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Testimony on Mandatory Minimum Sentences

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TESTIMONY ON MANDATORY MINIMUM SENTENCES

Testimony Chief Justice Gants delivered to the Massachusetts Legislature's Joint Committee on the Judiciary at the Massachusetts State House on June 9, 2015.

I want to thank Chairmen Brownsberger and Fernandes, and the Members of the Committee for the opportunity to testify before you today. I am here to explain why the Legislature should abolish mandatory minimum sentences for drug crimes. I will seek to present you with the facts that demonstrate the wisdom of repealing mandatory minimum sentences in these cases, taking the lead from a former Chief Justice of the Supreme Judicial Court, John Adams, who once wisely stated “facts are stubborn things.”

There are at least three reasons why the Legislature needs to abolish mandatory minimum sentences: racial justice, justice reinvestment, and fairness in sentencing. Let me begin with racial justice: mandatory minimum sentences have a disparate impact on persons of color. I can spare you a thousand words by turning your attention to . . . [a] chart [that] shows that in 2013, 44% of all persons convicted of drug offenses were persons of color, but 75% of all persons convicted of drug offenses with mandatory minimum sentences were persons of color. This remarkable 31% differential is not a one year phenomenon; it is the same differential as in 2002. And the differential during this twelve-year period never fell below 20%. Given the durability of this racially disparate treatment over time, there is no reason to believe that the past will not be prologue. If you do not abolish mandatory minimum sentences for drug offenses, you must accept the tragic fact that this disparate treatment of persons of color will be allowed to continue.

Let me turn now to justice reinvestment. Every time a judge is required to impose a mandatory minimum sentence that is greater than the sentence that the judge otherwise would have imposed if the judge were allowed to apply individualized, evidence-based best practices in sentencing, the taxpayer is paying money to incarcerate that offender longer than he or she should be incarcerated. That money could be better spent on programs that are designed to combat our opiate abuse crisis. We have too few drug treatment beds; too few programs to assist those battling mental health problems; too few probation officers to closely supervise those in our drug courts and in our HOPE-MORR programs. The money saved from abolishing mandatory minimum sentences in drug cases is money diverted from needless over-incarceration that can be more wisely spent on programs proven to help those struggling with opiate abuse.

I wish to address some of the criticisms that have been leveled against this justice reinvestment argument. Some note, correctly, that Massachusetts is already the 48th lowest in the nation in our rate of incarceration per 100,000 residents. It is true that, in any discussion of mass incarceration, we should not fairly be lumped with states with far higher rates of incarceration. But it is fair to compare where Massachusetts is today in terms of our rate of incarceration with where we have been over the past 45 years. . . . [O]ur rate of incarceration per 100,000 residents today is 306, which is approximately 500% greater than it was in 1974 and 1975, when our violent crime rate was approximately where it is today and when our property crime rate was more than twice as high as it is today. I am not suggesting that we should return our rate of incarceration to where it was in the mid-1970s, but do we need to be five times higher? Think how much money could be diverted to drug and mental health treatment if we were three or four times higher. It should be plain that increasing the rate of incarceration by 500% has not prevented the most severe opiate abuse crisis in my lifetime; it should also be plain that the first and most important step needed to address that crisis is to ensure that drug treatment is available to all who need it, and that justice reinvestment will help free up the funds to do so.

It should also be plain that we can eliminate mandatory minimum sentences in drug offenses without any adverse impact on public safety. Other states, including Michigan, New York, and Rhode Island, have eliminated or substantially reduced the scope of mandatory minimum sentences in drug cases. Since doing so, the violent crime rate in these three states combined has fallen on average by 7.4% and the property crime rate has fallen on average by 14.1%. Here in Massachusetts, the legislation enacted in 2010 and 2012 that reduced the scope of minimum mandatory drug sentencing has had no apparent adverse impact on public safety: between 2010 and 2012, the violent crime rate fell by 13.1% and the property crime rate fell by 8.4%, and since 2012, both the violent crime and property crime rates have continued to fall.

[The data] also speaks to the argument that the increase in mandatory minimum drug sentences in 1980 reduced the rate of violent crime. It is true that the rate of violent crime dropped in the 1980s but it increased in the early 1990s to the point that it was considerably higher than it was in 1980. If one is to credit the increase in mandatory minimum drug sentences in 1980 with the reduction in violent crime in the 1980s, one could just as well blame them for the increase in violent crime in the 1990s. I think it is fair to say that the social science scholarship, including the empirical research presented last week in this auditorium at the MassINC conference, has demonstrated that mandatory minimum drug sentences deserve neither the credit nor the blame.

Let me also address the argument that, without mandatory minimum sentences, judges would be sentencing every drug offender to probation for trafficking crimes. . . . Apart from the school zone mandatory minimum, all of [the

drug crimes with mandatory minimum sentences] are crimes that may proceed only in the Superior Court, not in the District Court or the Boston Municipal Court. . . . [For such cases,] even where there is no mandatory minimum sentence, judges still sentence 77% of offenders to prison or the house of correction. [The data also] gives you a window as to what would likely happen if you abolished mandatory minimum sentences in drug cases—most drug offenders would still be incarcerated, but their sentences on average would be modestly lower. Where there is a mandatory minimum sentence, the median sentence is 42–60 months in state prison and 24 months in the house of correction; where there is not, the median sentence is 36–48 months in state prison and 17.5 months in the house of correction. I know of no evidence to suggest that a reduction of this magnitude in the length of incarceration would have a significant adverse effect on the level of deterrence for drug offenses.

Let me also address the argument that only the worst drug offenders are given mandatory minimum sentences by showing you 54% of those sentenced to mandatory minimum sentences in FY2013 had either no criminal record, a minor record, or a moderate record.

When you think about it, this is not surprising. Most drug distribution cases are not realistically “tryable” once the motion to suppress is denied, because the case arises from an undercover buy-bust or from the search of a residence or vehicle where drugs are found. Where a case is not “tryable,” the prosecutor, for all practical purposes, will choose the sentence, because the defendant has the choice of going to trial, where he will lose and receive the mandatory minimum sentence, or pleading to the sentencing offer made by the prosecutor. The cases that generally go to trial are the “tryable” ones: the girlfriend who lives with the defendant at the residence but claims that she was not involved in his drug distribution, the passenger in the car who claims that the drugs were not his, or the driver of the car where the drugs were found in a hide who claims that he did not own the care and did not know there was a hide. These are the persons who go to trial and who, if they lose at trial, are the persons who receive the mandatory minimum sentences. As a result, sometimes the defendants who are the least culpable are the ones who, as a result of mandatory minimum sentences, receive the highest sentences.

This leads me to the third reason to abolish mandatory minimum sentencing in drug cases: fairness in sentencing. With mandatory minimum sentences in drug cases, the crime of conviction determines the sentence; minimum mandatory sentences are neither individualized nor evidence-based. They are based on the principle that one size fits all, but one size does not fit all with respect to drug crimes. The drug dealer and his girlfriend who helps him package the drugs, the drug kingpin and the courier, the dealer who sells drugs to support his drug habit and the dealer who sells to get rich, may all be charged with the same crime, but they do not deserve the same sentence, and a judge free to sen-

tence would not give them the same sentence. Prosecutors are entitled to a great deal of discretion, but that discretion should be limited to the decision as to which charge to bring, and which sentence to recommend to the judge. It should not include the discretion to determine the sentence. But when the charge determines the sentence, that is precisely the discretion that is given to the prosecutor. You would never pass a law that provides that, upon conviction, the sentence shall be set by the prosecutor. But, for all practical purposes, that is what laws establishing mandatory minimum sentences in drug cases do. The only way to ensure fairness in sentencing is to let prosecutors do the prosecuting and let judges do the sentencing.