The Commonwealth of Massachusetts

Committee for Public Counsel Services

44 Bromfield Street, Boston, MA 02108-4909

TEL: (617) 482-6212
FAX: (617) 988-8495

ANTHONY J. BENEDETTI
CHIEF COUNSEL

CPCS Chief Counsel Testimony – Joint Committee on the Judiciary – June 9, 2015

Good afternoon, my name is Anthony Benedetti, and I am the Chief Counsel of the Committee for Public Counsel Services. I want to thank Chairman Brownsberger, Chairman Fernandes, and the entire Committee for the opportunity to speak to you today. As head of the agency that is responsible for providing representation to the overwhelming majority of the individuals charged with mandatory minimum drug offenses, and because of this possessing first-hand knowledge of the true impact of these sentences, I am here to testify in favor of **H.1620 and S.786**, bills that would eliminate mandatory minimum sentences for drug offenses.

For over 30 years, the Commonwealth has depended on mandatory minimums to fight the "war on drugs". Massachusetts, like so many other states and the federal government, is losing that war. Mandatory minimum sentences, which were once thought to be the answer to all our drug-related woes, have fallen far short of reducing drug offenses or substance use addiction and the problems stemming from it.

Proponents of these sentences maintain that they are sound criminal justice policy – deterring offenders, reducing crime, aiding those dependent on substance use, providing uniform sentencing, and preserving appropriate sentencing discretion. Whether you examine these together or separately, the fact remains, mandatory minimum sentences have not, do not, and will never accomplish any of these. It is clear that drug mandatory minimums are a failed policy.

Deterrence and Crime Reduction

Those who promoted drug mandatory minimums promised the sentences would deter crime, yet numerous studies now reveal that mandatory minimums have little to no effect as a deterrent. Research indicates that would-be offenders are more concerned with the risk of being caught than the severity of any punishment they receive if arrested and convicted.[i] Over the last decade, a number of states have embraced sentencing and prison reform, among them Michigan, New York, Rhode Island, South Carolina, Connecticut, New Jersey, and Georgia, many eliminating or reducing mandatory sentencing. Since enacting these reforms, crime rates in all states fell; a clear indication that the deterrence rationale can no longer be used to justify harsh mandatory minimum sentences.[ii]

Proponents also promised that mandatory minimums would reduce crime. As we know, this did not happen. Prisons across the country are overflowing with inmates serving mandatory minimum sentences for low-level, nonviolent, drug offenses. Yet, advocates of mandatory minimums adhere to the belief that locking away an offender reduces crime because he or she is removed from our streets

and unable to further offend. This is a plausible theory, but one that ignores the reality that low-level offenders are quickly replaced by others….causing most leading researchers and many law enforcement officials to now agree that incarcerating the foot soldiers in drug-related crimes, not to mention drug users, has a negligible impact on crime. [iii] In addition, mandatory minimums have not had an effect on the flow of drugs into our communities. Drugs continue to be readily available for those who want to use them and at cheaper prices.

The fact that mandatory minimums' certain and lengthy incarceration are ineffective in reducing crime is further exposed in a recent report from the Brennan Center for Justice. The report asks, "'What Caused the American Crime Decline?'. The authors conclude that incarceration had relatively little to do with the crime decline. They find that the dramatic increases in incarceration have had a limited, diminishing effect on crime…. At today's high incarceration rates, continuing to incarcerate more people has almost no effect on reducing crime.[iv] Supporting its own empirical analysis, the report refers to findings in the 2014 report of the Brookings Institution's Hamilton Project, which "explained that incarceration has 'diminishing marginal returns.' In other words, incarceration becomes less effective the more it is used."[v]

Some argue that Massachusetts is doing well, that our prison population is declining and our per capita incarceration rate places us at 48th in the nation. However, the fact is that, since the 1970s, the incarceration rate in Massachusetts has quadrupled. If Massachusetts were a separate country, it would have the fourth highest incarceration rate in the world: Cuba and Russia joining the U.S. in the top three. Massachusetts can and should do better. The Legislature has taken some positive steps on sentencing in the last few years and should be applauded for it, but the time has come to go further and completely eliminate mandatory minimum drug sentences.

Uniform Sentencing, Sentencing Disparities, and Just Punishment

One of the original goals of drug mandatory minimums was to provide fair and consistent sentences. Studies conducted by the National Research Council found that mandatory minimums do nothing to provide equality in sentencing. "[They] create less equal outcomes, and less just ones, by allowing certain individuals to avoid the Draconian penalties due to circumvention, while others, who are often even less deserving of this punishment, [end up] not so lucky."[vi] Everyone who practices in Massachusetts knows that "mandatory" drug laws are enforced differently in the cities than they are in suburban communities. Furthermore, any suggestion that each of the Commonwealth's 11 district attorneys and their assistants charge, offer plea deals, or impose sentences that are uniform for similar or identical offenses is simply not accurate. Our experience representing individuals accused of mandatory minimum drug crimes makes clear that prosecutorial policies and practices vary from county to county and can even vary from prosecutor to prosecutor. The prosecution may start out by charging everyone accused of a drug offense with the maximum without discretion, but as the process moves forward deals are made for reductions or lesser charges that are not founded on the facts of the case, the record, or the circumstances of the accused. Instead, they are often made in exchange for pleading guilty or admitting to facts that are not truthful. Even though charges, plea offers, and decisions to move forward on an offense that carries a mandatory minimum are made in an environment that lacks transparency, differences are still evident, especially for persons of color and defendants from lower socio-economic backgrounds, such as our clients.

The Sentencing Project reports that one in every ten black males in their thirties is in prison or jail on any given day in the U.S. These trends have been intensified by the disproportionate impact of the "War on Drugs," in which two-thirds of all persons in prison for drug offenses are people of color.[vii] The War on Drugs is commonly referred to as a war on communities of color. Despite the fact that white and black people use drugs at similar rates, blacks are jailed on drug charges ten times more often than whites.[viii] Massachusetts is no exception. Like most states, our African-American and Latino communities are impacted more often than white communities by the imposition of mandatory minimum sentences for drug offenses. Recent statistics gathered by MassINC reveal that our state's incarceration rate for blacks is six times higher than that for whites, while the Commonwealth's incarceration rate for Latinos is four times higher than that for whites, higher even than the rate for Latinos in the U.S.[ix]

Appropriate Discretion

Mandatory minimum sentences shift discretion inappropriately from judges to prosecutors, providing prosecutors with unprecedented influence at multiple stages of a criminal prosecution, including charging decisions, plea agreements, and sentencing recommendations. They remove sentencing determination from judges, impartial adjudicators, who after hearing the facts of a case are tasked with sentencing a defendant found guilty. It impedes the ability of the judge to fashion evidence-based sentences founded on individualized facts such as the individual's background, criminal history, and involvement in the crime, as well as the circumstances of the crime, the severity of the offense, and all other available mitigating [or aggravating] evidence.[x] The current system places discretion in the hands of prosecutors who wield a powerful stick by telling charged individuals that they will seek enhancements against them if they do not plead guilty, which leads to tremendous unreliability where even innocent people are sometimes compelled to plead guilty to avoid more serious sentences. The practice of compelling individuals to give up their constitutional right to a fair trial is hardly a sufficient justification for maintaining a system that is so clearly broken.[xi]

As defense attorneys, we see how expansive the net cast for drug mandatory minimums is. The District Attorneys argue that only one per cent of those convicted in fiscal year 2013 were subjected to a drug mandatory minimum. This fails to portray an accurate account of what really happens. In 2013, only 4.7 per cent of those charged with a mandatory minimum school zone offense were convicted of a mandatory minimum school zone offense.[xii] There are no statistics on how many individuals were charged generally with drug mandatory minimums and how many of those were convicted, but there is no reason to believe the percentage is any different and our attorneys' experiences confirm this.

Treating Addiction

The fact that our prisons continue to house so many low-level, nonviolent drug offenders and that opioid/heroin-use and -related deaths are on the rise should be evidence enough that incarceration is not successful in treating substance use problems. Enforced abstinence misleads us by underestimating the vulnerability for substance users to relapse post-incarceration[xiii] and research now supports that "punishment alone is a futile and ineffective response to drug abuse, failing as a public safety intervention for offenders whose criminal behavior is directly related to drug use. "[xiv]

Growing Call for Change

As states, including Massachusetts, begin to reconsider the use of mandatory minimum sentences as effective and just punishment for drug offenders, the call for eliminating them has spread. As I mentioned earlier, a number of states have already reformed their use of mandatory minimums and here in Massachusetts support for their repeal is growing. In 1991, the broad-based Task Force on Criminal Justice report decried the excessive harshness and false uniformity of mandatory drug sentences and recommended they be abolished. Just last year, the Criminal Justice Commission voted to recommend the elimination of mandatory minimum drug sentences. In addition to the recommendations of these official bodies, the call to end mandatory minimum sentences has come from a number of others, including a majority of the Commonwealth's public. In a 2014 MassINC poll, 86% of the Massachusetts residents polled said that they either strongly support (52%) or somewhat support (34%) a criminal justice system that would give judges more flexibility and discretion to sentence nonviolent criminals and drug users on a case by case basis, rather than through mandatory minimum sentencing, and they support a system that would provide those convicted of using drugs rehabilitation treatment, rather than being sent to prison.[xv] The Legislature should heed this appeal to eliminate mandatory minimums, especially since it is now supported not only by a number of criminal justice experts, both nationally and locally, but by a significant percentage of the Commonwealth's populace who have come to understand that these sentences do not work and should be discarded for less costly more effective alternatives.

Conclusion

Punishment for any offense, drug-related or not, should be sensible, fair, and appropriate, and it should work in deterring and reducing crime. Mandatory minimums do none of these. They defy proportionality, carrying harsher penalties for drug offenses than those for a variety of violent crimes; they seldom reduce the availability of drugs or the number of traffickers; they are not rehabilitative; the decisions that lead to a defendant receiving a mandatory sentence are conducted beyond public view and defy transparency, and rather than result in uniformity, they result in disparate, inconsistent, and disproportionate sentences that impact communities of color more often and much more severely. For all of these reasons, I ask that the Joint Committee on the Judiciary report **H.1620 and S.786** favorably from committee.

Thank you. I am happy to answer any questions you may have.

---

[i] National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, (2014), 4.

[ii] Bryan Stevenson, *Statement to House Judiciary Committee's Over-Criminalization Task Force's Hearing on Penalties*, (May 30, 2014), 4.

[iii] Pew Center on the States, *One in 3: The Long Reach of American Corrections*, (March 2009), 19.

[iv] Dr. Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, the Brennan Center for Justice, *What Caused the Crime Decline?*, (2015), 1.

[v] Roeder, the Brennan Center for Justice, 7.

[vi] Stevenson, *Statement to House Judiciary Committee's Over-Criminalization Task Force*, 5.

[vii] The Sentencing Project, *Racial Disparity*, (2015), www.sentencingproject.org/.

[viii] Vanita Gupta, Center for Justice, American Civil Liberties Union, *The 40-Year War on Drugs: It's Not Fair, and It's Not Working*, (June 1, 2011), www.aclu.org/blog/40-year-war-drugs-its-not-fair-and-its-not-working.

[ix] Ben Forman, "We Need to Reverse Course on Mandatory Minimums", *CommonWealth*, (April 15, 2015), https://commonwealthmagazine.org/criminal-justice/we-need-to-reverse-course-on-mandatory-minimums/.

[x] Stevenson, *Statement to House Judiciary Committee's Over-Criminalization Task Force,* 4.

[xi] Stevenson, *Statement to House Judiciary Committee's Over-Criminalization Task Force*, 8.

[xii] Massachusetts Court System Annual Reports, *Trial Court Arraignments by Offense and Offense Type* and Massachusetts Sentencing Commission Survey of Sentencing Practices, *Appendix B.*

[xiii] Redonna K. Chandler, PhD, Bennett W. Fletcher PhD and Nora D. Volkow, MD, National Institute of Health, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety,* (January 21, 2010), 183.

[xiv] Chandler, Bennett and Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System,* 189.

[xv] The MassINC Polling Group Criminal Justice Poll, Survey of 1,207 Massachusetts residents, (January 23-29, 2014), 6.