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# Oakland County judge challenged on drunken-driving jail sentences

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A Bloomfield Hills attorney and a Wayne State University law professor are challenging 48th District Judge Kimberly Small's policy of sending first-time drunken drivers to jail, saying she is violating the defendants' constitutional rights and should be barred from hearing such cases.

In a motion filed Wednesday in 48th District Court in Bloomfield Township, attorney Robert Larin and professor Kenneth Mogill argued that Small violates the constitutional rights of defendants by sentencing almost all first-time drunken drivers to jail, often for weeks.

Small, the motion says, is legislating from the bench and is creating mandatory jail time when Michigan law does not require it. Larin and Mogill argue that she should disqualify herself from hearing the cases because she has made public statements showing what they say is a deep bias on drunken-driving cases.

The motion is filed on behalf of one of Larin's clients, Thomas Cygan, a 67-year-old West Bloomfield man who was recently arrested for the first time on charges of operating while intoxicated. The case is assigned to Small.

Small, through her office staff, declined to comment, saying it would be inappropriate to talk about a pending case. But she said in a recent interview with the Free Press that she believes sentencing drunken drivers to jail sends a message to the community that it is a serious crime that should not to be tolerated.

Experts said the motion creates an interesting legal question.

"There are arguments on both sides," said University of Michigan law professor Eve Brensike Primus. "If a judge is willing to impose a sentence within the statutory limits, then perhaps that is within the judge's province, but if they are compromising fundamental fairness and individual sentencing, that can become problematic."

Larin said he filed the motion "on behalf of anybody charged with a first offense at present, in the past, or in the future."

"I have nothing against Judge Small, but it is time this matter is resolved in the courts," he said.

Small's sentencing practices received national attention in recent weeks. On July 27, she sentenced former NBA basketball player Jalen Rose to 20 days in the Oakland County Jail following his arrest in March. He is expected to be released Aug. 18.

A Free Press review last month of drunken-driving sentences in metro Detroit and nationwide found Small exceeds most judges when sentencing first-time offenders.

"We have to decide if we're going to get serious about this or not," she told the Free Press for the article.

Under Michigan law, first-time drunken driving is a maximum 93-day misdemeanor, but there is no minimum mandatory jail time.

The motion filed by Larin and Mogill first will be heard by Small. If she denies it, they will argue it before Marc Barron, chief judge of the district court. If he also denies it, the case goes to circuit court and can be appealed to the court of appeals and then to the state Supreme Court.

Defense attorney Steve Fishman, who has handled a variety of high-profile cases in metro Detroit, said he supports the motion. "The purpose of sentencing is not to send a message to anybody, it's to judge the facts and circumstances of each individual and impose a sentence that is proportional and appropriate," he said.

Others support Small's tough stance on drunken driving.

"Those charged with this offense are a serious threat to the public," Paul Walton, Oakland County's chief assistant prosecutor, told the Free Press.