

Lyle E. Strom
District of Nebraska

*I know it's no justification or solace to you, but I am serious when I say this is an outrageous sentence, and I apologize to you on behalf of the United States Government.*¹

*It is interesting to note that in most of our states, persons convicted of murder or of rape, of child molestation and abuse, receive sentences substantially lower than those convicted of distributing, in many instances, small amounts of crack cocaine.*²

Appointed by: President Ronald Reagan, 1985.

Military Service: Ensign, Naval Reserve, 1943-46.

Law School: Creighton University, J.D., 1953.

Prior Legal Experience: Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler 1953-85.

Background and Reputation in the Legal Community

Judge Strom practiced with Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler in Omaha for thirty-two years before his judicial appointment. He was a litigator who took an active role in trial lawyer and bar associations including the International Academy of Trial Lawyers, the American Bar Association, the American College of Trial Lawyers, and the Nebraska and Omaha bars (serving terms as president of both these latter two). Judge Strom has also been a Director of the Legal Aid Society of Omaha and is known in his home state for his treatises on the Nebraska Jury Instructions and the Nebraska Rules of Evidence.

Lawyers say that Judge Strom is a well respected trial judge. One lawyer wrote, "I try cases all over the country and he is one of the finest judges I have ever been before." Lawyers also report that he has a good judicial temperament but that he is a stickler for civility and preparation. Plaintiff and civil defense lawyers consider him fair and evenhanded. Criminal defense attorneys concur. On sentencing, these lawyers report that Judge Strom is considered reasonable although some complained that he usually accepts the government's arguments on sentencing issues. On the other hand, one lawyer surveyed made the point that, "if he sees what he perceives to be an injustice – he will attempt to find a way in the guidelines to impose the sentence that he thinks is appropriate."

Judge Strom took senior status in 1995 but has maintained an active caseload. In a newspaper editorial after his announcement to take senior status, the Omaha World-Herald praised his "fairness, common sense, and incisive legal reasoning."³ The paper also recognized his

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Lauren Niles, *Strom Lengthens Terms in Crack Cocaine Cases*, Omaha World-Herald, November 20, 1995 at 1, 1995 WL 11339122 (quoting Judge Strom at the sentencing hearing of Eugene Maxwell and Hassan Majied).

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Joy Powell, *Shorten Terms in Crack Cases, Strom Urges Guidelines Discriminate, Congress Told*, The Omaha World-Herald, July 4, 1995 at 11; 1995 WL 4079533 (quoting Judge Strom's testimony before a congressional subcommittee).

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Editorial, Omaha World-Herald, September 3, 1995 at 10B, 1995 WL 4086546.

service to the community through the Boy Scout’s juvenile diversion program and as an adjunct professor at his alma mater.

Judge Strom on Sentencing Policy

In a 1993 case, Judge Strom ruled that crack cocaine penalties disproportionately affect African-American defendants, holding that blacks are “being treated unfairly in receiving substantially longer sentences than caucasian males who traditionally deal in powder cocaine, and this disparity simply is not justified by the evidence.”⁴ He used this disparity to depart downward and impose 20 year sentence on two black defendants, instead of the 30 years otherwise required by the Guidelines.⁵ Judge Strom was the first federal judge to cite racial disparity as the grounds for a downward departure. He also went to Congress to testify in favor of lowering crack penalties (as recommended by an amendment proposed by the Sentencing Commission). He told Congress, “We have an opportunity to resolve an unfair and unjust disparity in our sentencing system.” Congress rejected the Commission’s amendment and the Eighth Circuit reversed his ruling, ordering Judge Strom to resentence the defendants according to the Guidelines.⁶ At the resentencing, one of the defendants, Delano Maxwell asked, “You can’t depart downward? I don’t understand that. I really don’t. For two hundred years, a judge has been able to use his discretion in sentencing. How can you justify not giving me a chance?”⁷ Judge Strom promised to continue to work to change the law. He told each of these defendants, “I know its no justification or solace to you, but I am serious when I say this is an outrageous sentence, and I apologize to you on behalf of the United States Government.”⁸

Judge Strom has also been concerned about unwarranted disparities in other areas of the Guidelines including how the early Guidelines used an unrealistic formula for calculating drug weight for marijuana cultivators that increased their sentences.⁹ In a 1993 case of a grower before Judge Strom, application of the Guidelines resulted in a sentencing range of 97-121 months. Judge Strom *sua sponte* departed downward to 66 months because he found this classification system “arbitrary and capricious” and “simply didn’t make sense.”¹⁰ Judge Strom was reversed by the Eighth Circuit in that case as well.

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United States. v. Majied, 1993 WL 315987 (D. Neb. July 29, 1993) at 5.

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These two men, Delano Maxwell and Hassan Majied were brothers.

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See *United States v. Maxwell*, 25 F.3d 1389 (8th Cir. 1994).

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Associated Press, *Apologetic Judge Stiffens Crack Sentence*, Los Angeles times, November 21, 1995 at 19, 1995 WL 9847544 (quoting Maxwell from the resentencing hearing).

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Niles, *supra*, n. 1 (quoting Judge Strom at the sentencing hearing).

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Under the 1993 version of the Guidelines, if more than 50 plants were involved, each plant counted as 1 kilogram of marijuana for purposes of calculating quantity. However, if there were 49 or fewer plants, each plant converted to only 100 grams. The Drug Enforcement Agency has calculated that the average yield of usable marijuana from a single plant is only 400 grams. This discrepancy was eventually addressed by the Sentencing Commission through the Amendment process. See U.S.S.G. App. C, Amendment 516 (1995).

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Lastly, Judge Strom has spoken out about the disproportionality between drug sentences in federal court and sentences for crimes of violence in state court. In another crack case, Judge Strom was required to sentence Clarence Robinson to life in prison without parole for conspiracy. At the sentencing Judge Strom stated

I have before me a 23-year-old man who is facing a mandatory life sentence. And we have people in Nebraska every month being convicted of first-degree murder and second-degree murder who sentences are going to be substantially less than what I have imposed on this defendant.¹¹

At Judge Strom's urging, the government agreed to set aside an enhancement provision, which would have allowed the judge to impose a 27 year sentence, but only if the defendant dropped his appeal of the conviction which the defendant refused to do. Robinson had been convicted on the testimony of three drug dealers higher up in the network, who although charged with the same offenses, received sentences of 9 to 10 years in exchange for their cooperation. At sentencing, Robinson said, "I really don't understand how all this occurred. I'm in jail, and they are giving me more time than the guys who really did all the stuff . . . I don't know what to do."¹² Judge Strom replied that he had no discretion to lessen the sentence, saying, "I'm disturbed by that. I think its wrong, Mr. Robinson."¹³

Cindy Waugh

Offense: Conspiracy to Distribute & Attempt to Possess with Intent to Distribute Cocaine; Use of a Firearm in During a Drug Trafficking Crime.
Sentence: 115 months (drugs) + 60 months (gun) = 175 months.
Release Date: December 29, 2003.

Cindy Waugh was convicted of conspiracy and attempt to possess with intent to distribute more than 500 grams of cocaine and of using a firearm during a drug trafficking offense. The government convinced a jury that Cindy had been involved in distributing cocaine with her

United States v. Marshall, 998 F.2d 634 (8th Cir. 1993) (quoting Judge Strom from the record below).

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Joy Powell, *Crack Sentence Harsher than Most Killers*, ' Omaha World-Herald, March 2, 1996 at 1, 1996 WL 6007723 (quoting Judge Strom at the sentencing hearing). The judge explained that the average sentence in Nebraska murder cases is fifteen years of time served.

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Id.

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Id.

brother, Craig Waugh, and David Ipock as the result of a reverse sting operation on August 7, 1989.¹⁴

On that day, an undercover officer sold 1 kilo of powder cocaine to her brother and Ipock. Although Cindy was not present during the sale, the government contended that Cindy provided the money for the purchase and offered powerful circumstantial that she was involved in the deal. Specifically, the government's evidence at trial showed that Cindy and Ipock arrived first at a restaurant that was not far from the hotel where the transaction later took place. Cindy's brother joined them and the three of them were observed having a short conversation. Afterwards, Ipock switched from his car to Craig's car and drove with Craig to the hotel. Cindy then drove Ipock's car past the hotel several times during the transaction, eventually parking a few blocks away. Cindy was arrested shortly after the transaction. Found in Ipock's car in the seat next to her was a loaded, sawed off shotgun. A loaded handgun was also found in the backseat of this car.¹⁵

At her trial, several cooperating defendants including Ann Glinski, Cindy Hesper, and Lorraine Robinson testified that they had bought cocaine from Cindy. Lorraine Robinson also testified that she had helped Cindy separate and bundle large amounts of money which Cindy used to purchase cashier checks at banks, even though during this period, Cindy had no regular employment and was on public assistance.¹⁶

At sentencing, Cindy continued to deny her involvement in the offense, and therefore, received no credit for acceptance of responsibility.¹⁷ The probation officer estimated the quantity of drugs to be at least 500 grams but less than 2.5 kilograms, for a base Offense Level of 26.¹⁸ The probation officer also recommended a two point enhancement for obstruction of justice for allegedly threatening a witness,¹⁹ and a four level increase for her role as a leader/organizer of more than five people, for an adjusted Offense Level of 32. With a minor criminal record for theft and possession of marijuana, she was placed in

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The government also alleged that Cindy had been involved in cocaine distribution in the Omaha area before the onset of this specific conspiracy since around June 1987.

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See United States v. Waugh, 982 F.2d 526, 1992 WL 369480 (8th Cir. (Neb.)).

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The government also presented evidence that Cindy had substantial quantities of cash at hand including \$15,000 for the drug purchase, \$30,000 for bail for her and her brother that her boyfriend posted, \$15,000 she lent to her stepfather for him to invest in a recording studio with a friend, and about \$13,000 for a used Corvette. The car and the drug purchase and bail money was subjected to forfeiture.

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The probation officer who prepared the report gratuitously added that her denial was in the face of "overwhelming evidence."

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The probation officer stated his belief that the quantity was probably more than 2.5 kilograms, but he ultimately concluded that the testimony of Ipock was not sufficiently credible to support a higher offense level.

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Two weeks before the trial, government witness Lorraine Robinson claimed that Cindy asked her to lunch. When she refused, she told Lorraine that nobody would hurt her but later in the conversation stated that anyone who testified against her was going down with her. The government contended that this was an attempt to intimidate the witness.

Criminal History Category II. Thus, she was initially exposed to a sentencing range of 135-168 months. However, Judge Strom rejected the probation officer's conclusion that she had supervised more than five people, thus lowering this role adjustment to a two point increase for a supervisory role. With a sentencing range of 108-135, Judge Strom selected 115 months as her sentence on the drug counts. He then had to add a consecutive 60 month sentence for the gun count, yielding a total sentence of 175 months.

What is peculiar about this case is that for still unexplained reasons, her brother Craig and David Ipock, the named co-conspirators in Cindy's federal case were prosecuted by the State of Nebraska, not by the federal government.²⁰ Thus, while charged with conspiracy, Cindy was the only defendant in the federal case. Meanwhile, in the state court proceeding, the Nebraska prosecutors charged Craig and Ipock with possession with intent to deliver, not conspiracy, thereby limiting the quantity of drugs for sentencing purposes to just the 1 kilo from the controlled buy. Nor was either man charged with a state gun offense. Under these circumstances, and because the Nebraska drug statute did not contain a mandatory minimum sentence, Craig Waugh and David Ipock were sentenced to just 3 to 6 year terms in state prison for essentially the same conduct as Cindy.²¹

When it was time to pronounce sentence, Judge Strom first addressed Cindy, stating, "Miss Waugh, the most difficult job, I think, that a judge has . . . [is] the decision as to what is an appropriate sentence."²² Judge Strom then told Cindy that many federal judges had opposed the Sentencing Guidelines, but that they had been overruled by the United States Supreme Court. He also explained that although the judge imposes the sentence, it is the legislature that has the sole authority to decide on the applicable punishment, as well as the power to specify a mandatory minimum term. Having explicated the limits of his power, Judge Strom said that nevertheless

I am cognizant of what appears to be a disparity between what is proposed by the sentencing guidelines and the sentences that your brother and Mr. Ipock received in state court. . . . Congress has placed an extreme burden, I think, on the court [because here] I have two mandatory penalties that are called for. . . . And the law is clear that

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The record reveals no explanation for why only Cindy was charged in federal court. One disturbing possibility is the change of venue for Ipock was a quid pro quo for his cooperation. This would be particularly egregious as his cooperation agreement was eventually terminated by the government because the U.S. Attorney's Office concluded that Ipock was not being truthful. It could also be that the government's suspicions that Cindy had been involved in cocaine distribution with others was the deciding factor. Cindy's mother wrote that she suspected the government wanted to seize Cindy's cars and her substantial bail money. December 2, 1991 letter from Thelma Aronson to Whom it May Concern, at 3 (copy on file with author).

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In its unpublished opinion, the Eighth Circuit panel that denied Cindy's appeal recognized that the disparity between Cindy's sentence and her co-conspirators was the result of both forum and charge selection by federal and state prosecutors, differences in the sentencing laws of each jurisdiction, and the leniency shown to the co-conspirators by the state judge. However, the court held that these exercises of discretion by the prosecutors at both levels and by the state court were neither reviewable or permissible factors for a downward departure. *United States v. Waugh*, 982 F.2d 526, 1992 WL 369480 (8th Cir. (Neb.)) at 3-4.

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Sent. Tr. at 495.

I cannot depart from the mandatory portions of this sentence without a motion by the government. Do I think that's right? No. But I don't know that I'm in a position to rewrite the laws that Congress has adopted.²³

Judge Strom then turned to the impact of the sentence on all those concerned. He told her

I know that this sentence which I feel compelled to impose in this matter is going to be a fairly severe sentence. I do not do it without compassion. I do not do it without feeling responsibility not only to the defendant, to her family, and to members of this community, and the government that is represented here as the plaintiff, but nevertheless, I do it, I think out of a sense of justice, what is required.²⁴

There is not a lot of information about Cindy in her PSI because she maintained her right to remain silence while her appeal was pending. She had been a life long resident of Omaha and had resided with her stepfather for the previous three years. She was the single mother of girl who was eight when she was sentenced. On December 29, 2003, Cindy completed her sentence and she was released. According to the most recent court record, due to her numerous health problems and limited income, the probation office filed a motion to remit the costs of her probation which Judge Strom signed.

Compiled from Sentencing Transcript, PSI, inmate and family letters, newspaper articles, judicial opinions.

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Sent. Tr. 496-97.

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Sent. Tr. at 500. Clearly, the judge's complete remarks indicate that he felt the sentence was too severe. His final statement, "a sense of justice, what is required" requires some explication because its literal meaning is arguably contradictory. Probably, Judge Strom here was commenting on his broader, institutional sense that justice first and foremost required him to do his duty under the Constitution rather than impose his personal sense of justice on the result in this particular case.