Does Anyone See a Problem Here? Our Failing Judicial System

By John B. Webster and Chrisa Gonzalez
National Prison & Sentencing Consultants, Inc.
310 Bourne Avenue
East Providence, RI 02916
401-339-8368

As of January 2005 the American criminal justice system has in excess of 181,000 Americans in federal custody and over 2 million people are incarcerated in the various states' systems. One out of every 134 Americans is incarcerated. America has the highest per capita rate of incarceration than any nation in the world including present and former totalitarian regimes such as China, Libya, North Korea or even Stalinist Russia.

More has been written about the American criminal justice system than perhaps any other system in either modern or ancient history. Few systems have been critically examined more than ours. I make no attempt to discuss the historical developments of our system or all its shortfalls. As often recognized by participants in the system, "It ain't the best, but it is the only one we got." Perhaps it "aint the best" due its amalgamation of ancient English judicial principles (the common law) with idealistic and ancient constitutional principles examined through ever changing societal mores, values and technological and medical developments. Perhaps, the system is fine but its participants are failing the ideals and standards of our forefathers when the "system" was created. I've often wondered what would have happened in Justice John Marshall, the Third Chief Justice of the US Supreme Court, never wrote the seminal (and hyperbolic) decision in *Marbury v. Madison, 1 Cranch 137 (1803).* Who would or could force the President to deliver properly authorized judicial commissions? The critical assumption in *Marbury* was that the Supreme Court had the constitutional authority to declare Acts of Congress and the Executive branch unconstitutional.

What would have happened if former President Nixon simply said "No" when the Supreme Court ordered him to release the "Nixon Tapes." Why was "separate but equal" constitutional in 1898 when

the Supreme Court decided the *Plessy v. Ferguson,* 163 U.S. 537, (1898) case but clearly unconstitutional in 1954 when *Brown v. Board of Education,* 347 U.S. 483 (1954) was decided?

Of more modern importance, why was it legal prior to June of 2004 for a judge to make findings of fact that added a substantial amount of prison time to a defendant's sentence, but such was unconstitutional on June 25, 2005. See, *Blakely v. Washington*, June 24, 2004. Is the system making a "market correction" similar to the financial markets? Do the embedded, acknowledged and time honored frailties of man so permeate the system that any system is destined to produce unjust results at times? Or perhaps the system itself brings out and highlights those same human frailties so as to ensure the systemic imperfections' proliferation and exacerbation?

What most people fail to realize however is that the judicial system loathes changes. Its judges, lawyers, administrators, probation officers, police, law enforcement agencies often oppose change or new developments. The reason appears rather simple: Any change is a threat to the *status quo* and the *status quo* is where the individuals evolved, developed and worked.

What we see nonetheless is the proliferation of legislative pronouncements that are not only thrust upon the people, but upon those chosen to execute those laws. Congress and state legislators alike seldom support a piece of legislation unless it is "poll driven." Recognizing that many politicians view their main function as getting re-elected, few buck public opinion or what they perceive as the sentiment of the day. In other words, the legislation will be sponsored or supported only if a large plurality or a majority of that legislator's constituency supports the law or its underlying platform or ideology. Unfortunately few of those constituents truly appreciate the ramifications of the law or in fact understand the law at all. For instance, for almost 30 years countless politicians ran on a "get tough on crime" platform. No politician ever won an election on a platform setting inmates free or requiring MORE due process safeguards. Of course, EVERYONE, the theory goes, will support the general concept

of getting tough with criminals. But how many of the electorate ever asked for the specifics? Few, I believe.

This was how we got the ridiculous, offensive and in my opinion patently absurd "Rockefeller Laws" where the adage of "lock 'em up and throw away the key" was put into practice. If the purpose of such draconian laws was to deter criminals, it failed. Drug use and distribution and rates of incarceration for drug offenses are at an all time high. The so called "War on Drugs" is a pure and simple unadulterated failure that only a few courageous legislators now admit.[1] There are as many drugs and drug addicts on the street today as there were in the 1970's when these "Rockefeller Laws" were first enacted and over 500,000 Americans are in prison for drug offenses. The last time you voted for a politician with an "anti-crime" platform, did you expect that they would pass a law requiring someone to spend 25 years for behind bars for stealing videos? How about first time, non-violent drug offenders getting 30 or 40 years? Did you vote for that too? Well, you say, the judge has discretion and therefore after carefully considering the defendant's lengthy record and abysmal attempts at rehabilitation, the judge was of the opinion that a life sentence was in order. Wrong. Both Congress and state legislatures alike have slowly but effectively taken away judicial discretion and imposed mandatory minimums sentences and, as some judges believe, a judicial straightjacket. Again, how did this come about?

Indeed, a few judges exercised their judgment in ways that seem to offend the public conscience. Many judges imposed what appeared to be absurdly light sentences. Needless to say, there was a justifiable public outcry and relentless media attention to these isolated incidents. Rather than addressing *that* particular judge's seeming dereliction of duty and disregard of their oath, Congress and state legislatures passed laws that mandated that all judges impose certain sentences for a particular crime rather than be able to examine the particularized facts and the admittedly unique circumstances and history of the offender. Previously, judges were

[1] . The states of New York, Pennsylvania and Michigan have recently rewritten many of their drug laws and now provide emphasis on rehabilitation and treatment rather than on incarceration.

able to fashion punishments based upon the perceived needs of the criminal (rehabilitation) while also tending to society's need to be protected from violent criminals as well as the necessary object to punish offenders. That discretion has now been taken away form most judges---particularly in the federal system. Many in the judiciary and former judges now feel that they are nothing more than legislative minions acting in violation of their oath when they impose a mandated sentence that that they believe is unconstitutional or unconscionable. Hence, often—but not often enough--- these judges speak out. In his December 31, 2004 Report to Congress, Chief Justice Rehnquist pointedly cautioned Congress about its threat to impeach federal judges that are "out of the mainstream."

Recently, Justice Anthony Kennedy, Associate Justice of the United States Supreme Court, spoke in staunch opposition to mandatory minimum sentences and the United States Sentencing Guidelines. Justice Kennedy recently told the American Bar Association stated that: "Our resources are misspent, our punishments too severe, our sentences too long." Although the Supreme Court has repeatedly upheld the legality and constitutionality of the Federal Sentencing Guidelines and Congress' sentencing scheme, Justice Kennedy stated that:

> "The court on which I sit and other courts have upheld long sentences, but please remember because a court has said something is permissible does not mean it is wise." Although, unwise from a penological, societal and financial point of view these laws are generally "popular" at least until the individual member of the electorate is able to directly experience their draconian effect."

Indeed, some Judges have spoken against the concept, but have quit rather than follow the "will of the people" as codified through mandatory minimum sentences. In fact, United States District Court Judge John S. Martin, Jr. recently resigned from the United States District Court for the Southern District of New York. In explaining is rationale, Judge Martin courageously wrote:

> Every sentence imposed affects a human life and, in most cases, the lives of several innocent family members who suffer as a result of a defendant's incarceration. For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice.
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> When I took my oath of office 13 years ago I never thought that I would leave the federal bench. While I might have stayed on despite the inadequate pay, I no longer want to be part of our unjust criminal justice system.[2]

Judge Martin felt that the system was so unjust that he was no longer able to be a participant dispensing "justice" in accordance with the emotional and politically motivated mandates of the legislature rather than on long established and supported principles of criminal *justice*.

The United States Sentencing Commission was established by Congress in 1984 and was designed to, in part, to eliminate inequities in sentencing whereby one defendant may receive a suspended sentence for marijuana distribution where another would receive 8 years in prison. However, the "system," as devised by the United States Sentencing Commission, has with few exceptions, essentially eliminated the Judges role in sentencing. Particularly troublesome is the fact that prosecutors in charging and negotiating plea bargains effectively determine or preordain the sentence that the court must impose. Judge Myron Bright of the United States Eighth Circuit Court of Appeals recently wrote that:

[2] June 24, 2003, *New York Times*

> However, the Sentencing Guidelines and other changes limit the discretion of the district judge. This does not mean that sentencing disparities have been eliminated or that injustice does not exist, because it does. What it has come to mean is that much of the discretion in sentencing decisions unfortunately falls to persons far less qualified to judge an offender than the district judge. While we say the district judge sentences the offender, in fact, the prosecutor, as I have shown in a number of opinions, often has more input into the sentence to be imposed than does the district judge. The sentencing process also can become mechanical when a probation officer figures out the mathematical aspects of what constitutes a sentence under the guidelines.[3]

In other words, as a result of voter complacency, the inherent vagaries and problems of political process, and prosecutorial zeal from those of John Ashcroft's ilk, the penal system has devolved into an arena where adjudication, discretion and compassion have been replaced by an almost mechanical calculation based upon the charge and the plea.

For instance, in the Federal system, one of the most effective methods a criminal has to reduce their sentence is to provide "substantial assistance" to the government. In other words, to fully cooperate. However, under Section 5k1 of the United States Sentencing Guidelines, the prosecution is the sole arbiter of whether the defendant's cooperation was substantial enough to warrant the downward departure. Only the government can file the requisite motion so as to permit the judge to downwardly depart based on substantial assistance. Thus, even if the judge believed that the Defendant's cooperation was substantial, honest and fruitful in terms of other convictions and solving other crimes, unless the prosecutor files a 5K1 Motion, the judge's hands are tied. It is all too often that

[3] *United States v. Flores*, 336 F. 3rd 760 (8th Cir. 2003)

a defendant will immediately cooperate, wear a wire, permit telephone taps, provide records, make drug buys and provide truthful testimony AND then the government refuses to file the motion. In fact several courts have concluded that this very process—albeit underhanded—is perfectly legal.[4]

To be sure, there are numerous other bases in which to seek a downward departure and to relieve the judge from their legal straightjacket. However, these bases, enumerated in Section 5K2 of the Sentencing Guidelines (as well as in other provisions of the Guidelines and sporadically placed throughout various statutes), are also quickly being eroded. In 2002, pursuant to a Congressional mandate (and direct Congressional intervention), the United States Sentencing Commission again further reduced a court's ability to grant a downward departure. In a little known amendment to the "Amber Alert" bill known as the Feeney Amendment, the White House tacked on a rider which eliminates several other reasons for a court to grant a downward departure. Not to be outdone, in August 2003, soon to be former Attorney General John Ashcroft mandate that all Attorney Generals in the United States develop prepare and submit to Congress a list (a blacklist?) of all federal judges that grant downward departures. Again, only a few directly affected or connected to the system are aware of these subtle and not so subtle attempts to eliminate judges' discretion in sentencing.

What I believes further exacerbates the unfairness of our system, is the system itself. It must be understood that the American judicial system is based on the adversary system. In other words, an "adversarial" battle between the government and the defendant. As with anything of an adversarial nature, the combatant with the best resources usually has a substantial advantage. In all criminal cases, law enforcement authorities have unlimited resources---not nearly unlimited or seemingly unlimited but *absolutely* unlimited. Typically, the government would have had years with unlimited manpower to investigate an alleged crime. It had the benefit of secret grand jury investigations and discovery and of course the ability to interview and obtain statements from cooperating witnesses. At the point

[4] *See, e.g. United States v. Medford*, 194 F.3d 419, 423 (3d Cir. 1999).

immediately prior to an indictment, the government for the most part has an airtight case. The government has had the benefit of innumerable law enforcement personnel, a substantial if not unfathomable institutional database; scientific analysis, DNA samples, fingerprints, criminologists, experts from every field expertise necessary. At this juncture, the indictment is handed down by a grand jury and unless waived, the defendant has 90 days to get ready for a trial. At this point in the process, the defendant, quite often while being held, must obtain a lawyer and prepare a defense. If being held, that person may get to meet with their lawyer 1 or 2 hours a few days a week. During that time they must prepare a defense, investigate witnesses, obtain discovery, research, analyze and in their spare time enjoy the surroundings of a detention center. In the meantime, they have lost their jobs and access to money as their accounts are often frozen and or seized. Even though the 8th Amendment to the United States Constitution mandates bail in non-capital cases, courts routinely deny bail once the prosecution invokes the incantation of "flight risk" or a 'threat to the community." The prosecution knows full well that they are more likely to obtain a plea or cooperation if the defendant is sitting in a despicably maintained and dangerous detention center. Thus, it is interesting that the prosecution will seize all of the defendant's assets and of course not object to the $1,000,000 bail the court suggests as being reasonable. For most criminal defendants, a million dollar bail bond is not appreciably different than any bail at all. Of course, the court is not constitutionally permitted to deny bail outright except in capital cases or where the defendant poses a danger to others or is a grave flight risk. As a result, many judges set bail but at a price so high it might have not been set at all. The full court press is on to compel a guilty plea and/or obtain cooperation. Keep in mind, however, that the defendant is still considered innocent. Trust me, he doesn't feel very innocent at that point. To the uninitiated however, help appears to me on the way.

The lawyers of course are an integral part of the system. At or immediately after the arraignment, where the charges are formally lodged against the defendant, the court will recognize the defendant's private counsel or will appoint counsel. In the federal

system, if the court appoints counsel, they will come from one of two places: the Federal Public Defenders Office or from a list of private attorneys willing to be appointed at very substantially reduced fees. These are known as CJA attorneys, or Criminal Justice Assistance Program attorneys. They are usually experienced private attorneys who have volunteered to represent indigent attorneys at a substantially reduced fee. Many are quite skilled and have a busy and lucrative federal criminal practice. Indeed, it is certainly possible that whether an attorney is appointed via the Public Defender's office or CJA, that a defendant will receive competent, skilled counsel and the soundest legal advice. It is also a distinct possibility that a criminal defendant will receive neither. Many attorneys in the Public Defender's Office are simply too overworked or inexperienced and have a caseload which does not permit proper representation. All too often these attorneys merely run through the motions of representation and often fail to discover and investigate facts which may greatly assist the defense with an acquittal or a non-punitive plea bargain. In fact I have met many criminal defendants who have met their court appointed lawyer twice, usually not even the same person: Once at the arraignment and once and the entering of the plea. It is absolutely impossible for anyone to receive sound legal advice and to make intelligent, focused and considered decisions about the rest of their life, when they don't have the opportunity to confer with counsel in any meaningful way. I have literally witnessed lawyers looking around the courtroom and hallways bellowing out the name of their client whom they have never met. This practice, although slovenly at any time, certainly makes one question the process when it occurs at such a late stage of the proceedings. In fact, I recall one defendant who was being held pending trial. He knew he was leaving the facility in a couple of days to go to court. When queried, he wasn't sure why he had to make an appearance but did not seem concerned since he had never met his court appointed lawyer and that being the case, the appearance could not have involved a matter of great significance. Upon return from court, he informed me that he went to a hearing to negotiate his plea and upon his lawyer's advice plead guilty. He was led to believe that his "lawyer" cut a great deal. He ultimately received 188 months in federal prison. Certainly knowing only the facts as stated above, I

couldn't surmise as to whether this was a good deal or not. However, I can state with absolute certainty that the lawyer did not adequately represent the individual, as the attorney did nothing other than stand there at the plea and presumably the sentencing hearing. Presumptively, a lawyer can not adequately represent a client he has neither met nor spoken to.

Is it me or does anyone else see a problem here?