



Testimony of

Ed Marsico

Dauphin County District Attorney

Lisa Lazzari-Strasiser

Somerset County District Attorney

Craig W. Stedman

Lancaster County District Attorney

**Before the Senate Judiciary Committee and the Appropriations Subcommittee
on Public Safety and Criminal Justice
Joint Public Hearing on Mandatory Minimum Sentencing**

Monday, May 22, 2017

Harrisburg, PA

Good Morning Chairmen Greenleaf and Leach and members of the Senate Judiciary Committee and Public Safety Subcommittee of the Senate Appropriations Committee. Thank you for holding a hearing on the very important topic of mandatory minimum sentences.

As many of you are aware, our state Supreme Court recently struck most of our mandatory minimum sentencing statutes because they did not require the Commonwealth to prove the elements triggering the sentence beyond a reasonable doubt. HB 741 addresses the Court's findings and remedies these defects by requiring the fact finder in a trial to determine if the mandatory sentencing elements have been proven beyond a reasonable doubt.

Mandatory minimum sentences are an important component to keeping the public safe: they help to keep the most dangerous offenders off of our streets. These offenders will not be committing crimes while they are incarcerated. They also help to ensure that defendants who commit similar crimes and have similar records receive the same sentences. And they help to provide law enforcement the necessary leverage to target and incapacitate the most dangerous drug traffickers who are profiting from the sale of drugs, like heroin, in our neighborhoods.

Mandatory minimums also advance the important goals of accountability and punishment. The child victim of a rape or the elderly victim of a gunpoint robbery cares about justice in his or her case. And justice can be defined as ensuring that the violent felon who commits that crime will serve a significant amount of time in prison, not able to commit new crimes. In individual cases, when a violent crime is committed, the mandatory minimum sentence works for that victim and that community.

As a society, we must demand that offenders who commit terrible crimes receive a certain sentence in order to hold them accountable. In every discussion about mandatory minimums, we must consider the effect of sentences on the victims and communities in which they live. The opposition against mandatory minimum sentences put forward by Families Against Mandatory Minimums and the Commonwealth Foundation has minimized the importance of incapacitation and marginalized the importance of the voice of victims.

Let's note some of the very serious and dangerous crimes that are covered by HB 741: rape of a child, aggravated assault against the elderly, gunpoint robberies and home invasions, impersonating a law enforcement officer while committing a violent crime, selling drugs while in possession of a firearm, and trafficking in

illegal drugs.

We recognize that restoring some mandatories for some drug delivery crimes is not necessary. HB 741 does not, therefore, restore every single mandatory that existed before, and it also reforms some of the prior mandatory minimums. For example, the minimum weights of drugs triggering a mandatory for marijuana and cocaine are higher, and the length of the sentences are lower. The legislation also reduces the scope and penalties of the school zone mandatory in different ways, and we believe there can be further discussion about more narrowly focusing the school zone mandatory.

At the same time, we know that in drug cases especially, mandatory minimum sentences incentivize lower-level dealers to cooperate with law enforcement. A Montgomery County Grand Jury report released just last week emphasized this point: “strong penalties also help law enforcement investigate crimes. A dealer who is caught and who faces a long prison term has a powerful incentive to cooperate with police and bargain for a lower sentence.” Without this leverage, law enforcement is not able to hold high-level players in a drug trafficking operation accountable. Dealers are willing to risk convictions rather than cooperate with law enforcement because the threat of real prison time has been diminished significantly.

Drug dealing is a violent crime. Drug dealers carry guns; they are not afraid to use them. So many of us have seen first-hand that so much of our violent crime is related to the drug trade. And what heroin dealers sell literally kills people. Without mandatories, law enforcement has been significantly handicapped in the fight against these dangerous, violent individuals.

The lack of mandatory minimum sentences has already been a boon to dangerous and violent offenders. In a short time period, we are seeing individualized determinations that are troubling. Consider how major heroin dealers are receiving significantly lower sentences. Between 2013 (when there were mandatory minimums) and 2015 (when there were no mandatory minimums for much of the year):

- The average minimum sentence for trafficking no less than 3,300 individual doses of heroin decreased by almost 4 months.

- The average minimum sentence for trafficking no less than 1,650 individual doses of heroin decreased by more than 1 year.
- The average minimum sentence for trafficking no less than 330 individual doses of heroin decreased by more than 1 year.
- The average minimum sentence for trafficking no less than 33 individual doses of heroin decreased by more than 6 months.

Consider some of the following individual cases from different counties in which justice was not served because there were no applicable mandatory minimums:

- The defendant raped and orally sodomized a 12-year-old girl in an alley. He was convicted of rape of a child, involuntary deviate sexual intercourse, unlawful contact with a minor, corruption of minors, and indecent assault. The judge sentenced the defendant to 4 to 15 years in prison, followed by 20 years of probation. The mandatory minimum would have been 10 years' imprisonment. The child rapist received a 60% reduction from the lowest possible sentence he would have received had mandatory minimums still been in effect. The Sentencing Guidelines called for a standard range minimum sentence of no less than 6 years.
- The defendant was caught smuggling bulk heroin. He had 103 grams of heroin (enough for about 2,000 individual doses) in his car when he was arrested. He was sentenced to 9 days to 23 months in jail and 10 years of probation. The mandatory minimum would have been 5 years' imprisonment. The Sentencing Guidelines called for a standard range minimum sentence of 3.5 to 5 years' imprisonment. The defendant continued to run his heroin distribution operation while awaiting sentencing.
- The defendant was convicted of dealing approximately 15 grams of methamphetamine packaged to sell (30 to 45 doses). He was sentenced to 9 months to 23 months in jail, followed by 6 years of probation. Mushrooms, scales, and baggies were also found in the residence where the defendant was arrested with the methamphetamine. The mandatory minimum would have been 4 years' imprisonment. The drug trafficker received a minimum sentence of just 9 months' incarceration. The Sentencing Guidelines called

for a standard range minimum sentence between 9 and 16 months, meaning he was sentenced to the lowest possible Guideline sentence.

- The defendant was convicted of three separate gunpoint robberies (one of which included an aggravated assault conviction as well). During one of these robberies, he pointed a gun at police officers. The judge originally sentenced the defendant to 17.5 to 35 years in prison (15 years of which were required by the mandatory minimum sentence in place at the time). After the mandatory minimum statutes were struck by the state Supreme Court, the defendant was resentenced to just 3 to 6 years in prison, representing an almost 83% reduction.

Data is important, but data is not singularly dispositive. Would these cases affect data showing mean or median sentences? Probably not. Do these results have a negative effect on victims, their families, and their communities? Absolutely. Do these sentences send a message to other criminals or would-be criminals that there are little to no consequences for their actions? Definitely.

Moreover, we cannot assume that the Sentencing Guidelines ensure meaningful sentences in every case. Consider the following differences between the mandatory minimum sentences for these crimes and the standard guideline range, assuming no prior record score:

Rape of a child under 13:

- Mandatory = 10 years;
- Standard range guideline sentence = 6 years

Home invasion burglary with a gun:

- Mandatory = 5 years;
- Standard range guideline sentence = 2 years, 6 months

Aggravated assault of the elderly with deadly weapon and bodily injury:

- Mandatory = 2 years;
- Standard range guideline sentence = 9 months

Delivering 150 heroin packets while carrying a gun:

- Mandatory = 5 years;
- Standard range guideline sentence = 1 year, 6 months

Despite these facts and figures, the Department of Corrections, Commonwealth Foundation, and Families Against Mandatory Minimums say that mandatory minimums should not be reenacted in part because judges depart from the Guidelines in just 7% of cases. Comparing mandatory and Sentencing Guideline ranges is like comparing apples to oranges. A judge can comply with the Guidelines and still sentence well below the prior mandatory minimum. As the figures above demonstrate, Guideline ranges typically call for much less time than mandatory minimum sentences, and they are not mandatory in nature. A person who rapes a 4-year-old child could be sentenced to 35%-50% less time in prison under the Guidelines than under prior existing mandatory minimums.

Moreover, these examples do not account for the additional mitigation range that is built into the Sentencing Guidelines. The above sentences could be reduced by a year in most cases and the sentence would still fall within the Guidelines.

We have heard a lot from the DOC, the Commonwealth Foundation and Families Against Mandatory Minimums. They have gone to great lengths to make their case against mandatory minimums. Their arguments, however, are flawed. We would like to discuss several of these flawed arguments.

- Claim: There is no evidence that mandatory minimums work.

This assertion is plainly false. There are many studies concluding that longer prison sentences, some of which were the result of mandatory minimum sentences being served by our most violent criminals and biggest drug traffickers, helped to reduce crime. By way of example, criminologist James Q. Wilson concluded that laws increasing sentences drove down crime rates by 25 percent. Economist Steven Levitt concluded that “[t]he evidence linking increased punishment to lower crime rates is very strong.” While we strongly believe that mandatory minimums make us safer and prevent future crime, one can disagree with these conclusions, of course. But to state that there is “no” evidence that mandatory minimums work is factually inaccurate.

- Claim: Mandatory minimums don't deter crime because, according to a recent Sentencing Commission report, no more than 34% of Pennsylvanians could identify an offense for which there was a mandatory minimum. People cannot be deterred by something they don't even know about.

This statement is intentionally misleading. The same report concluded on Page 205 that “[m]ost offenders could correctly identify the offenses that had mandatory sentencing provisions.” Specifically, 80% of offenders could identify at least one specific mandatory minimum. And the same report noted on Page 210 that the “majority of offenders did identify correctly nine of the ten offenses requiring mandatory sentences.” What the Report actually demonstrates is that law breakers know a lot about mandatory minimums, while law abiding citizens do not. That seems rather appropriate.

- Claim: If people who were on the corner selling drugs were “big picture, long term cost-benefit folks, they wouldn't be on the corner selling drugs.”

This argument conflates drug users with drug traffickers. Those who traffic in drugs are typically single-minded in purpose: how to make money and get more drugs to sell. Our conversation needs to include discussions about how to better deal with users. But we have to treat users and traffickers differently. We cannot show mercy to major drug traffickers. Mercy to drug traffickers may be nice for that drug trafficker, but for all those individuals who buy drugs from the traffickers, and the communities that suffer from the scourge of drugs caused by the traffickers, then showing them mercy is devastating.

- Claim: Crime rates and prison population have gone down simultaneously. Since mandatory minimum sentences are out, crime continues to fall.

This assertion is both factually incorrect and logically flawed. First, it is not so clear that crime is still decreasing. According to the FBI, when comparing the number of violent crimes reported during the first six months of 2016 to the same figures for the first six months of 2015, crime was up in Allentown and Pittsburgh. In Philadelphia, homicides are up 18% thus far this year. Shootings at the end of 2016 were at their second highest point in the last five years. And the opioid crisis is getting worse and worse by the

day: overdose increases by one third between 2013 and 2015. As a matter of logic, would we blame these troubling statistics on the lack of mandatories alone? We do not. But using this logic put forth by some opponents of mandatories, we would have to attribute these tragic increases to the lack of mandatories.

- Claim: The Sentencing Commission concluded that neither the length of sentence, nor the imposition of the mandatory was a predictor of recidivism.

The Commission actually concluded that neither the length of a sentence nor the imposition of a mandatory minimum sentence “alone” were related to recidivism. We agree with the report’s conclusion in this regard. Longer sentencing laws help to incapacitate the most dangerous offenders and help to reduce crime rates, but they do not singularly do so. There is no single solution to reducing crime. The report also concluded that the certainty of incarceration may be more important than the duration of the confinement. Mandatory minimums create a strong certainty of incarceration.

- Claim: We do not need to attack the supply of drugs in Pennsylvania by targeting traffickers because those who traffic in heroin and other drugs will merely be replaced by new dealers on the street.

This argument is tantamount to giving major drug dealers a free pass. It ignores the fact that disrupting the sophisticated and major drug dealers slows and stymies their illegal operations. It assumes incorrectly that reducing drug supply and demand are mutually exclusive. And it ignores that drug dealers are conducting a business and make decisions every day about how to increase their profit. If you accept this argument, then you should cut all funds that go to the PSP and Attorney General’s Office used to target major drug dealers.

- Claim: DOC claims it will cost \$85 million annually to restore mandatory minimum sentences.

Public safety decisions cannot be driven by budget concerns. They must be based on what will make Pennsylvania safer. Should we not incarcerate child rapists, gunpoint robbers, drug dealers with guns and major heroin traffickers because doing so will increase the DOC budget? The most important function of government is to keep its people safe. Studies and

statistics demonstrate that the offenders subject to these sentences are not low-level, first-time offenders. Allowing these dangerous offenders to avoid appropriate prison time in order to help the DOC balance its budget represents the antithesis of good government.

Additionally, one cannot have a discussion about sentencing and fail to consider the economic losses to victims. Nationally, crime causes economic losses of approximately \$15 billion to victims and \$179 billion in government expenditures on police protection, judicial and legal activities, and corrections. Anything that prevents crime, such as mandatory sentences for dangerous and other violent offenders, generates substantial economic benefits by reducing crime-related costs incurred by victims, communities, and the criminal justice system.

We know that some of you share our firm belief that reenacting mandatory minimums is critical to public safety, offender accountability, and closure for victims. We also know that some of you have meaningful concerns about reenacting some mandatories. But it is clear to us that mandatory minimum sentences play a critical role in keeping our society safe, preventing crime, and effectively investigating and prosecuting dangerous heroin dealers. We also ask that we continue this conversation; the issues are too important to do otherwise. Many of our goals here are the same: to keep our communities safe and to do justice for victims.