

The Supreme Court
State of Washington

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January 26, 2011

Mr. Luis Ricardo Fraga, Board President
OneAmerica
1225 S. Weller Street, Suite 200
Seattle, WA 98144

Re: Issues Regarding Gross Misdemeanor Sentencing Practices in District and
Municipal Courts

Dear Mr. Fraga:

I recently received a letter dated December 13, 2010 (attached) expressing concerns about sentencing practices in Washington's courts of limited jurisdiction and their impact on immigrants. The unsigned letter indicates it was sent on behalf of several organizations, including OneAmerica. Because the return address on the envelope is for your organization, I am responding to you with the hope you will share it with others as you feel appropriate.

The Washington Supreme Court and I, as chief justice, are committed to the cause of equal justice for all persons served by the judicial branch. We strive to honor that commitment through judicial education, opinions and rulemaking.

Education

It appears that misdemeanor sentencing practices changed in 1982 as a consequence of the decision in *Avlonitis v. Seattle Dist. Court*, 97 Wn.2d 131 (1982). In *Avlonitis*, the district court could have imposed a 365 day sentence and suspended some or all it. Instead, the district court imposed and suspended a 30-day sentence. The Supreme Court held that the district court only retained jurisdiction to revoke the suspended sentence during the 30 days actually imposed. In response, judges then began routinely imposing maximum

sentences and suspending portions of them as the only way to retain jurisdiction to revoke in case of a probation violation.

The legislature responded the very next legislative session by expressly extending the court's jurisdiction without regard to the number of days suspended. *Laws of 1983, Ch. 156*. Nonetheless, it appears that many courts did not revert to pre-*Avlonitis* practices of imposing less than maximum sentences despite the change in the law. In most cases, current law gives judges the discretion to impose fewer than 365 days and still retain jurisdiction for either two or five years for gross misdemeanors.

This sentencing practice and other issues described in the December 13, 2010 letter were discussed during a June 2010 educational session for limited jurisdiction courts. The session, entitled "Challenges of Serving Immigrants in Courts of Limited Jurisdiction," was sponsored by the Gender and Justice Commission. Participants were provided with materials prepared by the Washington Defender Association's (WDA) Immigration Project staff and others describing immigration consequences of particular court actions and a "Practice Advisory Regarding Litigation Strategies to Challenge Routine Imposition of 365 Day Sentences in Misdemeanor Cases for Noncitizen Defendants."

The educational materials are maintained on the Administrative Office of the Courts (AOC) website and available for download at any time.

AOC and the Gender and Justice Commission recently received a grant from the State Justice Institute to develop a program that will train all judicial officers and key court personnel on immigration issues that arise within our courts.

This work is overseen by the Advisory Committee on Immigration Issues chaired by Judge Mary Yu and Judge Ann Schindler. The committee is officially sanctioned by the Access to Justice Board, the Gender and Justice Commission, the Minority and Justice Commission, and the Board for Judicial Administration (BJA). The District and Municipal Court Judges Association (DMCJA), the District and Municipal Court Managers Association (DMCMA), the Superior Court Administrators Association (SCA), the Superior Court Judges Association (SCJA), and the Washington State Association of County Clerks (WSACC) have all selected representatives to serve on the committee. In addition, the Seattle University (SU) School of Law, the SU School of Law Korematsu Center, the SU Women's Law Caucus, and the University of Washington School of Law also have representatives on the committee. Dr. John Martin serves as a consultant to the project.

The work is divided into five areas:

1. Educational programs for judicial officers, court personnel, and the clerk's office
2. Development of immigration resources
3. Bench guides for judicial officers and court personnel
4. Online educational and informational programs
5. Development of model policies and procedures

I will share your letter with the advisory committee and Dr. Martin.

All new judicial officers must attend a week-long Judicial College within the first year of their appointment or election. The program includes sessions on ethics, cultural competency, and sentencing. I am forwarding copies of the letter to the Judicial College Board of Trustees with the hope there can be discussion of these issues, perhaps as early as January 2011.

Likewise, I am forwarding a copy of the letter to Justice Susan Owens as chair of the committee that is developing education programs for a fall 2011 conference of judicial officers from all levels. I note that a copy of the letter was already sent to the District and Municipal Court Judges' Association officers and board members.

In addition, I will forward the letter to Justice Charles Johnson, chair of the Minority and Justice Commission.

Opinions

The WDA Practice Advisory described above also outlines, in detail, an approach to challenging 365 day sentences on appeal. It also states: "It is our hope that favorable decisions from a RALJ appeal will significantly and favorably shift the practices of judges who continue to refuse to exercise appropriate sentencing discretion. Additionally, we anticipate that at some point the issue will reach the Courts of Appeal." In this way, sentencing decisions can be analyzed and affirmed or reversed with a corresponding impact on sentencing practices of individual judges and the judicial community.

Rulemaking

The court does not generally initiate rule changes sua sponte. No new or amended rule has been suggested for consideration. I am certain the Supreme Court Rules Committee will give prompt consideration to any rule change that may be suggested.

Mr. Luis Ricardo Fraga, OneAmerica
January 26, 2011
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Statutes

On January 24 Senator Margarita Prentice introduced Senate Bill 5168, which would reduce all maximum misdemeanor sentences by one day, to 364 days maximum, in order to address the immigration consequence. Here is a link to the bill:

<http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/5168.pdf>

Thank you for bringing your concerns to my attention. I am certain that further education and developments in case law will continue to ensure just sentencing practices in all Washington courts.

Sincerely,



Barbara A. Madsen
Chief Justice

c w/enc: Justice Charles Johnson
Justice Susan Owens
Judge Stephen Brown, President, DMCJA
Judge Richard McDermott, Chair, Judicial College Trustees
Advisory Committee on Immigration Issues
Dr. John Martin

December 13, 2010

Chief Justice Barbara A. Madsen
Washington State Supreme Court
415 12th Avenue Southwest
Olympia, WA 98504-0929

RE: Issues Regarding Gross Misdemeanor Sentencing Practices In District and Municipal Courts

Dear Chief Justice Madsen,

We, the undersigned organizations, represent constituencies who advocate for fair and appropriate treatment of all individuals in both the immigration and criminal justice systems. We write to express our concerns regarding persistent and troubling sentencing practices in many district and municipal courts throughout Washington. We believe that an effort to return to proportional sentencing practices is necessary to ensure the due process rights of all defendants. The disproportionate, often severe, consequences of these practices on noncitizen defendants and their families highlights the urgent need for such reform.

Washington statutes permit imposition of anywhere between 0-365 day sentences for gross misdemeanor convictions. Case law further requires a court, in exercising its discretionary sentencing authority, to make proportional, individualized determinations based on relevant facts. However, despite the clarity of the law, routine (often blanket) imposition of 365-day maximum sentences has been a widely accepted practice in district and municipal courts for many years that remains deeply entrenched.

The practice did not become controversial until 2000 when changes in immigration law resulted in certain gross misdemeanor convictions, such as theft and assault, being classified as "aggravated felonies" where a sentence of 365 days is imposed (regardless of any suspended jail time). While classification of a conviction as an "aggravated felony" under immigration law is not the only immigration-related concern at sentencing, it is the most critical for noncitizen defendants. Such classification triggers the most severe consequences, including virtually automatic deportation and permanent separation from family and community, even for refugees and other lawfully present noncitizens (e.g., greencard holders).

In response, many defenders (and some prosecutors) began requesting, and many courts began imposing, where appropriate, sentences of less than 365 days to avoid these dire consequences. However, as the recent controversy sparked by the (now withdrawn) Ethics Advisory Committee opinion has revealed, many courts (and prosecutors) continue to steadfastly refuse to consider immigration consequences in exercising their sentencing discretion. (See attached EAC opinion and 10/11/10 memorandum from the Yakima Municipal Court.) These courts continue to routinely impose 365-day sentences, even when advised by counsel that a sentence of even one day less (of suspended time) would avoid triggering severe immigration consequences.

In its recent decision in *Padilla v. Kentucky*, the United States Supreme Court held that deportation is not a collateral consequence of the criminal proceedings, but rather a "particularly severe penalty" that is often the most relevant consideration for a noncitizen defendant in resolving his or her criminal case. The *Padilla* Court highlighted that providing "informed consideration" of immigration consequences in

the resolution of the criminal proceedings can be in the State's interest. It specifically sanctioned, where appropriate, crafting a sentence to avoid deportation as a means to ensure that justice is served.

Even prior to *Padilla*, Washington courts had clearly established that immigration consequences are a highly relevant factor in determining a defendant's sentence. In 2006, the Washington Supreme Court held in *State v. Osman* that the trial court had appropriately denied a SSOSA sentencing alternative to a noncitizen defendant facing likely deportation. The Court held that this did not violate his right to equal protection because "equal" treatment at sentencing did not mean "identical" treatment and consideration of immigration consequences was critical to fashioning an appropriate sentence.

In its published decision in *State v. Quintero-Morelos* the appellate court in Division III upheld a one-day suspended sentence modification from 365 to 364 so the defendant could avoid classification as an aggravated felon and certain deportation. In so doing the court specifically recognized that this did not violate any Constitutional provisions and recognized that judges routinely, and appropriately, factor federal law considerations into the sentences they craft.

The justifications used by judges who refuse to consider immigration consequences at sentencing, and insist on (often routine) imposition of 365 days, reflect a willful disregard, or at best, a willful ignorance, of this and other well-established case law. As such, we are deeply concerned that this intransigence reflects a bias against immigrants (most of whom are persons of color) that is interfering with the ability of noncitizen defendants to access justice in our courts. In our work, especially those of us who also practice before the Immigration Courts, we have witnessed the impact on countless individuals in our communities who were deported as aggravated felons due to first-time minor theft and simple assault convictions for which they received 365-day suspended sentence but did little or no jail time. Many left behind families and well-established lives to which they will never be able to lawfully return. Individuals convicted of these same offenses who received a sentence of even one day less than 365 have not suffered this same fate.

The law rightly accords judges significant discretion in determining the sentence to be imposed upon a defendant based upon the gravity of the offense and the individual factors presented. Therefore, the need for proportional, appropriate sentences should mean that imposition of the statutory maximum, 365 days, is the exception, not the rule. For both citizens and noncitizen alike, it should be a rare case indeed that warrants such a sentence; not the routine case, as is the situation today in too many district and municipal courts.

We believe there is a need to foster a cultural shift in district and municipal courts that would result in a return to more proportional sentencing practices for everyone. Certainly for noncitizens and their families this need is urgent. As such, we respectfully request that you take steps to address this issue.

We appreciate your time and attention to this matter and would welcome the opportunity to engage in further discussion on these issues. Thank you for your consideration.

Sincerely,

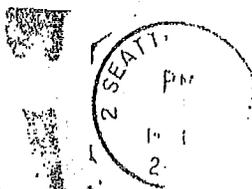
American Civil Liberties Union of Washington
American Immigration Lawyers Association – Washington State Chapter
Asian Counseling and Referral Services

Council on American-Islamic Relations (CAIR) of Washington State
El Centro de La Raza
Fuse Washington
Latino Bar Association of Washington
Loren Miller Bar Association
Lutheran Public Policy Office
Middle Eastern Legal Association of Washington
Minority Executive Directors Coalition
Native American Bar Association of Washington
Northwest Immigrant Rights Project
OneAmerica
Puget Sound Alliance of Retired Americans
SEIU 775NW
Skagit Immigrant Rights Coalition
Statewide Poverty Action Network
The Defender Association/Racial Disparity Project
Washington CANI
Washington Defender Association
Washington Women Lawyers Association
Vietnamese American Bar Association of Washington

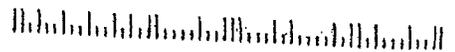
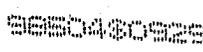
Cc: DMCJA Officers & Board of Governors



1225 S. WELLER ST., SUITE 200
SEATTLE, WA 98144



Judge Barbara Madsen
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929



WITHDRAWN

The Ethics Advisory Committee (EAC) is appointed by the Chief Justice of the state Supreme Court under General Rule 10, and consists of judges from the Court of Appeals, superior court, courts of limited jurisdiction, an attorney, and the Administrator of the Courts. This is the designated body to advise judicial officers on the application of the Code of Judicial Conduct. The Ethics Advisory Committee issues formal advisory opinions that are circulated publicly by the Administrative Office of the Courts. The opinions are available at a searchable Web site at www.courts.wa.gov, under 'Programs and Organizations.'

The Commission on Judicial Conduct (CJC) is separate from the EAC. The CJC is a constitutionally-created, independent agency of the judicial branch of state government which enforces the Code of Judicial Conduct, pursuant to WA State Const. Art IV, §31. Although EAC opinions are not binding on the CJC, a judge's compliance with an opinion by the EAC shall be considered as evidence of the judge's good faith. GR 10(b). The CJC has a searchable website at www.cjc.state.wa.us.

STATE OF WASHINGTON
ETHICS ADVISORY COMMITTEE
OPINION 10-03

Question

May a court adopt a blanket policy for all crimes with a maximum sentence of 365 days and impose a maximum sentence of 364 days to help defendants avoid possible immigration consequences? May individual judges adopt such a blanket sentencing policy for these types of cases?

A court is being asked to adopt the city attorney's policy to recommend a maximum sentence of 364 days (in cases in which the maximum sentence is 365 days) to help defendants avoid possible immigration consequences. The city attorney's office has exercised affidavits of prejudice against judges who do not apply this policy in all cases.

Answer

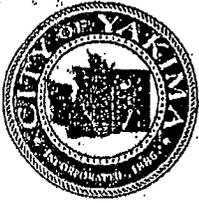
CJC Canon 1 requires that judicial officers observe high standards of judicial conduct to preserve the integrity and independence of the judiciary. CJC Canon 2(A) requires that judicial officers comport themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Finally, CJC Canon 3(A)(5) requires that judicial officers perform judicial duties without bias or prejudice.

A court or an individual judicial officer may not adopt a blanket policy with the 365/364 day sentencing scheme described above. It is prohibited by CJC

W. J. ADAMSON

Canons 1, 2(A) and 3(A)(5) because judicial officers are required to examine the facts and law in each case that comes before them and make an independent determination as to whether a defendant is guilty and the sentence merited in each case.

See Opinion 03-09.



CITY OF YAKIMA MUNICIPAL COURT
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 Yakima, Washington 98901
 Phone (509) 575-3050 • Fax (509) 575-3020

Revised

Judge
 Susan J. Woodard

TO: ~~Cynthia Martinez, City Prosecutor~~

Judge
 Kelley C. Otwell

Marty Dixon
 Troy Lee

Court Commissioner
 Kevin G. Eilmes

Bryan Gillihan
 Etoy Alford

Court Services Manager
 Linda S. Hagert

Kim Grijalva
 Adolfo Banda
 Patrick True
 George Hansen
 Fred Porter
 Kip Kendrick
 Barry Woodard
 Paul Edmonson
 Greg Scott
 George Colby
 Robin Emmans
 Amanda Stevens
 Tamerton Granados
 Howard Schwartz
 Ulvar Klein
 Kenneth Raber
 Christopher Taft
 Blaine Connaughton
 Ellen McLaughlin

FROM: Judge Kelley Otwell, Yakima Municipal Court (15)
 Judge Susan Woodard, Yakima Municipal Court
 Commissioner Kevin Eilmes, Yakima Municipal Court

DATE: October 11, 2010

RE: Gross Misdemeanor Sentencing Practices

Yakima Municipal Court has customarily followed a sentencing scheme that imposes a maximum of 364 days in jail for gross misdemeanors and then suspends a portion of those days. This sentencing practice has long been followed by many courts of limited jurisdiction. One such court recently requested an opinion from the Washington State Supreme Court Ethics Advisory Committee regarding the propriety of adopting a blanket policy with this sentencing scheme for crimes punishable by up to 365 days in jail. Ethics Advisory Opinion 10-3 advises against a court or individual judicial officer adopting a blanket policy described above for sentencing of gross misdemeanors.



In light of this Opinion, commencing November 1, 2010, Yakima Municipal Court will impose a maximum of 365 days in jail for gross misdemeanors and, from that number, suspend days in jail. The Court will continue to advise all defendants pleading guilty to any crime (both orally and in writing) of the potential consequences of conviction for a defendant who is not a citizen of the United States pursuant to RCW 10.40.200(2).