

FEDERAL PUBLIC DEFENDER
Southern District of Texas

Lyric Office Centre
440 Louisiana Street, Suite 310
Houston, Texas 77002-1634

FEDERAL PUBLIC DEFENDER:
MARJORIE A. MEYERS

Telephone:
713.718.4600

First Assistant:
H. MICHAEL SOKOLOW

Fax:
713.718.4610

Testimony of
Marjorie A. Meyers
Federal Public Defender for the Southern District of Texas
on behalf of the Federal Public and Community Defenders
Before the
United States Sentencing Commission
Public Hearing on Proposed Disaster Fraud Amendments
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My name is Marjorie Meyers, and I am the Federal Public Defender for the Southern District of Texas. I would like to thank the United States Sentencing Commission for holding this hearing and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding implementation of the proposed disaster fraud amendments.

In response to the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110-179, the Sentencing Commission promulgated emergency amendments made effective February 6, 2008, which provide for a new two-level enhancement if the “offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency.” USSG § 2B1.1(b)(16). The amendment also explains that in disaster fraud cases, the “reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable.” USSG § 2B1.1, cmt. (n. 3(A)(v)(IV)). The Commission now seeks to make those amendments permanent and seeks comment on whether to provide a minimum offense level for these offenses, whether to expand the enhancement to include contract related disaster fraud, and whether there are aggravating or mitigating circumstances in disaster fraud cases that might justify additional amendments to the guidelines.

As we indicated in our comments on the emergency amendments, we believe that USSG § 2B1.1 already adequately accommodates the new offenses set forth in Pub. L. 110-179. As with all other types of fraud, those offenses necessarily encompass a wide range of activity, from first-time

offenses involving small amounts of funds to large-scale operations designed to defraud the government or others of millions of dollars. In the disaster-related context, offenders range from desperate victims of the disaster itself to con men ready to take advantage of the disaster and its victims.

As the experience of our clients demonstrates, many of the individuals prosecuted for disaster relief fraud after Hurricanes Katrina and Rita were themselves victims of the disaster. Many had little or no criminal record and are the sole support of their minor children. They stole to obtain the most basic necessities for survival or because they were manipulated by recruiters who took advantage of their desperate plight. They are not likely to offend again, and, for most, incarceration is a punishment greater than necessary to meet the purposes of 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could end up costing society more than the original crime, both because of the substantial costs of incarceration and because of the longer-term societal costs of failing to provide treatment for mental health issues or of removing the custodial parent from the care of her/his children.

The Disaster

On August 29, 2005, Hurricane Katrina slammed into the Louisiana and Mississippi Gulf Coasts. According to FEMA Director David Paulison, “Hurricane Katrina was the most catastrophic natural disaster in our nation’s history.”¹ “The scope of human suffering inflicted by Hurricane Katrina in the United States has been greater than that of any hurricane to strike this country in several generations.”² The storm devastated a 90,000 square mile area, roughly the size of Great Britain, and forced more than 270,000 people into shelters.³ More than 1800 people lost their lives.⁴ Thousands of homes and businesses were destroyed in New Orleans alone, while entire coastal

¹ See <http://www.fema.gov/hazard/hurricane/2005katrina.anniversary.shtm>.

² Richard D. Knabb, Jamie R. Rhome & Daniel P. Brown, National Hurricane Center, *Tropical Cyclone Report, Hurricane Katrina, 23-30 August 2005* (updated 10 August 2006) (“NHC Report”) at 10-11 (available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf).

³ See <http://www.fema.gov/news/newsrelease.fema?id=29109>.

⁴ See *Association of Community Organizations for Reform Now (ACORN) v. Federal Emergency Management Agency (FEMA)*, 463 F.Supp.2d 26, 29 n.2 (D.D.C. 2006) (citing FEMA Disaster Information Page (Aug. 22, 2006), <http://www.fema.gov/news/newsrelease.fema>; National Oceanic Report on Katrina, http://www.ncdc.noaa.gov/oa/reports/tech-report-200501_z.pdf), stayed in part, 2006 WL 3847842 (D.C. Cir. Jan.22, 2006).

communities were obliterated along the Mississippi coast.⁵ Approximately 3,000,000 people in Louisiana, Mississippi, Alabama, Georgia and Florida were left without power, and approximately 1,200,000 were placed under some sort of evacuation order.⁶ Equally catastrophic were the financial costs of the storm. In August, 2006, the National Oceanic and Atmospheric Administration estimated the total damage cost to be approximately \$125 billion.⁷

Hurricane Rita made landfall along the Texas coast less than a month later on September 24, 2005, wreaking havoc on those who had been spared by Katrina. Some 424,696 people were affected by the storm in Texas.⁸ “One of the most intense hurricanes ever recorded during the Atlantic Hurricane Season,” Rita displaced approximately 37,000 people from Louisiana to Texas and 33,000 people from Texas to other states, costing FEMA \$528 million in aid to those displaced families.⁹ FEMA offered \$521 million in rental assistance, \$94 million in other needs assistance and 4605 temporary housing units to Texas residents.¹⁰ Two years later, 932 Texas households were still in temporary housing.¹¹

In Louisiana, twenty-three parishes were designated disaster areas.¹² Approximately 366,000 people were affected by the storm. Some 10,151 claimants received disaster unemployment assistance, 11,000 households received temporary housing units, and 54,900 people received other needs assistance.¹³

The storms took their greatest toll on the most vulnerable members of our society: the poor

⁵ See NHC Report at 11-12.

⁶ Id. at 12-13.

⁷ See ACORN, 463 F.Supp.2d at 29 n.2; NHC Report at 12 (estimating losses at upwards of \$81 billion).

⁸ <http://www.fema.gov/news/newsrelease.fema?id=40920>.

⁹ ACORN, 463 F.Supp.2d at 29 n.2.

¹⁰ <http://www.fema.gov/news/newsreelase.fema?id=29109>.

¹¹ Id.

¹² <http://www.fema.gov/news/newsrelease.fema?id=29987>

¹³ Id.

and the mentally ill.¹⁴ Unemployment in the Gulf Region shot up from 5.5%-7.4% pre-Katrina to 16.5% immediately after the storm,¹⁵ when thousands of people were left homeless and impoverished. Those with pre-existing mental health issues were unable to obtain treatment, and thousands more developed new mental health problems such as post-traumatic stress disorder, depression, anxiety and suicidal ideation.¹⁶

The Current Guideline

Guideline 2B1.1 already allows the courts to take into account the wide variety of criminal conduct arising out of the disasters. As a result of the statutory increase in penalties for disaster-related mail and wire fraud, 18 U.S.C. §§ 1341, 1343, and the new offense set forth at 18 U.S.C. § 1040, persons convicted of theft or fraud will already be subject to the enhanced base offense level of seven even if losses are minimal. See USSG § 2B1.1(a)(1). Section 2B1.1(b)(1) specifically ties increased loss to increased offense levels. It also requires upward adjustments for conduct that will likely be inherent in the more egregious fraud prosecutions involving disaster or emergency benefits, including:

- Increases based on the number of victims, USSG § 2B1.1(b)(2);
- A two-level increase and a floor of ten if the defendant misrepresented that s/he was

¹⁴ *See* U.S. Census Press Release, *Census Bureau Estimates Nearly 10 Million Residents Along Gulf Coast Hit by Hurricane Katrina* (Sept. 2, 2005) (noting that about 2.1 million people were living in poverty in the areas that were hardest hit by the storm); Appleseed Foundation, *A Continuing Storm: The On-Going Struggles of Hurricane Katrina Evacuees* (“Appleseed Foundation”) at 3 (opining that “the mental health toll could turn out to be one of the most significant long-term impacts of the storm”).

¹⁵ *See* Appleseed Foundation at 4 (noting that, while unemployment rates ultimately leveled out at only slightly above pre-Katrina levels, “[a] substantial number of evacuees face barriers which impede the search for employment, including childcare needs, insufficient transportation, inadequate training, and unresolved healthcare and mental health issues”).

¹⁶ *Id.* at 3 (describing the “critical need to address mental health issues relating to Hurricane Katrina. . . . Some evacuees had pre-existing mental health issues that were left untreated in the weeks and months following the hurricane. Substantial numbers of additional evacuees have now developed mental health problems such as depression and post-traumatic stress disorder. . . . The mental health toll could turn out to be one of the most significant long-term impacts of the storm”); *see also* National Institute of Mental Health, *Mental Disorders persist Among Hurricane Katrina Survivors* (Jan. 24, 2008), available at <http://www.nimh.nih.gov/science-news/2008/mental-disorders-persist-among-hurricane-katrina-survivors.shtml>.

acting on behalf of a charitable organization or a government agency, USSG § 2B1.1(b)(8); and

-A two-level increase and a floor of twelve if the offense involved relocating to another jurisdiction to evade law enforcement or regulatory officials or otherwise involved sophisticated means, USSG § 2B1.1(b)(9).

Chapter Three provides additional opportunities to impose a higher sentence where warranted, including enhancements for offenses involving vulnerable victims, USSG § 3A1.1(b), for defendants who played an aggravating role in the offense, USSG § 3B1.1, and for defendants who abused a position of public or private trust or who used a special skill. USSG § 3B1.3. Defendants who used the identity of another, including a social security number, are subject to a mandatory two-year consecutive sentence if convicted under 18 U.S.C. § 1028A(a)(1), (b).

The Guidelines in Practice

In our experience with disaster fraud cases, the Guidelines already account for the range of offenses. Defendants who received probation or other lenient sentences had not engaged in an organized attempt to defraud anyone. The cases typically involved a single claim from an individual who was an actual disaster victim but who nonetheless falsified information on a benefits application or failed to terminate unemployment benefits upon re-employment. The dollar values were low, and the defendants were often indigent single parents with mental health issues and no prior criminal record. Often they were manipulated by recruiters into applying for benefits. Typically, the government did not oppose the lenient sentences in these cases. On the other hand, more serious criminals were subject to lengthy sentences.¹⁷

The following are examples of the types of cases that we handle that involve disaster related fraud.

The majority of cases in the Middle District of Louisiana involved single women with young children living in public housing. Many of them had no criminal record. They were uneducated and either unemployed or underemployed. Most of them had some type of property damage: to cars, windows, clothing that was water soaked, or refrigerated foods that went bad when power was lost. However, they did not evacuate or were not entitled to claim housing damage because they were renters. As a result of their federal felony convictions, these women and their families have lost their federally subsidized housing in an area where the cost of housing post-Katrina and Rita has skyrocketed.

¹⁷ See e.g. U.S. Dept. of Justice Press Release, *Hurricane Katrina Fraudster Sentenced to 43 Years in a Federal Prison*, available at http://www.usdoj.gov/usao/alm/Press/willis_sentence.html.

Clients who relocated to Baton Rouge from New Orleans after having evacuated to Houston and elsewhere have developed severe mental problems, particularly those who initially tried to ride out the storm in New Orleans. One such defendant stayed in New Orleans to help her family. Before the storm, she was a strong, independent working woman. She was among those who thronged to the convention center, where people were dying, and she ultimately waited on the Interstate for three days in the sun and heat before being bussed to Houston. Unbeknownst to her, the remainder of her family was in Dallas. In Houston, she met a young man who brought her to Baton Rouge, where she found a job with her former employer from the New Orleans area. She had no criminal history at all. She was charged with wire fraud for claiming unemployment benefits when she was working. She has returned to the New Orleans area but is now suffering from severe post-traumatic stress syndrome and depression. Her family is scattered throughout the South.

A young Mississippi woman was living with her boyfriend in a trailer until May 2005 when she moved in with her mother because complications with her pregnancy required bed rest. Katrina forced her to evacuate to Panama City, Florida. When she returned to her trailer a week later, she discovered that her personal belongings had been damaged, including her furniture, appliances and clothing. She also learned that her ex-boyfriend had sold some of her clothing on EBay. She received approximately \$11,000 in FEMA funds for these losses but was prosecuted because the trailer lease and utilities were in her boyfriend's name.¹⁸ The government did not oppose a sentence of probation.

Another single mother was living temporarily with her mother after spending a month in the hospital recovering from back surgery. She evacuated to Pensacola, Florida with her mother and eleven-year-old daughter. They stayed in a shelter for about a month and half. When she returned, she discovered that her personal possessions left in the apartment had been lost. She was prosecuted for receiving approximately \$13,000 because she was not living in the damaged apartment at the time of the storm. She will lose her job at the hospital due to the felony conviction. She may yet be

¹⁸ There was a lot of confusion about the ability of members of a single household to obtain housing assistance. Normally, FEMA will provide all members of a single household with one temporary residence based on the assumption that members of a single household will relocate together. 44 C.F.R. § 206.117(b)(1)(i)(A); *see also* Declaration of Donna Daniels, Acting Deputy Director of the Recovery Division at FEMA, at ¶ 20, ACORN v. FEMA, Civ. No. 06-1521-RJL (D.D.C. Sept. 11, 2006).

FEMA recognized, however, that many of those displaced by Katrina were separated during evacuation and unable to reconnect after the storm. As early as September 19, 2005, FEMA modified its "shared household rule," providing separate assistance to members of a single household who were separated post-Katrina. McWaters v. FEMA, 436 F.Supp.2d 802, 821 (E. D. La. 2006) (denying injunctive relief because modification was discretionary). Unfortunately, FEMA did not consistently advise applicants of the modification. Id.

a success story. Although she is a single mother, she works two jobs and recently graduated from culinary school. She also volunteered at the Red Cross after the storm.

Another Mississippi defendant, who can neither read nor write, was receiving disability payments because he has been diagnosed with diabetes, hypertension, and asbestosis. He had been residing with his daughter in an apartment in Gulfport that sustained storm damage. This defendant was prosecuted because he reported living at the family residence, which was no longer occupied. He received a sentence of five years' probation without opposition from the government.

A Mississippi resident was sentenced to probation conditioned on six months' house arrest, without government opposition, after she made a claim on a trailer that she and her husband had been fixing up but they had not yet moved into. Nevertheless, many of her personal possessions and her dog were in this home, all of which were lost to the storm. Her husband was a shrimper, whose source of livelihood was destroyed by the storm and she is a homemaker with virtually no education and no criminal record. They had evacuated but had no lease to document the trailer.

A partially blind, illiterate mother of three was induced by her husband to make a claim that the siding on their home had been blown away by the storm. The home was indeed damaged but the siding had been sold earlier. The FEMA award was sufficient to enable the couple to obtain a new trailer. The woman received a probated sentence without objection from the government, and the government declined to forfeit the trailer because the family was so poverty-stricken.

A parolee was living in a halfway house in Beaumont when Rita struck. The residents were evacuated to another halfway house in Houston where many were led to believe that they were eligible for relief because they had evacuated. The government charged the evacuee with making a false claim based on his receipt of approximately \$2000. The Bureau of Prisons determined that the defendant was severely mentally disabled but competent to stand trial. After the district court learned of the conflicting and confusing advice offered this evacuee, the defendant was found not guilty.

A forty-nine-year-old grandmother living in HUD Section 8 housing in Houston allowed her daughter to use her name and Social Security number to apply for expedited hurricane assistance. The woman and her daughter split the \$2000 in proceeds. The government agreed that a sentence of probation was appropriate.

A New Orleans resident evacuated after Hurricane Katrina and found shelter outside of Houston. He had twice been hospitalized for mental illness and had at some time received disability payments. He applied by telephone for disaster unemployment assistance but when he did not receive the debit card in timely fashion, he called again inquiring about the card. After he received the first card, the second arrived. The disaster relief personnel had apparently erred in transcribing

his Social Security number by one digit. Because he then used both cards to obtain disaster unemployment benefits, thereby wrongfully receiving approximately \$3724, he was convicted of wire fraud and aggravated identity theft. Thus, he will receive a mandatory two-year sentence consecutive to the wire fraud sentence.

Even those clients who were not themselves disaster victims were often nonetheless victimized by con artists eager to take advantage of their limited resources and desperate situations. For example, uneducated and illiterate clients were preyed upon by enterprising “sellers” of New Orleans street addresses. Typically, these sellers would go to local shelters and grocery stores and advertise New Orleans addresses for sale for FEMA claims. The defendants “bought” the addresses from the seller, who filed Internet or telephone claims. When the FEMA check arrived, the defendant paid between \$500 to \$1000 of the \$2000 check to the seller. While the buyers were convicted, the sellers escaped prosecution.

A typical circumstance is reflected in a recent sentencing memorandum from the Middle District of Florida:

Defendant also took advantage of those he assiduously recruited to participate in his scheme. Some were of marginal intelligence, some were young - one was a teenager with no prior criminal history who trusted the Defendant. Almost all of those lured into the scheme were poor. Though they participated in this scheme of fraud and have pled guilty, they too have been victimized by the Defendant.¹⁹

In the Florida case, the defendant had gone to a severely impoverished, rural area to recruit people to submit claims for disaster relief. Among those recruited was a woman with borderline intelligence and little or no education who lived in a tiny, isolated trailer. The woman agreed to call a toll-free number to submit a claim for disaster relief. Of the \$2,000 disbursement she received, she kept \$500 and gave \$1500 to the defendant. The district court properly considered the woman’s individual circumstances and role in the offense and sentenced her to probation. In contrast, the defendant who recruited her and others like her received a sentence of fifty months in prison.

In the Middle District of Alabama, the government has prosecuted a number of people for submitting false claims for disaster relief. One woman, a single mother living in extreme poverty, is currently facing sentencing for filing a false claim for relief after being recruited by an acquaintance. Of the \$2350 she received, the woman gave the recruiter \$2050 and kept only \$300, which she used to pay her utility bill so that the utilities would be turned back on in the apartment she shared with her four children. As with many of our disaster fraud clients, in addition to being

¹⁹ See Sentencing Memorandum, dated Oct. 13, 2006, filed in United States v. McNeil, No. 6:06-cr-77-Orl-28DAB (Antoon, J.).

an impoverished single mother, this woman was suffering from an untreated mental illness at the time of her offense and had obtained only a ninth grade education, leaving her particularly vulnerable to the advances of others. Because the government chose to prosecute this woman under the aggravated identity theft statute for submitting the claim under her daughter's social security number, she is subject to a two-year mandatory minimum prison sentence irrespective of the guideline range.

On the other hand, defendants who gamed the system have received significant punishment. A defendant in the Southern District of Texas received \$35,548 when he falsely claimed residence in New Orleans and Beaumont and used false Social Security numbers. He was sentenced to serve a total of thirty-nine months in prison. In light of the mandatory two-year consecutive sentence for aggravated identity theft, the government agreed that upward departure was not appropriate. Another defendant created a website diverting funds designated for the Salvation Army. After trial, he received a 111-month sentence, which included enhancements for the amount of loss, the number of victims (donors), use of sophisticated means, falsely representing himself to be a charity, and a four-year consecutive prison term for two convictions of aggravated identity theft. As noted previously, another defendant received a forty-three-year prison sentence for committing fraud related to Hurricane Katrina.²⁰

Disaster Relief Enhancements Should be Limited to the Most Culpable

While we oppose any change in Guideline 2B1.1, the addition of administrative costs to the loss calculation and the proposal to promulgate a floor are particularly ill-advised. With respect to administrative costs, we note that many of the individuals prosecuted for disaster relief fraud are themselves indigent with little or no means of repaying the money. Calculation of these costs will be exceedingly difficult. For example, if the defendant evacuee was forced to move repeatedly, the administrative costs of recovery will presumably increase. If the defendant has no funds to make repayment, delays in payment and court actions, likely to be futile, will increase the cost of recovery. FEMA's record of dispensing and recovering funds is replete with examples of inaccurate and incomprehensible instructions, documents sent to the wrong address, and other administrative mismanagement.²¹

²⁰ See footnote 17.

²¹ Granting a preliminary injunction preventing FEMA from cutting off housing benefits, Judge Leon noted: "It is unfortunate, if not incredible, that FEMA and its counsel could not devise a sufficient notice system to spare these beleaguered evacuees the added burden of federal litigation to vindicate their constitutional rights." ACORN, 463 F.Supp.2d at 29. FEMA's letters "cryptically indicated, by a code or phrase inserted therein, FEMA's decisions and, if necessary, its purported reasons for denying (or terminating) benefits. . . .Beyond the code or phrase inserted automatically into each letter, FEMA provided little other individual explanation for its decision to deny or terminate benefits. To the contrary, FEMA frequently sent more than one letter to an evacuee

Any floor in the guideline, above and beyond the seven-level floor already contained in Guideline 2B1.1, will create “unwarranted *similarities*” among dissimilarly situated individuals. See Gall v. United States, 128 S.Ct. 586, 600 (2008) (emphasis in original). As the foregoing reveals, individuals convicted of disaster-related fraud range from the poverty-stricken, traumatized victims of the disaster to the fraudster who takes advantage of the desperation of both the victims and the service providers.

Moreover, disaster relief is not limited to hurricanes. The President can declare an emergency for all manner of disasters ranging from hurricanes and earthquakes to drought or wild fires.²² A minimum offense level would all too easily condemn to prison the farmer who wrongfully obtains unemployment compensation while his crops wither on the vine, even though such a result would not serve the purposes of sentencing.

Mitigating Circumstances

The Congressional directive instructs the Sentencing Commission to account for any mitigating circumstances that might justify exceptions to the disaster relief amendments. A defendant’s experience as an actual victim of the disaster is a mitigating circumstance that should be included in any amendment. Should the two-level enhancement for disaster related fraud, USSG § 2B1.2(b)(16), be made permanent, we suggest that the Commission recognize that an offender’s status as a victim of the disaster is a mitigating factor. The Commission could specify that the § 2B1.1(b)(16) enhancement shall not apply if the defendant has been detrimentally affected by the disaster. Alternatively, the Commission could encourage a downward departure in these circumstances.

Conclusion

In summary, we believe that a minimum base offense level is particularly inappropriate for a Guideline that encompasses such a broad range of conduct including the desperate acts of individuals uprooted and traumatized by the disaster itself. Further, inclusion of the administrative costs of recovery as reasonably foreseeable pecuniary harm is unwarranted by the nature of the offense and impractical in application. If anything, the Guideline should be amended to encourage courts to take into account the mitigating circumstances of those who turned to fraud out of desperation after becoming disaster victims themselves.

containing *contradictory* codes or explanations, ..., and calls by evacuees to a ‘toll-free helpline’ frequently resulted in conflicting ‘review of the applicant’s case file on the spot’ that plaintiffs found ‘confusing and chaotic.’” Id. (citations omitted, emphasis in original).

²² 42 U.S.C. § 5122(2).

“In our civilization there are fearful times when the criminal law wrecks a man.”²³ As the Supreme Court has repeatedly recognized: “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensure.” Gall v. United States, 128 S.Ct. 586, 598 (2008)(quoting Koon v. United States, 518 U.S. 81, 98 (1996)). A minimum offense level requiring incarceration would too often wreck those who have already been victimized by outside forces and would undermine our long standing commitment to individualized justice.

Respectfully submitted,

Marjorie A. Meyers
Federal Public Defender
Southern District of Texas

²³ Victor Hugo (translated by Lee Fahnestock and Norman MacAfee), Les Miserables, at pp. 84-85 (1862) (Signet Classic, New York, New York 1987) (recognizing the injustice of imprisoning a man for stealing a loaf of bread to feed his family).