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Let Our Judges Use Their Best Judgment

In a recent opinion piece, the Oregon District Attorneys Association (ODAA) voiced opposition to SB 401 and several other bills introduced in the Oregon Legislature that propose long-overdue reforms to Measure 11's (M 11) mandatory minimum sentencing.

In the 26 years since M 11 became law, we have seen the inequity of its one-size-fits-all sentencing scheme. It removed any discretion for a judge to impose a tailored sentence for the specific facts and circumstances of a particular case.

Measure 11 is a "one-strike and you're out" sentencing structure. Even if a person has no prior criminal history, they receive the exact same mandatory minimum sentence as a "career" criminal. Under M 11, the district attorney is allowed to ask for longer sentences based on "aggravating circumstances" around the crime, but the defendant's attorney is prohibited from asking the judge to impose a more lenient sentence based on "mitigating circumstances" such as young age, a first offense, or childhood trauma that contributed to the conduct.

In other felony cases, a judge considers information and reports from both sides before deciding the sentence. Judges have complained that the mandatory minimum sentencing in M 11 is often inappropriate, but they do not have discretion to modify it. Further, even though the legislature amended how M 11 applies to youth, it still applies to teens as young as 15 years old.

According to a December 2020 poll commissioned by the ODAA, 58 percent of Oregonians support judges having discretion when sentencing an individual. A second poll released last week by The Appeal found that 62 percent of Oregonians support SB 401 while 61 percent support repealing M 11.

ODAA prosecutors claim in their op-ed that M 11 provides equity based on "conduct, not color." Nothing can be further from the truth. M 11 has resulted in more inequities and has had a disproportionate impact on people of color in our state prison system. Instead of honoring the people's will expressed in their own survey, prosecutors are embedded in a fight to cling to the unbridled power and control over sentencing that they acquired under M 11.

Measure 11 inadvertently shifted the decision-making from a judge to the district attorney for sentencing an individual, 15 years or older, who is convicted of specific felonies. The changes M 11 instituted 26 years ago put the district attorney in the catbird seat. M 11 made it possible for district attorneys to stack unreasonable conditions on a crime suspect to accept a "deal."

Here are some examples of egregious conditions some district attorneys demand: forego any appeals, prohibit participation in rehabilitation programs, and/or require longer sentences than what the person would receive if convicted and sentenced under the standard sentencing guidelines.

Some ODAA attorneys have actually told me in open meetings that they oppose judges having discretion in sentencing because they don't trust judges. That viewpoint confirms how prosecutors' unchecked power for the last 26 years has warped their perception of the sentencing process. Since its founding 162 years ago, Oregon has invested in its judges — not the prosecutor — the power to impose sentences.

To address this unfair balance of power, SB 401 provides a sensible and logical fix. Here's how it will work:

The current M 11 mandatory minimum sentences will become the “presumptive” sentences. In other words, the sentence becomes a recommended or guideline sentence, but the judge has the discretion to impose a longer or shorter sentence for justice to be served in a particular case. Both the district attorney and the defense counsel will continue to serve as advocates. They will be expected to present their points of law and the facts supporting their recommended sentence. Then the judge — not the prosecutor— will decide the appropriate sentence.