

GERALD W. MOWRIS is a partner in the Madison firm of Pellino, Rosen, Mowris & Kirkhuff, S.C. He began his legal career in law school, interning at the Madison Legal Services Center (mentored by State Public Defender Dennis Burke), as well as clerking for the late P. Charles Jones. After graduating from law school in 1973, he went to work as an Assistant District Attorney in Dane County. In 1979, he began with the Madison firm that has evolved to Pellino, Rosen, Mowris & Kirkhuff, S.C. Mr. Mowris is a founding member and past president of the Wisconsin Association of Criminal Defense Lawyers. He was past-president and member of the Board of Governors of the State Bar of Wisconsin, past-president of the Dane County Bar, retired Major in the U.S. Army Reserves JAG Corp., and was one of the Governor's appointees to the Wisconsin Sentencing Commission from 2003-2007. He was also a founding member of the Wisconsin Criminal Justice Study Commission. Mr. Mowris has presented on many occasions to the State Bar, the Dane County Bar, WACDL, and other groups on the topics of ethics, criminal law, traffic law and family law. In his spare time, Mr. Mowris is on the National Ski Patrol at Indianhead Mountain in Michigan, president of the Board of Directors of ARC Community Services, which provides halfway house services for female offenders, and enjoys hiking, paddling, golfing and skiing.

POWERFUL SENTENCING PRESENTATIONS TO COMBAT PREJUDICE AT SENTENCING

Presented by:
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Pellino, Rosen, Mowris & Kirkhuff, S.C.

Date: September 24, 2009

I. IDENTIFY THE BIAS AND PREJUDICE

A. Educate the court. By now you should have more than enough materials to show that our system suffers from racial disparities. However, since judges claim to be more interested in fact than anecdotal evidence, here are some facts from reports of the Wisconsin Sentencing Commission.

1. “By mid-year 2001, Wisconsin led the nation with an estimated 4,058 African-American prison and jail inmates per 100,000 African-American state residents (Beck, Karberg & Harrison, 2002).”
2. “A study of the disparity indexes at the state level ranked Wisconsin sixth in the nation with a disparity index of 11.59 (The Sentencing Project, 2004.)”
3. University of Wisconsin sociologist Pamela Oliver (2004) calculated a disparity ratio in 1999 prison admissions of 20.6 to one. According to Oliver, the extent of racial disparity varies by county. Only six Wisconsin counties in 2000 had a high enough African-American population to

provide statistically meaningful information on imprisonment rates: Milwaukee, Dane, Racine, Rock, Kenosha, and Waukesha. Of these counties, Dane and Waukesha counties had the largest racial disparities. In Dane County, African-American males were 35.5 times more likely to be in prison than were white males. Milwaukee, Rock, Racine, and Kenosha counties all had similar, relatively low disparity measures (Oliver, 2004, p. 20).

4. The United States Department of Justice estimates that approximately one-third of all Black men will spend time in state prisons in their lifetimes. Similarly, Pettit and Western have estimated that for Black men, the lifetime risk of imprisonment is nearly 29 percent, compared to 4.4 percent for White men.

5. Although current research shows little evidence of overt, invidious discrimination, racial bias likely endures, sometimes through conscious ill-will, but more commonly through unconscious stereotyping. A 2004 study of Florida inmates found that although race was not a significant factor in determining sentence length when legitimate factors such as offense severity and criminal history were included, whether an offender had predominantly Afrocentric facial features had a significant effect on sentence length over other factors. After controlling for legitimate

sentencing factors such as offense severity and criminal history, White offenders with relatively high Afrocentric facial features on average received longer sentences than Whites with relatively low Afrocentric facial features. Similarly, Black offenders with relatively low Afrocentric facial features on average received shorter sentences than Blacks with similar crimes and criminal records but stronger Afrocentric facial features. Thus, while the study did not find evidence of discrimination in sentence determination based on overt racial categories, an offender's appearance, particularly when an offender manifests strong Afrocentric facial features, does affect sentence length and reinforces traditional racial stereotypes above other factors. Pizzi, Blair and Judd, "Discrimination in Sentencing on the Basis of Afrocentric features". Michigan Journal of Race and Law 10 (2004), 327-353.

- B. What causes the disparities? Again, using the Wisconsin Sentencing Commission Report on Race and Sentencing in Wisconsin: Possible Explanations: Researchers suggest two main reasons why minorities typically comprise a larger percentage of the prison population than the general population: differential involvement in criminal activity and disparate treatment throughout the criminal justice process. The criminal justice process includes arrest, prosecution, and sentencing. The first reason, differential involvement in criminal activity, implies that minorities commit more crimes, and the more serious crimes, than Whites.

The second reason, disparate treatment, suggests that institutional bias yields different outcomes for minority defendants on the whole. Researchers suggest that differential involvement in criminal activity may account for 40-80 percent of the racial disparity between the prison population and the general population, and that disparate treatment may account for the remaining 20-60 percent.

C. How do we tie this to our client?

1. Try to identify:

- a) Points in the processing of your case through the system where discretion could have impacted your client.
- b) Points in your client's history where discretion could have resulted in a different result.
- c) Facts from your client's life history that led him/her to where you are.

2. Show, if you can, how different options available to a White, middle-class kid were not made available to your client, thus impacting why he/she is here. Explain how perception becomes reality.

II. HUMANIZE YOUR CLIENT. THE JUDGE MUST SEE HIM/HER AS A REAL PERSON, NOT “THE DEFENDANT”.

- A. Get to know your client, his/her history, etc. Have people in the courtroom who care about your client and may even offer to help.

- B. Always try to meet these people in advance and talk to them about your client.
 - 1. What kind of a young person was he/she?

 - 2. Likes/dislikes while growing up.

 - 3. Try to get from someone a story about an event that shaped his/her life.

 - 4. Any incidents where a break or a different decision by someone in authority could have changed his/her life?

- C. Try to find a story you can tell about your client that will resonate with the judge—something to make him/her associate your client with the judge’s family or friends.
 - 1. Childhood

 - 2. School

 - 3. Athletics

- D. Try to find a “there, but for the grace of God, goes (I, my kid, my neighbor’s kid, etc. _____” story.

III. WHENEVER POSSIBLE, AND ESPECIALLY IN CASES WITH A PRE-SENTENCE REPORT (PSR), GET SOMETHING TO THE JUDGE IN ADVANCE.

- A. Most judges read parts of the file before the actual sentencing.
- B. Most judges read the PRS before sentencing.
- C. Most judges have their mind made up before they hear your brilliant argument the day of sentencing.
- D. You need to give them something to balance all the bad stuff.
- D. It should not be comparable to a PSR, or too long. It must be short and to the point.
- E. You need to make the judge think about your client and how he/she can actually make an impact on his/her life with a creative sentence.
- F. Sending someone to prison or jail for a long time is too easy from where a judge sits. Make it harder for the judge.
- G. At the same time, make it easier by coming up with a viable/realistic option.

- H. Refuse to argue for the impossible. Convince your client to shoot for the attainable.

IV. CONCLUSION. WHERE/WHEN CAN I USE THIS?

- A. The place where sentencing bias is more prevalent in Wisconsin is not in the length of the sentence, it is in the decision whether or not to use prison.

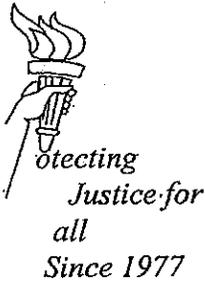
“Racial disparities, when present, were typically found in sentence types (prison or probation) not sentence lengths.”

- B. “In drug trafficking cases across the board, a higher percentage of Black offenders received prison sentences than White offenders. This disparity increased as offense severity decreased.”

Both above from Findings of Report on Race and Sentencing in Wisconsin. Wisconsin Sentencing Commission.

- C. If you have a real chance to keep a Black/Hispanic kid from going to prison, try to use some of these facts/arguments to convince your judge to be courageous and give your client a chance.

See attached letter used by SPD lawyer Dennis Burke to keep a young Black kid who killed someone in a fight out of prison.



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August 11, 2009

Judge

Dane County Circuit Court

Re: State v.

Dear Judge

I spent a long weekend with the presentence, and I think it best to share some of my thoughts with you before I walk into your courtroom Friday morning. I'm not interested in rehashing 's character, or Mr. 's, or what happened the early morning hours of 2008. The presentence does a wonderful job of covering those bases. What I hope is to simply tell you what I think a fair disposition is and why.

I don't know if you've visited the Racine Youthful Offenders Correctional Facility, but I've been there twice. It's where I believe would be sent if he receives a prison sentence. It's a hellhole, judge, chocked-full of gang thugs off the streets of Milwaukee. If punishment is what we're after for , then that's where he should be locked up. But I can imagine nothing constructive or positive coming from such a sentence, and I fear s. would be lost forever.

The question then becomes, can a sentence be fashioned, short of a prison sentence, that serves all the purposes that need being addressed? I think so. Let me suggest that the court impose, and stay, a sentence similar to the one recommended by the writer of the presentence. Place Mr. on probation with conditions, including a lengthy stay in the Dane County Jail. But beyond the standard conditions (counseling, AODA if necessary) I suggest you order Mr. to spend considerable time speaking to high school students on the

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dangers of street fights, bar fights, and violence in general. I've talked this over with [redacted] And he thinks it's something he could do. I can think of no one who knows better the hurt and heartache that can come calling when someone suggests "let's take this outside." I believe telling the story of how he lost his best friend and took the life of another good man will be cathartic for [redacted] and help him to come to grips with the hurt he carries around inside.

I know there are some who will think that what I propose is "soft" and not punitive enough. I simply believe by extending the hand of kindness towards Mr. [redacted] we would be saving a life that is in the balance. I've spent eight months with this kid, judge, and he is kind, and generous, and soft spoken. I can't remember a client who shoulders the blame like he does. By keeping him in the community, with its resources, his friends and family, the court will acknowledge that not all sins are mortal, and all sinners need not be housed behind razor wire and concrete block in order to gain redemption.

Sincerely,

A handwritten signature in cursive script, appearing to read "D.E. Barber". The signature is written in dark ink and is positioned below the typed name "D.E. Barber".