

Statement of Kevin Ring
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Chairman Greenleaf, members of the committee, thank you for the opportunity to testify at this hearing. Most of all, Mr. Chairman, I want to thank you for holding this hearing in the first place. All too often, criminal justice policy is enacted without any meaningful deliberation - without lawmakers holding any hearings and seeking the input of experts and stakeholders and the public. The House's hasty passage of HB 741 is just the latest example.

Like you, Chairman Greenleaf, I once supported mandatory minimum sentencing laws. As a counsel on the US Senate's Constitution, Federalism, and Property Rights Subcommittee nearly 20 years ago, I helped the chairman, then-Senator, later Attorney General John Ashcroft, draft federal drug mandatory minimum sentencing laws. I later came to see that the superficial appeal of mandatory minimums was not supported by evidence. Indeed, there is no evidence that they reduce crime and enhance public safety. Yet the high costs of mandatory sentences - economic and social - are all too real.

Having been at FAMM for almost 9 years, I have met with federal prosecutors and state lawmakers and I think I have heard all the arguments for mandatory minimums. I have observed what has happened in states that don't have mandatory sentences, as well as those that had mandatorics and then got rid of them. I have met hundreds of people who were saddled with lengthy mandatory sentences that far exceeded the severity of their crimes.

After participating in debates like the one happening in Pennsylvania right now, I am convinced more than ever that mandatory minimum sentencing laws are a colossal fraud. They are a cancer on the criminal justice system. And I don't mean just their unintended consequences. I mean everything about them - their creation, their distortion of our constitutional system - even their name is a lie.

As I intend to explain, mandatory minimums have nothing to do with public safety and everything to do with power. Although my testimony is on behalf of FAMM only, I am very glad to make the committee aware that reinstating mandatory minimum sentences is opposed by numerous groups from across the ideological spectrum, including the Commonwealth Foundation, Americans for Tax Reform, the American Conservative Union, the Charles Koch Institute, and the ACLU.

Mandatory Minimums Are Neither Mandatory Nor Minimal

I want to begin by addressing the most important issue in the debate over mandatory sentencing: do mandatory minimums make us safer? I will argue they do not, and I will do

so primarily by sharing with you the overwhelming evidence gathered over the past 30 years from experts and real-world experience.

There are many false claims made about the benefits of mandatory minimums, but the fraud begins with their very name. Mandatory minimums are not mandatory. "Mandatory" connotes that everyone who commits the same crime will receive at least the statutory minimum penalty. In fact, one argument we often hear from those who support mandatory sentences is that some crimes are so bad that anyone who commits them deserves some minimum prison sentence.

The truth is, mandatory minimums are never mandatory. Even when the facts of a case would trigger the statutory minimum, prosecutors – and prosecutors alone – determine whether a defendant will actually receive the minimum sentence imposed by the statute. Prosecutors hold this power because they determine the charges a defendant will face. If they want the mandatory minimum imposed, they will allege the facts necessary to trigger it. If they don't want the mandatory minimum imposed for whatever reason – they think the defendant deserves a second chance or the defendant is old and unlikely to reoffend or they think the sentence is too long; whatever their reasoning - they will either charge an offense that doesn't have a minimum sentence, or they will offer a plea deal that avoids it. In either case, it's their decision. I will return to this point later, but I want to be clear: mandatory minimums are *not* mandatory.

Second, they are not really "minimums," either, for largely the same reasons. Prosecutors routinely – every day – offer deals to defendants to reduce their sentences far below the minimum in exchange for guilty pleas. This happens at the federal level, in Pennsylvania, and throughout the country. Some will justify this leniency on the need to gain cooperation or some other grounds, but it bears noting: lawmakers can not tell their constituents that they have secured minimum prison terms for offenders because many defendants will receive much shorter terms. The minimums are not the minimum.

So mandatory minimums are not mandatory and they are not really minimums. This should not surprise anyone who knows how these laws were created. And here I want to focus on the most widely used mandatories in the federal and state systems: the drug mandatories.

Mandatory Minimums Are Completely Arbitrary

I know from personal experience that the minimums set by Congress for various drug crimes were not set after careful deliberation. They were not set after any substantive deliberation. This is public record at this point. In the 1980s, responding to the fear of a growing epidemic of crack use, and the high-profile death of basketball star Len Bias – if you haven't seen the ESPN 30-for-30 on Len Bias and how it affected drug policy, a Democratic-controlled Congress drafted new mandatory minimum penalties without a single hearing, without any testimony from experts or law enforcement or criminologists or anyone. The committee counsel who drafted the laws said members of Congress were responding to the politics of looking tough on drugs and just began outbidding one another. Let's make the penalty 5 years for 10 grams, no, how about 5 years for only 5 grams...and

then 10 years for a higher threshold. Charlie Rangel, the Democratic congressman from Harlem, said he was not going to let the Reagan administration win the drug issue.

By the time members of Congress finished bidding against one another, the disparity became 100:1 and that's what was passed. It was only later that they learned that Bias had died from powder cocaine, not crack. Oh well. The facts weren't important. These mandatory penalties were made up completely out of wholecloth. Why 5 years and not 3.5 or 4 or 7? They had no basis in evidence or data or reason.

In 1998, when I was a counsel on the Senate Judiciary Committee, I was tasked with "getting tough" on methamphetamine, which was the drug crisis of the moment. Our solution was simple: make meth penalties the same as crack penalties since they were the toughest on the books. 5 grams will get you 5 years and 50 grams will get you 10 years.

We held no hearings. We consulted with zero experts. We didn't study sentencing patterns for meth, or even try to determine if new penalties would have any effect on trafficking or use. We did no due diligence whatsoever. I wrote the bill up, and after that there was no stopping it. If you opposed the bill, we would have said you were soft on meth.

This is how our federal mandatory minimums were and still are created. I fear the same thing is happening here. How were the thresholds that trigger the various mandatory minimums in the House bill chosen? I have read where some lawmakers have said the bill was written to distinguish between addicts and dealers. Such distinctions are impossible to begin with, given that we know many addicts sell drugs to feed their own addiction, to settle debts with real dealers, and so on. But even assuming you could draw a non-arbitrary line, look at the House bill. Mandatory prison sentences kick in at one gram of heroin and 5 grams of methamphetamine and cocaine. Where did those numbers come from? Why one gram and not two grams, or 1.5? Did anyone research how much heroin a typical addict consumes daily? Did anyone even think to ask? And how were the sentence lengths for first and second offenses arrived at? What evidence is that based on? And while recognizing that consuming, buying, and selling any illicit drugs is a crime, can lawmakers really say with any confidence that *every* person who buys or sells these amounts in the House bill is a kingpin or serious trafficker? To ask these questions is to answer them. Nothing in this bill is the result of careful deliberation, or an earnest attempt at solving the opioid crisis. It is little more than mindless chest-beating channeled into legislation, and the other side just hopes you won't notice.

Research Shows Mandatory Minimums Do Not Enhance Public Safety

Some might argue that none of these criticisms matter – and that all that matters is that mandatory minimums work. They have made us safer, we are told. This argument, however, always rests on just one data set. In the 1970s, crime rates rose. In the mid-1980s, Congress and states like Pennsylvania passed mandatory minimum sentencing laws, and then a few years later, crime began to fall and has kept falling. So crime was high 30 years ago, we passed mandatorics, and now crime is low.

So let's turn to this issue – because for many, this is the defining issue in judging sentencing policy. Do we need mandatory minimum prison terms to keep us safe?

The answer is clearly no. And the evidence is overwhelming. Our current drug mandatory minimum regime has been in place for 30 years, which has given experts lots of time to review their record. And there are no studies I know of – none – that have concluded that drug mandatory minimum sentencing laws reduce crime. Most experts, like the two extraordinarily distinguished criminologists the committee will hear from, agree with University of Minnesota Law professor Michael Tonry, who wrote, “The weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away.” Meta-analyses of studies, including those cited by the National Academy of Sciences, have found the same result.

Tons of practitioners have found the same thing in their research. As others no doubt have or will mention, the Pennsylvania Sentencing Commission was asked to study the impact of its mandatory minimums and concluded in a comprehensive report: “Neither the length of sentence nor the imposition of a mandatory minimum alone” is connected to reduced recidivism. An interesting finding in the Commission's report, which should have been obvious, is that most Pennsylvanians didn't even know which crimes were subject to mandatory minimums. That was based on a survey of all Pennsylvanians. Now think about those who are involved in selling drugs, who are more likely to be what we call “low information” citizens. Do we think that crowd is poring through the Pennsylvania statutes to see what the penalty structure is for various crimes? Of course not. So then why in the world would anyone expect a deterrent effect from something people don't even know exists?

Note that the question about mandatory minimums is a different question than whether a greater reliance on prison overall has helped to reduce crime. Some experts have said the effect was negligible, say, 2% or 5%. Some, like James Q. Wilson, say it was as high as 25%. The person who put the most stock in prison was Professor Steven Levitt, co-author of *Freakonomics*. He said the greater use of prison in the 1990s deserved credit for 33% of the reduction in crime. But in 2012, he said:

In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration. Today, my guess is that the costs outweigh the benefits at the margins. I think we should be shrinking the prison population by at least one-third.

Those are the academic studies. What about more recent, real world experience?

Real World Experience Shows Mandatory Minimums Do Not Enhance Public Safety

Once again, we find that the evidence that mandatory minimums are needed for public safety is nonexistent. Consider the State of Texas, which does not have drug mandatory minimums. Texas is a border state so it sees its fair share of drug smuggling and trafficking.

Yet Texas's overall crime rate is at a 45-year low. In 2007, the state had a choice: spend \$3 billion on prisons or find another way to control crime without relying so much on prisons. Under then-Governor Rick Perry's leadership, the state created diversion programs that, in Perry's words, "treat alcoholism and drug addiction as a disease and not a moral failing." Instead of building new prisons, the state shut down three prisons. Most important, the recidivism rate of drug offenders decreased and the overall crime rate dropped to its now-record low.

Smart reforms helped saved tens of thousands of Texans from becoming victims of crime, helped thousands of Texans get back on their feet and become contributing members of society who pay taxes and support their families, and let the state invest in police and victim's services. What Texas did not do - and what no one is even asking for in Texas - is to pass mandatory minimum sentencing laws.

But what about other states, including those, unlike Texas, that had mandatory minimums. If mandatory minimums worked as their supporters claimed, we would expect crime to go down after mandatory minimums were enacted and go up after they were repealed or eliminated. But that's just not what we see.

Michigan and New York practically invented drug mandatory minimums and kept them on the books for decades. Then, in 1998 and 2002, Michigan, under a Republican governor, repealed its drug mandatory minimums, which at the time were the toughest in the country. After doing so, the state's violent and property crime rates dropped. In 2004 and 2009, New York scaled back its drug mandatory minimums, the so-called Rockefeller laws, and its crime rate fell and has continued to fall. New York City is enjoying historically low crime.

Rhode Island, Delaware, South Carolina, Georgia - dozens of states have either repealed or reformed their drug mandatory minimum laws in recent years and in each case, they experienced a falling crime rate and a falling prison population. That's why other states are shedding their mandatory sentencing laws. Just last month, Montana eliminated its mandatory minimum drug laws. Notably, Louisiana, indisputably the nation's most punitive state, is effectively repealing its mandatory minimum drug laws right now. Their senate, with the support of the state's district attorneys association, has already voted to repeal them and the House is expected to follow suit.

It makes no sense for Pennsylvania to go backwards, especially since Pennsylvania has joined the list of states that have been able to reduce both crime and prison populations in recent years. Crime has fallen even since the Supreme Court in *Hopkins* struck down most drug mandatory minimums. Instead of celebrating this achievement, proponents of mandatory sentences say it's too soon to tell if crime has gone down. It's only been a couple of years, they say. Of course, if crime had gone up, they would be saying the increase was directly attributable to losing mandatory minimums.

Because crime is down, mandatory minimum supporters seem to want to change the subject. Instead of talking about crime, they want to talk about drug overdoses. The same

too-short window for evaluating the loss of mandatories on crime rates turns out to be a completely appropriate amount of time to evaluate the loss of mandatories on drug overdoses. This is how you play tennis without the net.

Yet, even here, mandatory sentence backers must selectively choose their evidence to make a connection between the elimination of drug mandatory minimums and the state's heroin and opioid crisis. They say overdose deaths have increased since mandatories were invalidated. But that is misleading for a number of reasons. First, overdose deaths started rising in Pennsylvania while mandatories were still in effect. Second, overdose deaths are increasing all over the country, including in states like Ohio, which kept their heroin and other drug mandatory minimums. Florida has had harsh heroin mandatory minimums for nearly two decades, and is currently experiencing its worst heroin overdose death crisis ever. Finally, federal law hasn't changed. The toughest drug mandatory minimums are in federal law and those have remained in place while this epidemic has spread. Given all these facts, it is completely disingenuous to blame the lack of mandatory sentences in Pennsylvania for the frightening rise in overdose deaths.

It's worth noting that some states that have moved to act in response to the opioid crisis have specifically rejected mandatory minimums. In Alabama, for example, legislative leaders considered adding mandatory minimum terms for fentanyl trafficking but decided against it. Republican state senator Cam Ward, the bill's author, said, "'By working to eliminate the mandatory minimums in this bill, we are able to target the drug trafficker without inadvertently punishing an individual with an addiction.'" Needless to say, Alabama is not considered a soft-on-crime state.

It is hard to imagine this today, but when mandatory minimums were adopted in Washington, DC and across the country three decades ago, one of the other main arguments for doing so was to reduce drug use. We know how that worked out. Illegal drug use among high school teens is the same today as it was in 1988. Zero improvement. If anything, drugs are easier to get, they are more powerful, and they are cheaper.

The academic and real-world evidence is overwhelming: mandatory minimum sentences do not improve public safety. Failing to produce any benefits is sufficient reason to discard mandatory sentences, but this failure is compounded by the fact that these laws come with high costs. These costs cannot all be measured in dollars and cents.

Mandatory Minimum Laws Upset Constitutional Values

Mandatory minimums damage our constitutional system of separate powers and checks and balances. Our government is supposed to treat each of us as individuals, not as members of groups or classes. Individuals commit crimes, and individuals should be punished as individuals.

After all, no two time crimes or defendants are exactly the same. Context matters – even for crimes that elicit the most disgust and anger.

Mandatory sentences are often justified with a frightening story about the worst offender for whom the minimum doesn't seem long enough. In some states, we hear horror stories about a filthy adult pervert luring a pre-teen girl to pose nude for pornographic pictures to justify a certain "rock bottom" sentence for child pornography. But in many cases we saw that same one-size-fits-all law used to prosecute a high school senior who traded dirty pictures with his sophomore girlfriend. That 18-year-old also gets the rock bottom sentence plus life on the sex offender registry. Though the crime is technically the same, that is a very different set of facts than the creepy 60-year-old in a van scenario. And that's the fundamental problem with mandating sentences based on the crime, rather than the particular circumstances of an individual case: legislatures simply cannot write a statute that covers every conceivable case. To ensure the punishment fits the crime, we have to distinguish between those two crimes and between these two individuals. Mandatory minimums make such distinctions impossible.

The bill passed by the House is guilty in most cases of treating very different individuals the same, but it also includes a provision to treat nearly identical offenders differently. That provision is the enhancement for drug sales made in a school zone. The bill ignores all of the criticism the Pennsylvania Sentencing Commission leveled at this overbroad provision. The size of the school zone is arbitrary; the provision does not limit sales made to children or even during school hours; and it ignores the fact that in many cities entire neighborhoods fall within these zones. The Commission recommended repealing the school zone law outright, which we support. Other states have retained their laws but dramatically reduced the school zone size and limited the enhancement to sales made on weekdays or when school is in session. This provision is yet another example of why one-size-fits-all sentencing schemes do not work by failing to treat individuals as individuals.

Our constitutional system already gives the executive branch significant influence over sentencing. Prosecutors exercise this authority in the charges that they – and they alone – choose to bring. There is no oversight over charging decisions – which offense to charge, how many counts, etc. Supporters of mandatory sentences raise concerns about "luck of the draw" sentencing. A much bigger problem is "luck of the draw" charging. Prosecutors wield mandatory sentencing enhancements in drastically different ways. Prosecutors – and prosecutors alone – also decide which defendants should get deals. Not everyone gets a deal and the decision to grant a deal is made behind closed doors and outside of public view and legislative oversight.

When one recognizes that mandatory minimums do not protect public safety, the real issue in dispute becomes clear: power. Prosecutors want control over sentencing. Of course, they already exercise significant authority over sentencing through their charging decisions as well as their decisions as to who gets plea deals. Because prosecutors have so much leverage, defendants plead guilty at record-high rates. In Pennsylvania, as in other states, we see that this plea rate is the same whether mandatory minimums are present or not.

But with mandatory minimums, prosecutors get total control over sentencing. And that, I would argue, is simply too much for a constitutional system that prides itself on checking governmental power.

This is not a knock on prosecutors. Prosecutors are no worse than any other governmental actors, but they are no better, either. Ask the members of the Duke lacrosse team. Ask the family of the late Senator Ted Stevens. Ask Judge Alex Kozinski, a Reagan appointee to the federal bench, who has grown so fed up with prosecutors' unconstitutionally hiding exculpatory evidence from defendants that he has taken the drastic step of shaming the prosecutors by name in open court. Power corrupts, we know, and that is why our Framers were so wise to separate it and let the separate powers check one another.

What is remarkable about the prosecutors' claims for authority over sentencing is how unreservedly they run down members of their co-equal branch, the judiciary. We have seen that here in Pennsylvania where prosecutors and other mandatory minimum supporters have pointed to some outlier cases where judges gave sentences below the guidelines recommended by the Sentencing Commission. What never gets mentioned is that judges follow the sentencing guidelines in more than 90 percent of cases in Pennsylvania. (This is a much higher compliance rate than we see at the federal level.) And, according to the Sentencing Commission's data, the most frequently cited reason judges give for departing below the guidelines is that prosecutors ask them to, usually as part of a plea deal that they have cut.

Lawmakers should not make policy based on anecdotes, but if anecdotal evidence is going to be used to claim that judges do not care sufficiently about public safety, what should we conclude from the cases where judges refuse to accept the lenient sentences proposed by prosecutors? Just a few months ago, the AP reported that a judge in Chester County rejected as too lenient a two-year jail term proposed by county prosecutors for a man who raped and impregnated a teenage girl. The judge said the crime was "way too serious" to accept the deal prosecutors cut.

Two months ago, a judge in Lebanon County rejected a plea deal cut by prosecutors that was too lenient on a man who took his girlfriend from a behavioral center after threatening two nurses with a gun. The man and his girlfriend eluded authorities for days until they were caught stealing from a Wal-Mart in South Carolina.

Maybe the judges in these cases were too harsh. Or maybe the prosecutors were too lenient. No matter what you believe, no one would argue that prosecutors as a group should not be trusted to make charging decisions and seek plea deals as they think appropriate. Yet, a few examples of judges seeking shorter sentences than prosecutors deem appropriate is now being used to justify stripping judges of any say over sentences in entire categories of cases.

Lawmakers need not decide whether they trust prosecutors more than judges or judges more than prosecutors, as the debate over mandatory minimums is sometimes and incorrectly framed. The question is whether you believe that good systems, like checks and balances and separation of powers, produce better results than any one individual governmental actor. Our founders believed so.

The Opportunity Costs Are Too High

The American idea that individuals should be considered as individuals and that our constitutional system of checks and balances produces better outcomes are not simply theoretical considerations. They lead me back to where I started: by focusing on public safety.

Requiring addicts and more low-level and low-risk offenders to serve unnecessarily lengthy prison terms will impose a larger burden on taxpayers. The Department of Corrections has already provided the legislature with the estimated cost to taxpayers – perhaps as high as \$85 million. We know from history the enormous and negative impact one-size-fits-all sentences have on the families whose loved ones are forced to serve disproportionately lengthy prison sentences. We know the consequences. More kids will grow up without a parent, causing a host of economic, educational, and social challenges. Families will struggle to stay together. Economic self-sufficiency will become much more difficult to achieve.

What the members must understand is that the opportunity costs will be even higher. This is important because I know the instinct of some will be to concede that some minnows will serve sentences designed for sharks but that we had better be safe than sorry. But this view is mistaken. Since budgets are always finite, policymakers need to make tradeoffs in every area of government, including those affecting crime and public safety.

Specifically, to hold more addicts and low-level offenders in state prison, how many fewer prosecutors and police will be hired? How many fewer murders will be solved? How many more rape kits will go untested? How many correctional officers will be harmed because prisons are overcrowded? How many fewer life-saving addiction treatments will be available?

I urge the members of this committee and the Senate to consider these questions and resist the calls to pass a fake solution with superficial appeal and no evidentiary support.