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## MEMORANDUM

**TO:** Pennsylvania House of Representatives

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** January 13, 2020

**RE: OPPOSITION TO HOUSE BILLS 1850, 1851, 1852 (STEPHENS) and HB 726 (DELUCA)**

Reinstating mandatory minimum sentences will exact a steep price from Pennsylvanians. These bills are an invitation to regress – to (re) adopt flawed and costly “public safety” measures that disproportionately damage communities of color and concentrate unreviewable power in the hands of prosecutors, all while forcing us to needlessly expend scarce resources in the vain attempt to incarcerate our way out of complex problems like gun violence and addiction.

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I urge you to oppose HBs 1850, 1851, 1852 and HB 726 for the following reasons:**

### **There is no credible evidence that mandatory sentences lead to crime reduction**

Decades of empirical research, including a meta-analysis reviewing over 29 separate studies of the effectiveness of policies and programs that attempt to reduce firearm violence,<sup>1</sup> have concluded that policies (like enhanced prison terms) have little to no empirical support as effective deterrents.<sup>2</sup> Recidivism studies also conclude that incarceration does not generally reduce recidivism upon a person’s return to the community,<sup>3</sup> because detaining people - even for a short period of time - *increases* their chances of recidivating.<sup>4</sup>

And these results echo the Pennsylvania Commission on Sentencing’s [2009 report](#) on the use and impact of mandatory minimum sentences in PA, which found that “neither the length of sentence, nor the imposition of the mandatory sentence per se, was a predictor of recidivism” and “only 34% of Pennsylvanians surveyed could correctly name a mandatory eligible offense.”<sup>5</sup> If most people cannot name a single crime or the minimum sentence it carries, then it defies reason - and established research - that mandatories deter crime.

### **Mandatory minimums create and exacerbate racial disparities in the criminal system**

Communities of color are already over-policed, drawing disproportionate contact with law enforcement, which frequently leads to unfair treatment in sentencing. For decades, it has been clear that white, non-Hispanic defendants arrested for mandatory minimum-eligible offenses are less likely to be charged at the mandatory level, more likely to be given

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<sup>1</sup> Matthew D. Makarios and Travis C. Pratt, *The effectiveness of policies and programs that attempt to reduce firearm violence: A meta-analysis*. 58 Crime & Delinquency 222 (2012).

<sup>2</sup> *Id.* at 236.

<sup>3</sup> Mark W. Lipsey and Francis T. Cullen. The effectiveness of correctional rehabilitation: A review of systematic reviews, 3 Annu. Rev. Law Soc. Sci. 297 (2007); Paula Smith, Claire Goggin, and Paul Gendreau. *The Effects Of Prison Sentences And Intermediate Sanctions On Recidivism: General Effects And Individual Differences*. Ottawa, ON: Solicitor General Canada (2002).

<sup>4</sup> A. Aizer & J. J. Doyle, 2015. "Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges," *The Quarterly Journal of Economics*, vol 130(2), pages 759-803, available at <https://www.nber.org/papers/w19102>.

<sup>5</sup> Pennsylvania (State). Legislature. House. Pennsylvania Commission on Sentencing, Report to the Pennsylvania House of Representatives: A Study on the Use and Impact of Mandatory Minimum Sentences. House Resolution 12, Session of 2007. Oct 2009.

diversion options, and less likely to be convicted at the mandatory level, than similarly-situated African-American and Hispanic defendants.<sup>6</sup> And as prosecutors are the “dominant procedural sources of disparity” in the criminal legal system,<sup>7,8</sup> mandatory sentencing schemes only exacerbate this power.

### **Mandatory minimums undermine judicial discretion and cede unreviewable power to prosecutors**

Legislating mandatory minimum sentences takes discretion from judges and hands it to prosecutors. Mandatory sentencing laws give prosecutors control over sentencing because they have the unreviewable authority to decide which charges to pursue. While judges must typically disclose the reasons, on the record, for their sentencing decisions, prosecutors need never disclose their reasons for bringing or dropping a charge. Judges do not need minimum sentence requirements to do their jobs; they look to Pennsylvania’s existing sentencing guidelines<sup>9</sup> for direction and apply those guidelines 90% of the time.<sup>10</sup>

Additionally, prosecutors use their charging power to cut deals, secure testimony against other defendants, and force guilty pleas. The threat of mandatory minimum penalties may cause offenders to give false information,<sup>11</sup> to plead guilty to charges of which they may be innocent,<sup>12</sup> or to forfeit a strong defense.<sup>13</sup>

### **Mandatory minimums needlessly waste valuable state resources**

In an analysis of a bill identical to HB 1851 that passed the House in 2014 ([HB 1498](#)), the Pennsylvania Department of Corrections estimated that it would cost taxpayers \$67.2 million after five years, \$366.4 million after 10 years, \$1.5 billion after 25 years, and \$3.5 billion after 50 years.

**For these reasons, we urge you to oppose HB 1850, HB 1851, HB 1852, and HB 726.**

#### **Bill Summaries**

[HB 1850](#) [PN 2531]: Reinstates mandatory sentences for:

- Offenses committed with firearms (Section 9712)
- Certain drug offenses committed with firearms (Section 9712.1)
- Offenses committed on public transportation (Section 9713)
- Offenses against elderly persons (Section 9717)
- Offenses against infant persons (Section 9718)
- Offenses committed while impersonating a law enforcement officer (Section 9719)

[HB 1851](#) [PN 2573]: Imposes new minimum penalties for people who possess a firearm and have certain prior felony convictions: 5 years for a first offense; 10 years for a second offense; 25 years for a third or subsequent offense.

[HB 1852](#) [PN 2533]: Requires mandatory sentences for a “crime of violence” to run consecutive to any other sentence for a crime of violence that involves a different victim, even if the crime stems from the same criminal event.

[HB 726](#) [PN 762]: Imposes a five-year mandatory sentence for possessing a firearm or a replica of a firearm while committing a “crime of violence,” and requires those sentences to run consecutive to any other sentence imposed by the court.

<sup>6</sup> United States Sentencing Commission, *Report To The Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011). Also see, Stephen J. Schulhofer, *Rethinking mandatory minimums*, 28 Wake Forest L. Rev. 199 (1993); Schlesinger, T. (2013). Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts. *Race and Justice*, 3(3), 210–238. <https://doi.org/10.1177/2153368713483320>

<sup>7</sup> Starr, Sonja, and Marit ReHAVI. "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker." *The Yale Law Journal* 123. October (2013).

<sup>8</sup> Ulmer, J. T., Kurlychek, M. C., & Kramer, J. H. (2007). Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences. *Journal of Research in Crime and Delinquency*, 44(4), 427–458. <https://doi.org/10.1177/0022427807305853>

<sup>9</sup> 204 PA Code § 303

<sup>10</sup> Melamed, Samantha. "Mandatory minimums don't reduce recidivism. So why is Pa. weighing bringing them back?" Philly.com. 20 Mar, 2017.

<sup>11</sup> U.S. Sentencing Commission’s Hearing on Federal Mandatory Minimums, Prepared Statements of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, to the Commission, (May 27, 2010).

<sup>12</sup> *Id.*

<sup>13</sup> U.S. Sentencing Commission’s Hearing on Federal Mandatory Minimums, Prepared Statement of Cynthia Hujar Orr, National Association of Criminal Defense Lawyers, to the Commission, at 8 (May 27, 2010).