



**U.S. Department of Justice**

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July 27, 2020

VIA E-MAIL: [Kathy\\_Nester@fd.org](mailto:Kathy_Nester@fd.org)

Kathryn Nester  
Executive Director  
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Dear Kathy,

I am writing in response to your letter to Senator Kamala Harris dated July 24, 2020.

Your first letter to Senator Harris dated March 31, 2020 contained multiple misrepresentations concerning the efforts of all the Southern District of California stakeholders to address the unprecedented challenges created by the COVID-19 pandemic. Although you did not see fit to correct the record after receiving our office's response to you pointing out your letter's numerous errors and mischaracterizations, I was hopeful that you would not repeat such a misguided and counterproductive endeavor. Unfortunately, that hope was misplaced.

Most regrettable about your decision to send two letters to Senator Harris in a span of three months is that your efforts only undercut the progress we – this office, the District Court, the Bureau of Prisons, the U.S. Marshals Service, U.S. Pretrial Services, U.S. Probation, and, of course, the defense bar – have made in the last several months to adjust and deal with this unprecedented crisis. Your letter omits many key facts and presents Senator Harris with an inaccurate, biased and incomplete picture of what is occurring in the Southern District of California.

**Increase In Prosecutions In July 2020**

You incorrectly assert this office has “reversed course” and has “dramatically increased new prosecutions” in July 2020. More fundamentally, however, your attempt to rely on a snapshot of new complaints over a very short period of time fails to convey the innovative efforts this office has taken in response to the pandemic over the past several months and our attempts to involve your office in those efforts wherever possible.

As you are aware, we dramatically reduced the number of new criminal cases in response to the COVID-19 pandemic. From January 1, 2020 to February 28, 2020, our district averaged approximately 217 new criminal cases per week. Starting the week of March 16, we reduced the number of new cases

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by approximately 85%. Throughout the pandemic, our new case filings have focused on defendants with significant criminal histories and those whose conduct presents the greatest threat to the safety and welfare of our communities, such as individuals who are caught smuggling fentanyl, methamphetamine, and other potentially lethal controlled substances into the United States.

Unfortunately, between May 2020 and the present, we have seen a dramatic increase in the number of controlled substances seizures at the Ports of Entry in our District as compared to 2019. For example, the number of methamphetamine seizures in June 2020 was 83% higher than the number of seizures in June 2019. The number of fentanyl seizures was 410% higher in June 2020 than the number of seizures in June 2019, and the number of seizures of cocaine and heroin also increased in June 2020 compared to June 2019.

Prosecuting individuals who import fentanyl, methamphetamine and other controlled substances into our District is a critical component of our public safety mission. In particular, the importation of fentanyl has contributed to an increasing public health crisis in our country, which unfortunately has not spared San Diego County. According to the San Diego Medical Examiner's office, between January and March 2019, there were 29 fentanyl-related overdose deaths in our County. During the same three-month period in 2020, the Medical Examiner reported approximately 75 fentanyl-related deaths, an increase of almost 200%. If the numbers remain steady, San Diego will double its total fentanyl-related overdose deaths from 2019 to 2020. We have continued to charge individuals who import fentanyl and other controlled substances through our Ports of Entry, as these prosecutions are essential to protect our community.

Your assertion that we “dramatically increased new prosecutions” in July 2020 is wrong. You state that “[i]n the three-week period between June 29 and July 17, the USAO filed 223 new, unsealed complaints, compared to 83 in the three weeks prior.” Your numbers are incorrect. Between June 8 and June 26, 2020, there were approximately 236 new complaints filed (75% of which involved drug importation offenses). This number remained nearly static between June 29 and July 17, 2020, during which time approximately 244 new complaints were filed (81% of which involved drug importation offenses). And as fully explained above, the increase in prosecutions from March 2020 to the present largely resulted from a dramatic increase in the number of individuals apprehended at Ports of Entry importing controlled substances into the United States. If you are going to quote numbers, please make them accurate.

Despite your assertions to the contrary, the number of immigration cases remains low. By way of comparison, in June 2019, we filed approximately 817 immigration-related cases (including violations of 8 U.S.C. §§ 1324, 1325 and 1326 and 18 U.S.C. § 1544). In June 2020, we filed approximately 44 immigration-related cases, a reduction of approximately 95%.

Your assertion that the U.S. Attorney's Office (USAO) is “ramping up prosecutions” is based on incorrect calculations and, as described above, is grossly misleading in that it fails to account for the increase in the number of controlled substances seizures in our District. Just as troubling is your erroneous assertion that our office's policies have created a “growing jail population.” As you well know, and as described below, we spearheaded an effort to identify individuals in custody who could be sentenced to time served and therefore released from U.S. Marshals Service (USMS) custody.

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Indeed, many Federal Defenders clients were the beneficiaries of our sentencing recommendations, which have dramatically reduced the number of individuals in USMS custody.

### **The USAO's Response To The Pandemic**

It is particularly troubling that both of your letters to Senator Harris ignore the steps this office has taken to deal with the ongoing pandemic. Had you intended to provide Senator Harris with a fair-minded and unbiased assessment of the state of the Southern District of California, you would have at least acknowledged these efforts rather than relying on incorrect data and unsupported conclusions. Your repeated failures in this regard are disingenuous and cannot stand unaddressed.

#### **A. Notices To Appear**

From March 2020 to the present, this office has authorized law enforcement to issue Notices to Appear to over 650 defendants who would have otherwise been detained until their initial appearance. This represents approximately 75% of the drug importation cases accepted by this office for prosecution during this time period. Your letter states that the USAO is “winding down” Notices to Appear but omits critical facts. Approximately 26% of defendants provided with Notices to Appear in San Diego County have failed to appear for their initial court date, and approximately 43% of defendants provided with Notices to Appear in Imperial County have failed to appear for their initial court date. Although we continue to authorize Notices to Appear where possible, the rates at which defendants have failed to honor the Notices to Appear has forced our hand to take into custody many defendants arrested for drug trafficking and other serious felony offenses until their initial appearances.

#### **B. Time Served Sentencing Recommendations**

To expedite a reduction of the District's detention population, this office invited Federal Defenders and CJA panel attorneys to propose cases that might warrant a joint sentencing recommendation for time served and immediate release from custody. We suggested a focus on defendants facing relatively low sentences under the U.S. Sentencing Guidelines and/or who suffered from CDC-recognized COVID-19 risk factors that increased the chances of serious complications should an individual contract the virus. Within a few weeks, we had reviewed 469 proposed cases and agreed to recommend time served in 338 cases (72%) despite, in many instances, defendants having already signed plea agreements that allowed the United States to recommend considerably more time in custody. While most defendants receiving time-served recommendations faced relatively low guideline ranges, in a few cases with significant medical concerns, we recommended time served for defendants facing as much as 46-57 months in custody under the guidelines. And where we did not agree to a time-served sentence, it was only after careful consideration of each case.<sup>1</sup>

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<sup>1</sup> For example, some defendants we rejected under this program had past or current gang involvement; were charged with importing multi-kilogram loads of cocaine, heroin, or methamphetamine; had prior convictions for violent crimes, sex crimes, or other public safety crimes; or otherwise had extensive criminal records.

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This time-served sentencing project initiated by us has been a critical part of the Southern District of California's successful effort to reduce the total number of pretrial defendants in custody. Indeed, the numbers belie your assertion that the District has a "growing jail population." The total detained population for the Southern District of California as of February 25, 2020 was 3,358 detainees. The total detained population as of July 24, 2020 is 2,112 detainees.<sup>2</sup> This means there are 1,246 fewer detainees in custody at present, which is an approximately 37% reduction in the total detainee population.

### C. Reduction Of In-Custody Material Witnesses

In addition to reducing the number of incarcerated pretrial defendants, this office also took the initiative to reduce the number of material witnesses in custody. We initiated communications with material witness counsel on this issue and subsequently coordinated with the District Court, CJA counsel, Federal Defenders, and material witness counsel to implement a program to reduce the number of in-custody material witnesses. The program was straightforward. Defendants charged with transporting or smuggling illegal aliens, in violation of 8 U.S.C. § 1324, were offered an additional reduction in their sentence in exchange for their agreement to release those individuals being held in their cases as material witnesses. Most defendants took advantage of the additional sentence reduction. In late April 2020, there were over 180 in-custody material witnesses. A month later that number had decreased to below 20. On June 4, 2020, material witness counsel reported to the Court in an email that "the majority of the [material witnesses] in custody affected by covid-19 have been released." Material witness counsel ended her email by thanking everyone for our "help and cooperation" in implementing this program. Why would you not mention this project to Senator Harris?

### D. Bond Modifications

Since the outset of the pandemic, we have evaluated approximately 230 defense requests for bond modifications. To fairly and consistently evaluate these requests, we designated a senior AUSA to consult with the AUSA assigned to each case to determine our position for every bond modification request. That senior AUSA spent dozens of hours over a weeks-long period evaluating the requests and providing guidance, and we agreed not to oppose defense bond modification requests in numerous cases. Even where we opposed defense requests to modify bonds, we complied with the District Court's procedures to ensure prompt judicial review of the modification requests.

As part of this process, this office asked Federal Defenders to provide a list of cases in which Federal Defenders believed that bonds should be modified based on defendants' vulnerability to serious illness if they contracted COVID-19. However, Federal Defenders declined to provide such a list and instead insisted on seeking bond modifications in a piecemeal fashion.

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<sup>2</sup> According to the U.S. Marshals Service, the 2,112 detainees include 379 post-sentencing defendants awaiting transfer to BOP facilities. In addition, there are 171 post-sentencing defendants at Central Arizona Detention Facility who are not included in the 2,112 figure.

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#### **E. Evaluation of Compassionate Release Motions**

To date, this office has received over 150 motions seeking compassionate release for BOP inmates. To ensure these motions receive the full and fair consideration they deserve, we selected an AUSA to serve as the office's coordinator for all compassionate release motions. The coordinator advises AUSAs on compassionate release issues and consults with AUSAs on our position with respect to every motion. Moreover, we have agreed to respond to compassionate release motions within seven days of the motion being filed unless the District Court issues an alternative briefing schedule. Although this seven-day turnaround often requires AUSAs to turn away from other pressing matters to evaluate compassionate release motions and file responses, we continue to comply with this deadline because we recognize the importance of prompt resolutions of these motions.

#### **The District Court's Response to The Pandemic**

Your letter takes issue with the District Court's resumption of in-person court proceedings. I do not purport to speak for the District Court. However, it is noteworthy that, other than a mention of the Strategic Committee on which you and I sit (which you included in your letter at my suggestion), you do not mention the safety measures the District Court and the USMS have implemented. It is true that the District Court has resumed in-person change of plea and sentencing hearings for defendants in San Diego. But you do not mention that in-custody defendants are twice temperature checked before being brought into court and that the USMS will not permit any detainee who has a temperature or otherwise displays symptoms of infection to appear in court. Moreover, you fail to point out that the District Court has continued to authorize VTC and telephonic change of plea and sentencing hearings for defendants in El Centro given the number of positive COVID-19 cases in Imperial County.

I note as well that you have chosen to rely on the national COVID-19 infection rate in BOP facilities rather than the infection rate for the facilities housing defendants in this District. This is particularly disappointing given that you receive weekly summaries from the USMS regarding the number of COVID-positive USMS detainees in our district. The USMS report that you received on July 24 indicates a total of 60 COVID-positive detainees out of 2,101 total detainees, an infection rate of approximately 2.9%. I do not suggest that any infection rate is "acceptable," but I submit it is incumbent on you, as the Executive Director of Federal Defenders, to provide accurate and relevant statistics when discussing the state of affairs in our District.

To send another one-sided, inaccurate and misleading letter to a Senator is totally counter-productive to dealing with this pandemic. This office has worked collaboratively over the past several months with your office, the defense bar, the District Court, the USMS, U.S. Probation, U.S. Pretrial Services and the MCC Warden to help find a path forward during a difficult time. I suggest your office do the same and not waste your time composing letters that unfairly represent the true condition of this District.

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After your March 31 letter, I asked you to send a letter to the Senator correcting your misquotations, omissions and mischaracterizations. You never did, which is unfortunate. You owe the Senator another letter correcting your most recent communication, if you want her to truly understand how this District has responsibly and effectively responded to the pandemic.

Sincerely,

  
ROBERT S. BREWER, JR.  
United States Attorney

cc: Via Email  
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