



## TESTIMONY IN OPPOSITION TO HOUSE BILL 741

Amends Titles 18 (Crimes & Offenses) & 42 (Judiciary), in minors, further providing for trafficking drugs to minors & for drug-free school zones; for firearms; public transportation; elderly persons & infants; & law enforcement.

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**May 22, 2017**

Senator Greenleaf and distinguished members of the Senate Judiciary Committee, my name is Elizabeth Randol. I am the legislative director for the American Civil Liberties Union of Pennsylvania. We appreciate the opportunity to testify today in opposition to House Bill 741, sponsored by Representative Todd Stephens.

As you know, Pennsylvania has been without mandatory minimum sentences for two years. In 2013, the United States Supreme Court ruled that the process by which courts reached a sentencing decision was unconstitutional under the Sixth Amendment.<sup>1</sup> Citing the *Alleyne* decision, the Pennsylvania Supreme Court invalidated existing mandatory minimum sentences in 2015 after ruling the state's Drug Free School Zones Act unconstitutional.<sup>2</sup> House Bill 741 would reinstate mandatory minimums by correcting the underlying unconstitutional sentencing process in Pennsylvania. If enacted, this legislation would put Pennsylvania on a collision course with reform efforts now standard throughout the United States.

### **RACIAL DISPARITIES**

Mandatory sentencing schemes create and exacerbate racial disparities in the criminal justice system. There are **three primary sources of unwarranted racial disparity in sentencing**: 1) racially biased use of discretion in sentencing – prosecutors are the “dominant procedural sources of disparity,”<sup>3</sup> but others include police officers<sup>4</sup>, judges<sup>5</sup>, and even public defenders<sup>6</sup>; 2) policies that have a disparate racial impact, like drug-free school zone laws; and 3) underfunding key areas of the criminal justice system that require significant financial outlays by defendants, like pretrial detention. Seventy percent of pretrial releases require money bond,<sup>7</sup> an especially high hurdle for low-income defendants. Detention increases the odds of conviction, and those who are detained are more likely to accept less favorable plea deals, be sentenced to prison, and receive longer sentences.<sup>8</sup>

### **SCHOOL ZONE PROVISION**

**Drug-free school zone laws, noted above, are one of three main causes of racial disparities in sentencing.** These laws mandate sentencing enhancements for people caught selling drugs near school zones. The 2009 Pennsylvania Commission on Sentencing (PCS) report on the impact of mandatory minimums specifically recommended repealing the Drug-Free School Zone mandates on the basis that they were “irregularly applied and overbroad geographically,”<sup>9</sup> noting that race and county most often determined whether someone was charged with an enhanced sentence under the school zone provision. Yet, HB 741 proposes to reinstate school zone mandates for drug offenses that occur within 1000 feet of a school or university and 250 feet of a playground or recreation center. The expansive geographic range of these zones coupled with high urban density disproportionately affects residents of urban areas and particularly those in high-poverty areas – who are largely people of color.<sup>10</sup> The PCS report also revealed several inconsistencies inherent in the provision, including inconsistent distances around zones, conflicting definitions of “school,” and different standards for determining risk to children. This provision is a recipe for injustice – if the Commission was “not at all clear why and under what circumstances the district attorney chooses to invoke this penalty,” then unequal treatment and uneven application of punishment is all but guaranteed.

## **JUDICIAL DISCRETION**

Legislating mandatory minimum sentences prevents judges from performing their most fundamental role – making decisions based on the case before them. By impeding judicial discretion, judges are unable to reduce a defendant’s sentence based on any number of mitigating factors, including a person's role in the crime, criminal history, or risk of recidivism. Judges do not need minimum sentence requirements; they look to Pennsylvania’s existing sentencing guidelines<sup>11</sup> for direction and apply those guidelines 90% of the time.<sup>12</sup>

## **UNREVIEWABLE PROSECUTORIAL POWER**

Mandatory minimums shift enormous power to prosecutors by transferring the discretion that a judge would have to impose an individualized sentence and giving that discretion to prosecutors. Under mandatory sentencing laws, prosecutors have control over sentencing because they have singular and unreviewable authority to decide what charges to pursue. Because prosecutors need never disclose their reasons for bringing or dropping a charge **mandatory minimums threaten due process** principles. Judges, on the other hand, typically must disclose their reasons for sentencing in the written, public court record and aggravating factors can be contested by the defendant.

Furthermore, **mandatory minimums create a powerful incentive for the perversion of justice.** 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>13</sup> to plead guilty to charges of which they may be innocent,<sup>14</sup> or to forfeit a strong defense.<sup>15</sup> Prosecutors are professionally rewarded for achieving numerous convictions for lengthy sentences, so if there is a reason to believe that a more severe sentence is warranted, the decision should be left to judges who have fewer incentives to impose harsher sentences.

## **PUBLIC SAFETY**

Proponents of mandatory sentences have recently invoked the growing opioid crises as justification for reinstatement, claiming mandatory minimums are an important crime-fighting and public safety tool. Yet there is widespread recognition that **mandatory minimums do not deter crime or prevent recidivism.** In fact, the 2009 Pennsylvania Commission on Sentencing report concluded that “neither the length of sentence, nor the imposition of the mandatory sentence per se, was a predictor of recidivism” and that “only 34% of Pennsylvanians surveyed could correctly name a mandatory eligible offense.”<sup>16</sup> If most people cannot name a single crime nor the minimum sentence it carries, then it defies reason - and established research - that mandatory minimums deter crime.

## **BUDGET IMPACT**

Finally, **reinstating mandatory minimums would unnecessarily increase costs.** In the fiscal note for HB 741, the Department of Corrections (DOC) estimates a total budget impact of “up to \$19 million in the first year after enactment, with a likely impact of \$47.3 million in approximately five fiscal years after enactment. However, the DOC also notes a potential maximum ceiling impact of \$85 million in a worst-case scenario estimate.”<sup>17</sup>

Reinstating mandatory minimum sentences will exact a steep price from Pennsylvanians. House Bill 741 is an invitation to regress – to (re)adopt outdated and ineffective “public safety” measures that disproportionately damage communities of color and concentrate unreviewable power in the hands of prosecutors, all while forcing us to unnecessarily expend scarce resources that do nothing to address the tragic loss of life to substance abuse. There are better, more effective ways to address addiction and crime – arresting our way out of the problem is not one of them.

On behalf of the 53,000 members of the American Civil Liberties Union of Pennsylvania, I urge you to vote in opposition to House Bill 741.

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<sup>1</sup> *Alleyne v. United States*, 133 S.Ct. 2151 (2013)

<sup>2</sup> *Commonwealth v. Hopkins*, 98 MAP 2013 (Pa. 2015)

<sup>3</sup> Starr, Sonja, and Marit Rehani. "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker." *The Yale Law Journal* 123. October (2013).

<sup>4</sup> Lynn Langton, Ph.D., and Matthew Durose. *Police Behavior during Traffic and Street Stops*, 2011. Rep.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, rev. Oct 2016.

<sup>5</sup> Spohn, Cassia. "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process." *Policies, Processes, and Decisions of the Criminal Justice System* 3 (2000): 427-501.

<sup>6</sup> Richardson, Song, and Phillip Atiba Goff. "Implicit Racial Bias in Public Defender Triage." *The Yale Law Journal* June 122.8 (2013).

<sup>7</sup> Ghandnoosh, Nazgol. "Eliminating Racial Inequity in the Criminal Justice System." *The Sentencing Project*, 2015.

<sup>8</sup> Jones, Cynthia, Ph.D. "'Give Us Free': Addressing Racial Disparities in Bail Determinations." *Legislation and Public Policy* 16 (2013): 919-961.

<sup>9</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.

<sup>10</sup> Porter, Nicole and Tyler Clemons. "Drug Free School Zone Laws." *The Sentencing Project*, Dec. 2013.

<sup>11</sup> 204 PA Code § 303

<sup>12</sup> Melamed, Samantha. "Mandatory minimums don't reduce recidivism. So why is Pa. weighing bringing them back?" *Philly.com*. 20 Mar. 2017.

<sup>13</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, *supra* at 13 (May 27, 2010).

<sup>14</sup> Nachmanoff, *supra* note 8, at 13.

<sup>15</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).

<sup>16</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.

<sup>17</sup> Pennsylvania (State). Legislature. House. Committee on Appropriations. Fiscal Note: House Bill No.741, PN 1262. 2017-2018 Reg. Sess. (April 5, 2017).