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DUI and the Trial Penalty: It's All in the Numbers

Defense lawyers are always concerned about the judge and the prosecutor only looking at the numbers — like those contained on a sentencing guidelines scoresheet. People are *not* numbers. While consistency and the removal of bias in sentencing are important goals, the criminal justice system should never reduce people to mere numbers. In a recent case, however, the numbers were the thing that really told the story, and a frightening one at that.

A tragic accident led to the filing of the charges (Leaving the Scene of an Accident With a Death; DUI Manslaughter). The man charged was a 28-year-old graduate school student.

The young man has always stated that he was not driving the car at the time of the accident. However, after a contentious trial that included numerous instances of misconduct by the prosecutor, the jury convicted the young man. The State immediately took him into custody. Unfortunately, trial counsel did not object to the misconduct, which led the appellate court to write that “the State made multiple inappropriate statements during closing argument. ... We affirm but write only to warn the State — *and specifi-*

cally the prosecuting attorney — that certain statements made during closing argument were improper.”

A sentencing hearing took place several months later before the trial judge. The defendant, now convicted, had a clean driving record and no prior criminal record or arrests. The judge commented that he was “impressed” by what the young man had done with his life prior to this accident. “Of all the people that appear in front of me to be sentenced, which is on a daily basis, thousands and thousands of people every year, there are not many that are college graduates,” the judge stated. “There are not many that are graduate school graduates or participating in graduate school. It’s an unusual circumstance.”

And yet, after noting how impressed he was with the defendant (and his family), the court sentenced him to 35 years in the Florida State Prison system. His scheduled release date is June 3, 2053.

This is where Al Barlow comes into the picture. A term in the English/Yiddish dictionary has become part of our language: “Mensch.” That term is used when the person being referred to is “a good person” or “a person of integrity and honor.” Next to that word in the dictionary is the picture of Al Barlow.¹

Barlow, a Florida Bar member for 35 years and former criminal defense trial lawyer, is one of three business partners who created a web-based software service called the Equity in Sentencing Analysis System® (ESAS®).

With Al and his team’s help, the young man’s defense lawyers² were able to conduct a study based upon information provided by the clerk of the court for the county in which the trial took place from Oct.

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1, 1998, through June 30, 2020. The data was then compiled by ESAS® and formulated by Technologies For Justice, Inc.³

What did the numbers say? From October 1, 1998, through June 30, 2020, judges in that county had sentenced 167 individuals for the offense of DUI Manslaughter.⁴ See Figure 1. The minimum jail/prison sentence imposed was 0.5 years, with the maximum sentence being 40 years.⁵ The average sentence imposed was 9.24 years, and the median sentence was 8.0 years.⁶

For the offense of Leaving the Scene of a Crash With a Death for the same time period, judges in that county sentenced 13 individuals. The minimum sentence was 1 year in prison, and the maximum sentence was 30 years (our graduate student client). The average sentence was 9.08 years, and the median sentence was four years.

The defense team also broke the data down to distinguish between sentences after pleas as opposed to trials for the judge and for the prosecutor (using data obtained from the State Attorney's Office pursuant to a public records request). The judge had only one of his DUI Manslaughter cases — the graduate student's case — proceed to trial during his short time on the bench, which resulted in the 35-year sentence.

However, another case that came before the same judge resulted in a vastly different sentence. In the second case, the State charged the defendant with Fleeing or Eluding a Law Enforcement Officer Resulting in a Death, Vehicular Homicide, and several additional criminal offenses.

In that case, when approaching the defendant's car, the officer "saw a large glass bottle of liquor in the front center cup holder [of the car]" and "[the officer] could smell a very strong odor of an alcoholic beverage and marijuana emitting from inside [the vehicle]." After the officer "announced [his] presence and identified [him]self by saying 'Police' ... [the defendant put] the vehicle in drive and [fled from the officer] at a high rate of speed." The officer further noted that he "believed [that the defendant] demonstrated behaviors consistent with someone operating a vehicle while impaired by alcohol and/or a controlled substance." Although several police vehicles took up the chase, "[the defendant] willfully disregarded and failed to stop the vehicle; instead he quickly accelerated his speed and

began maneuvering in and out of slower moving traffic in a manner that demonstrated a wanton disregard for the safety of others. ..." The defendant crashed his vehicle, and a passenger died. After all of that, the offender, who had a prior criminal record that included two convictions for Resisting a Law Enforcement Officer, Aggravated Battery, Possession of Cannabis, and Possession of Drug Paraphernalia, was sentenced by this same judge to 16 years in the Florida State Prison on an open plea to the court.

So the sentence given to the dangerous criminal who fled from the police, resulting in the death to another, was *less than half* that imposed against the student who was attending graduate school at the time his unfortunate *accident* occurred.

The *objective* evidence clearly showed that the *subjective* sentence, imposed by the judge at the request of the obviously peeved Assistant State Attorney prosecuting the case, was grossly disproportionate to those imposed upon individuals charged with such offenses in the county and far longer than even more serious offenses committed by individuals with long criminal records.

Even in a case in which the defendant charged with Leaving the Scene of an Accident Causing a Death was classified under Florida law as a "habitual felony offender"⁷ — with multiple prior convictions for Armed Robbery (five prior convictions), Aggravated Battery Causing Great Bodily Harm, Aggravated Assault With a Firearm, Possession of a Firearm in the Commission of a Felony, Resisting Arrest and Burglary — the sentence the judge imposed against that offender, at the request of the same prosecutor, was still 10 years *less* than the sentence imposed upon the graduate student client.

While the results of the graduate student's case were clearly tragic, nothing in the facts of the case would distinguish it from the average and median sentences imposed on others so convicted other than the fact that the graduate student *had exercised his right to proceed to trial* and had vigorously asserted his innocence through sentencing. Only one conclusion could be drawn from the analysis of the sentences contained in the defense team's motion: The young man was punished severely at the recommendation of the prosecutor — who was cited for several instances of prosecutorial misconduct in this case —

for his decision to proceed to trial in order to assert his innocence.

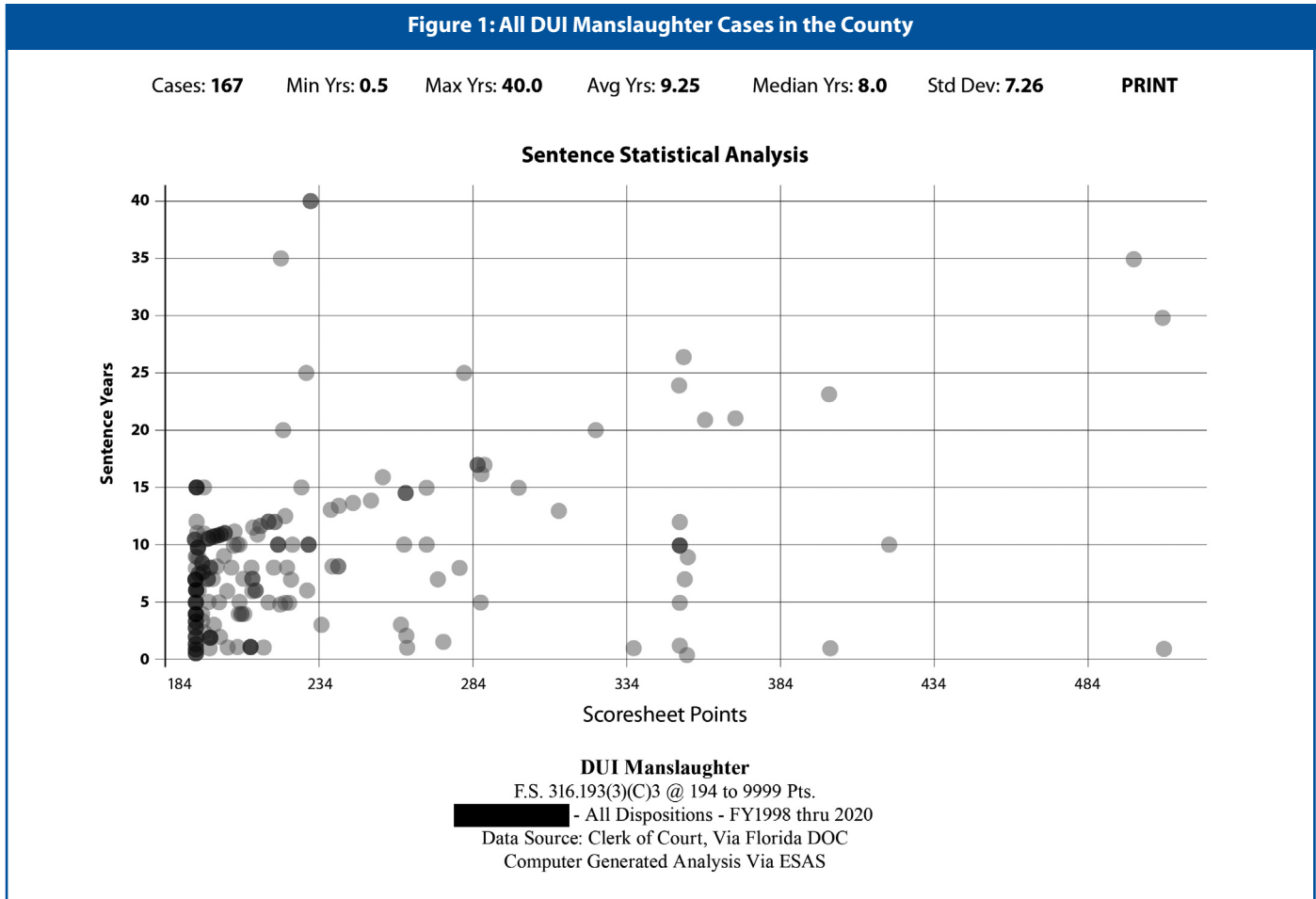
The prosecutor certainly had every right to recommend that the court punish our client consistent with the prior sentences that the prosecution had sought in similar cases for similar crimes. And the client had every right to be treated fairly and punished based on the jury's verdict and *not* because he refused to plead guilty to crimes he did not commit. The criminal justice system is not perfect. To date, 190 individuals convicted and sentenced to *death* have been exonerated.⁸ Death penalty cases are arguably the most closely investigated cases, utilizing the most experienced investigators, prosecutors, and defense attorneys. But there is a balance between individuals maintaining their innocence and being sentenced for the crimes of which they have been convicted.

In the words of John Adams, "[r]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."⁹ President Adams' colorful language reflected the strength of his view — a view shared by his contemporaries — that the right to trial by jury protects individuals' liberties as much as the right to cast votes for representatives.¹⁰

But what happens when an individual, accused of committing serious crimes but who did *not* commit those offenses, proceeds to trial and is found guilty? And what happens when a prosecutor then vigorously recommends to that court that it pronounce a sentence that is clearly disproportionate to the crimes charged and is objectively borne out of the prosecutor's desire to punish that individual for going to trial and protesting his innocence? What happens when the court bows to that recommendation? That is the Kafkaesque situation this young man now finds himself in, sentenced to 35 years in prison for an offense that he did *not* commit and given a disproportionately high sentence *because* he sought to defend himself and maintain his innocence against such charges.

With the help of Al Barlow, the defense team is seeking to mitigate this sentence pursuant to Rule 3.800(c) of the Florida Rules of Criminal Procedure. The defense team has asked the judge to consider the other sen-

Figure 1: All DUI Manslaughter Cases in the County



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tences meted out by judges in the same jurisdiction to similarly situated defendants, as well as those individuals previously sentenced by that judge for the same or similar offenses.

So will the judge do the right thing? We can only hope so. To be continued.

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Notes

1. Actually, his picture is not there, but it should be. Unfortunately, Wikipedia refused attempts to add his picture to its Mensch page.

2. The author is a member of the defense team.

3. The results of ESAS's data led to the awarding, in 2021, of the inaugural "Fairest of Them All Equal Justice Awards" based upon the analyzed data concerning the sentences imposed by judges across the state of Florida. See <https://www.sun-sentinel.com/local/palm-beach/fl-ne-judicial-awards-ss-prem-20210524-c6kxwz2vzbdxdfnyeqjca5fqai-story.html>.

4. The data obtained did not disclose if a single person perished as a result of the accident, as was the situation in this case, or if multiple people died or were injured.

Obviously, with additional points for each victim involved (Death - 120; Severe Injury - 40; Moderate Injury - 18; Slight Injury — 4), the guidelines score would be much higher, and the sentence could be expected to be much higher as well.

5. The data did show another seemingly outlier case in which the defendant received a 40-year sentence for his traffic homicide offenses. However, that sentence could be explained by the fact that the defendant had also been arrested for two other alcohol-related offenses: (1) a case in Virginia, seven months prior to the date of his homicide offenses, for driving under the influence, reckless driving and refusal to submit to testing, and (2) a case in Florida, the day after the fatal accident, for driving under the influence of alcohol.

6. An "average" is obtained by dividing the sum of the values in the set by their number. The "median" is the exact halfway point between all numbers in a set.

7. See FLA. STAT. § 775.084(1)(a) (2020).

8. Source: <https://deathpenaltyinfo.org/policy-issues/innocence> ("Since 1973, 190 former death row prisoners have been exonerated of all charges related to the wrongful convictions that had put them on death row.") (last visited Feb. 7, 2023).

9. See C. Bradley Thompson (ED.), THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 55 (2000).

10. See NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2019), www.nacdl.org/trialpenaltyreport.

About the Author

Robert S. Reiff has 40 years of experience



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