordered a hearing and all the Government could do is prove that it “looked like, walked like, and acted like,” narcotics proceeds meaning, that the prosecutor said “that narcotics dealers stack their money in ‘bricks’(money stacked in piles). Our money was stacked in “bricks,” and the prosecutor said: “Therefore the money must be narcotics proceeds.” The Judge didn’t buy it.

It taught me that if the government doesn’t have specific evidence that the money came from narcotics trafficking, you’re in good shape.

To get there though, and this is a point worth making, you might have to plead to every charge in the indictment. But that is ok. I have never known a judge to penalize a defendant for putting the government to its proof in a post conviction setting.

Actually, pleading to all the charges, except where there are mandatory minimum sentences is not unreasonable when you do not get a reasonable plea offer. I see no point in walking away from a good fight when you won’t get hurt anyway. There is no mandatory minimum in money laundering cases, so there is no reason to enter into a plea agreement. A defendant will get the same sentence whether he pleads to one charge or twenty charges, and every experienced lawyer knows that. Now maybe you want to get a limit on quantity of funds laundered so you’ll take a plea bargain, but that is a rare bird. Most judges will sentence you based on the funds you laundered not what was “reasonably foreseeable.”

– David Zapp

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