



Judge Michael A. Wolff
Supreme Court of Missouri
(Chief Justice 2005-2007)
207 West High Street
Jefferson City, Missouri 65101
Michael.Wolff@courts.mo.gov
Chair, Missouri Sentencing Advisory
Commission



Chief Justice Paul J. De Muniz
Oregon Supreme Court
1163 State Street
Salem, OR 97301-2563
Paul.J.DeMuniz@oid.state.or.us

Dear President-elect Obama and Transition Team:

Re: Civil Rights and Criminal Justice:

We write to urge major change in state and federal sentencing practices. The United States has become the world leader in incarceration, ironically imprisoning a higher percentage of its citizens than any other country while hoping to regain respect as leader of the free world. Minorities make up a disproportionately large share of our prison populations. Minorities also account for a disproportionately large share of the victimizations our archaic sentencing approaches fail to prevent. Disparity in sentencing extends far beyond cocaine sentences. As President-Elect Obama noted in his recent interview in *Ebony* regarding health care disparities (January 2009), addressing disparities is often best achieved by addressing what's wrong in the system as a whole; minorities may well benefit from improvements precisely because they suffer an increased share of the harm that the present system inflicts.

Evidence-based practices hold much promise for improving sentencing, but they have failed to influence sentencing culture outside the "treatment" courts. Accordingly, the National Institute of Corrections is presently engaged in a project designed to improve the penetration of such practices into local court systems. We urge your support and expansion of those efforts. The US Sentencing Commission maintains sentencing guidelines, advisory since *Booker v. Washington*, that allocate prison resources by means that are blind to risk and need assessment, and ultimately ignore public safety as an objective. We urge meaningful direction to the Commission for revision of those guidelines along the principles stated in this letter.

State and federal sentencing guidelines were designed to reduce disparities, to provide some measure of "truth in sentencing," and to slow prison growth. But guidelines have failed to end disparity or prison growth. Though they may achieve "truth in sentencing" by bringing time actually served within reach of the sentence imposed, they utterly conceal the truth that federal and most state guidelines have nothing whatever to do with public safety, and result in misallocation of prison resources as measured by public safety outcomes. The failure of guidelines to serve public safety has fueled pressure for more prisons.

Notable signs of hope include efforts in Missouri, Wisconsin, Oregon and Virginia to infuse risk and need assessment into sentencing. Virginia, by legislative directive, used risk assessment to reduce inflow into its prison population by 25% with no increase in crime. Meaningful change requires that we insist upon data-driven sentencing throughout the spectrum of criminal behavior. We must use programs that demonstrably work on those they work on – without prison if the risk level permits, otherwise in custody and during reintegration and post-prison supervision.

Rational sentencing requires that we identify our purposes, then intelligently pursue them within means that are available as a matter of law, proportionality, risk, and priority. The legitimate purposes of sentencing are all contained in these purposes:

Public Safety: crime reduction, accomplished by rehabilitation, incapacitation, and deterrence. Of these, deterrence is the least achievable, and, except very rarely, the weakest guide for sentencing.

Public Values: a) promotion of respect for persons, property, and rights of others; b) obviating vigilantism and private retribution; c) maintenance of public trust and confidence; d) serving the legitimate needs of any victims. All of the following may be appropriate means to these ends in a given sentence: denunciation of wrongful behavior; “punishment” in the sense of inflicting negative consequences on an offender; promoting pro-social values, as in restorative justice. Serving the needs of victims is also be a means to the other ends, and should be expressly articulated.

We must stop giving those who invoke “just punishment” a free pass. Just as we must hold crime-reduction sentencing strategies to outcome measurement, we must require rational demonstration that some purpose other than crime reduction justifies any departure from public safety as an objective. Public trust and confidence can never be maintained if we do not effectively pursue reduced recidivism. Most sentences that best seek crime reduction also serve any other legitimate purposes. Exceptions include some drunk driving homicides, shaken baby cases, and intrafamilial sex abuse cases.

We offer the following specific suggestions as guiding principles in directing federal energies and resources toward federal and state sentencing reform:¹

Punishment should be no harsher than warranted. Whatever our sentencing objectives, a sentence should not be disproportionately severe in view of the offender’s blameworthiness and the harm inflicted or threatened by the offender’s behavior. A sentence should not be more severe than required by the pursuit of legitimate sentencing purposes.

Avoid mandatory minimum sentences. Individualized sentencing does not guarantee best practices, but when properly directed and informed it is critical to best practices.

¹ This list is expanded from one proposed by Judge Wolff in *Brennan Lecture Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 NYU L. Rev. 1389 (2008).

"Evidence-based sentencing" should replace the misunderstood phrase "judicial discretion."

We should have a preference for community-based sanctions, rather than for incarceration. For most low and moderate risk offenders [other than some sex offenders], community based sanctions work better measured by recidivism reduction than does incarceration, and they are far more cost effective. The great majority of offenders who are imprisoned will return to their communities without receiving effective programming. When we need to use incarceration, that resource should not be spread among offenders who are better dealt with in the community. At present, we use prisons as addicts use drugs: they don't do what the public expects them to do, so we use them even more, with the result that we *need* more because prison makes many inmates worse when they return to their communities, and prevents inmates from receiving programs in the community that would work. We overuse and misuse prison; the cure is using prisons wisely for public safety, which also means using them less than we do now. Building more prisons can only make criminal justice more dysfunctional than it already is.

Everyone who works with an offender should know that person's risks and needs. A major flaw of most guidelines is that they pretend that offenders are alike who are vastly different in terms of risk and need – a difference that dramatically affects what response is most likely to work to reduce their criminal behavior.

Every sentence should pursue best efforts to minimize recidivism because in most cases, such a sentence best serves all sentencing purposes. When other sentencing purposes demonstratively require that we deviate from efforts to minimize recidivism, we should deviate only to the extent demonstrably necessary to serve those other sentencing purposes.

All treatment programs, both in prison and in the community, should be evaluated on an ongoing basis, particularly with respect to how well they meet the criminogenic needs of moderate and high-risk offenders.

We should evaluate sentencing outcomes. Evaluation should be in terms of recidivism, rather than some intermediate measure.

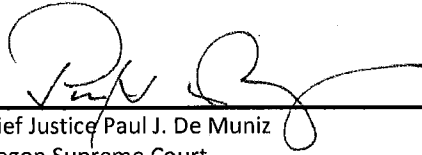
We should keep the public informed of what we are doing.

Sentencing in the United States affects the lives of millions of Americans, usually adversely. We imprison a higher percentage of citizens than any other country, while spawning avoidable victimizations because we fail to embrace data-driven practices. Minorities bear a disproportionate brunt of this dysfunction as inmates and as victims. We urge your attention to this archaic dysfunction to the benefit of all citizens.

Thank you for your attention to this matter.



Judge Michael A. Wolff
Supreme Court of Missouri
Chair, Missouri Sentencing Advisory
Commission
Dated: December 29, 2008



Chief Justice Paul J. De Muniz
Oregon Supreme Court
Dated: December 29, 2008

*The views expressed are those of the individual signatories and
Do not necessarily represent those of their respective courts or agencies*