

## Deterrence . . . or State Terrorism?

While President Clinton and the Congress continue to “git tuff on crime”, a prisoner in Memphis, Tennessee, sent me part of an opinion from the U.S. Eighth Circuit Court of Appeals. This opinion illustrates that even Federal Judges are beginning to openly admit that the “git tuff” approach to crime is irrational, unjust and – given the excessive length of the legislatively imposed sentences – essentially terroristic. After all, the purpose of long, mandatory sentences is not judicial, it’s political (to “deter” crime). That is, the legislature has decided to sentence Smith to twenty years for a crime that any fool could see warrants no more than five years in order to scare Jones, Johnson, and O’Reilly into obeying the law lest they, too, have their lives crushed by politicians hungry for reelection.

By definition, the concept of “deterrence” is contrary to any notion of justice for the person convicted. The reason for imposing excessive sentences is not to punish the criminal, but to empower government by scaring the public into fearful obedience of government authority. That’s not justice for the criminal or for the victim (who is part of the ter-

rified public). Instead, it’s at least an unconstitutional usurpation of power by the legislature, and arguably an act of political terrorism directed against the American people.

The stench of the world’s largest prison system (ours) has reached even the ivory towers of Federal Judges. Perhaps a return to reason (justice) is imminent – especially if some political pressure were generated by the voters.

Unfortunately, his letter did not include a precise cite. However, the case involves two men named Stockton and Badley in the early 1990’s — that information plus the Circuit and Judge’s name should be sufficient for those interested to find the case. [Bracketed comments are my additions to the judge’s opinion.]

J. BRIGHT, senior circuit Judge, concurring separately.

I write separately to comment about the cruel sentences imposed on Stockton and Badley, and to observe that, although not illegal, these sentences emanate from a law gone awry. Sentences ought to balance punishment

with societal needs as well as some concern for the offender. Under the sentencing guidelines, a judge can exercise little, if any, judgment on these matters . . . .

In this case, both offenders will serve nearly twenty years in prison for their first offenses. Stockton, now only age twenty-six, will be forty-five years old when he emerges from prison. Badley, now age forty-four, will be sixty-three years old when he is released, assuming he can survive that long. The cost to the government and its taxpayers will be approximately \$680,542 (38 years times \$17,909; this figure does not include inflation).<sup>1</sup> The suffering imposed on these men and their families cannot be calculated in monetary terms.

In my judgment, this sort of massively heavy punishment cannot be justified in a civilized society, unless there is a showing that lengthy incarcerations protect society from incorrigible and continuing criminals. No such showing has been made in this case.

As our federal prisons at 165% capacity,<sup>2</sup> include nonviolent first-time offenders, many serving near-life sentences, they begin to resemble the barbaric

Turkish prisons depicted in the 1978 academy-award-winning motion picture *Midnight Express*.<sup>3</sup> That film shocked the public by presenting the true story of a young American tourist arrested in Turkey for heroin smuggling and sentenced to life in prison by the Turkish courts. The public should be similarly shocked if it knew of the excessive sentences that can be and are imposed on [America's] first-time offenders.

The Sentencing Commission has created a system for punishing drug offenders based almost solely on the weight of drugs, and not based on the criminality of offenders. This system runs counter to the Congressional directive that this court shall impose a sentence that is sufficient, "but not greater than necessary to comply" with the sentencing objectives established by Congress. 18 U.S.C. Sect. 13553(a) (1988); see also *U.S. v. England*, No. 91-2128, Slip op. at 15 (8th

Cir. 6/3/92) (Bright, J., concurring); *U.S. v. Quarles*, 955 F.2d 498, 505 (8th Cir. 1992) (Bright, J., concurring and dissenting).

Although the Sentencing Commission and Congress, in their war on drugs, intended to use long sentences as weapons to deter drug crime, doubt exists that longer sentences have had any deterrent effect on crime. See *Freed*, supra note 2, at 1707; Andrew Ashford, *Sentencing Purposes in England*, 3 Fed. Sent. Rep. 337, 338 (1991). These excessively long sentences mandated by the guidelines waste the lives of many men and women. Yet, can we say we are winning the war on drugs? It is time for a new and more rational look at sentencing. See e.g., Gerald W. Heaney, "The Reality of Guideline Sentencing: No End to Disparity", 28 *Am. Crim. L. Rev.* 161 (1991).

While I am obligated to affirm the sentences, I need not put my stamp of approval on them.

<sup>1</sup> See *U.S. v. Quarles*, 955 F.2d 498, 505 n.6 (Bright, J., concurring and dissenting).

<sup>2</sup> Daniel A. Treed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *Yale L.J.* 1681., 1700 n. 102 (1992) (citing Attorney General William P. Barr, Remarks to the Cal. Dist. Attorneys Assoc. (Jan. 14, 1992)).

<sup>3</sup> The United States incarcerates more than one million people, a larger share of its population than any other nation; Sentencing Project, a nonprofit research organization. "United States Leads in Imprisonment", *St. Louis Post-Dispatch*, Jan. 6, 1991, at 6E.

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