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COMMITTEE ON JUDICIARY AND LABOR

Sen. Clayton Hee, Chair

Sen. Maile Shimabukuro, Vice Chair

Tuesday, February 5, 2013

10:00 a.m.

Room 016

SUPPORT FOR SB 68 – JUDICIAL DISCRETION

Aloha Chair Hee, Vice Chair Shimabukuro and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered on behalf of the 5,800 Hawai'i individuals living behind bars, always mindful that approximately 1,500 individuals are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 68 allows judges discretion in setting incarceration terms when sentencing drug offenders in class B and class C felony cases to make the length of the sentence proportionate to the offense and related conduct.

Community Alliance on Prisons is in strong support of this measure.

Mandatory minimum laws are being challenged across the nation in red and blue states. In fact, Senator Leahy, Chair of the U.S. Senate Judiciary Committee, is addressing mandatory minimum sentencing in his committee. In a January 16, 2013 article¹ in the Legal Times he said, *"The reliance on mandatory minimum sentences has been "a great mistake," Leahy said. "Let judges act as judges and make up their own mind what should be done. The idea we protect society by one size fits all...it just does not work in the real world."*

Mandatory minimum sentencing laws eliminate judicial discretion. These laws are problematic because they tie the courts' hands and mandate longer prison sentences, regardless of whether the Court believes the punishment is appropriate, based on the circumstances and facts of the case. Repealing mandatory minimum sentences would restore judicial discretion and further the cause of justice.

Prosecutorial discretion is essentially conducted behind closed doors, whereas that of a sentencing judge is conducted in an open courtroom. Thus, by shifting the locus of the use of discretion,

¹ <http://legaltimes.typepad.com/blt/2013/01/leahy-says-immigration-reform-top-priority-for-senate-judiciary-committee.html>

mandatory sentencing not only fails to eliminate the use of discretion, but also subjects it to less public scrutiny.

There are numerous studies, data and research on the subject of mandatory minimum sentencing – here is a sampling of a few, including the recent guidelines passed by the U.S. Sentencing Commission:

FAMILIES AGAINST MANDATORY MINIMUMS Poll²

- More than three-quarters of Americans feel that the court is the best qualified to determine sentences for crimes (78%).
- Both Democrats and Republicans feel that Courts, not Congress, should decide sentencing (81% vs. 78% respectively).

A Blue-Ribbon Indictment³ New York Times Editorial

“A 645-page report from the United States Sentencing Commission found that federal mandatory minimum sentences are often “excessively severe,” not “narrowly tailored to apply only to those offenders who warrant such punishment,” and not “applied consistently.””

MANDATORY MINIMUM SENTENCES: EXEMPLIFYING THE LAW OF UNINTENDED CONSEQUENCES CHRISTOPHER MASCHARKA, J.D. Florida State University College of Law

“There has long been a plethora of experts declaring opposition to mandatory minimums. The Sentencing Commission, the Judicial Conference of the United States, the Federal Courts Study Commission, the Federal Judicial Center, the ABA, and an overwhelming majority of judges oppose mandatory minimums.(331)⁴

Even three current Supreme Court Justices have publicly spoken out against these penalties.(332)⁵

Even among prosecutors, who are currently empowered with wide discretion under mandatory minimums, only half viewed these provisions in a favorable light.(333)⁶

Additionally, some argue that certain areas of governmental policy should not be overly guided by public opinion.(334)⁷

² FAMM Poll Fielded July 31 – August 3, 2008, Margin of error = ±3.1% in 95 out of 100 cases

³ NY Times Editorial, Published: November 13, 2011, http://www.nytimes.com/2011/11/14/opinion/a-blue-ribbon-indictment.html?_r=1&partner=rssnyt&emc=rss

⁴ (331) See Beale, *supra* note 77, at 27; cf. Breyer *supra* note 40, at 184 (“The Commission, from the beginning, has strongly opposed mandatory minimums.”).

⁵ (332) See Breyer, *supra* note 40, at 184. Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer have all publicly spoken out against mandatory minimums. See *Id.*

⁶ (333) See Schulhofer, *supra* note 63, at 216-17 (noting that not all prosecutors disfavored them solely on the harshness of the sentence).

⁷ (334) For a comprehensive accounting of the public’s opinions regarding crime and punishment, see Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 *CRIME & JUST.* 1 (2000), which summarizes numerous public opinion studies on crime and punishment.

Public attitudes on risk can be highly skewed from reality. Justice Breyer has compellingly contended that in certain fields, cognitive errors create a public perception on risk so fundamentally flawed it should not be the basis for public policy.(335)⁸

Crime, and the resulting criminal justice decisions, are an area fueling highly emotional, and arguably irrational, public reactions. Considering that policy determinations affect the liberty interests of defendants, basing criminal justice policy on empirical research seems favorable to public-driven and politically motivated measures.(336)⁹

In sum, mandatory minimum sentencing does not eliminate sentencing disparities; instead it shifts decision-making authority from judges to prosecutors, who operate without accountability.

Mandatory sentencing does not deter crime.

“There is a better solution. Repealing mandatory minimum sentencing laws not only saves taxpayers the burden of subsidizing a bloated prison system, but it gives states (and courts) the freedom to choose more effective alternatives to reduce crime.”¹⁰

The data show that for every \$1 spent on drug treatment in the community, you save approximately \$18. Substance abuse treatment provided in the community is more cost-effective than imprisonment. Individuals with substance abuse histories compose a large portion of the prison population. Substance use/abuse plays a role in the commission of certain crimes. Treatment delivered in the community is one of the most cost-effective ways to prevent such crimes.¹¹

Hawai'i's correctional system is bursting at the seams with nonviolent drug offenders. The data show that appropriate treatment works and prison only works to enhance criminal thinking.

⁸ (335) See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 59-81 (1993) (arguing primarily in the context of environmental risk); see also Beale, *supra* note 77, at 65 (paraphrasing Justice Breyer's sentiments on the issue). But see Beale, *supra* note 77, at 65 n.157 (stating that some would consider Justice Breyer's opinions "elitist").

⁹ (336) See Cullen et al., *supra* note 334, at 3. The authors expressed the following concern: One immediate concern is whether public opinion should be the arbiter of sentencing and correctional policies. Public sentiments on policy issues must be accorded some weight in a democratic society, but justifying policies on the basis of what citizens want confronts a dismaying reality: much of the public— in the United States and elsewhere— is ignorant about many aspects of crime and its control.

Id. However, there are those who believe that the appropriate source of criminal justice policy lies with our elected politicians. Relegating criminal justice decisions to experts may raise complaints that it is undemocratic and elitist. See Beale, *supra* note 77, at 65 n.157. It may also be argued that in a democracy— given certain constitutional limitations— a society has a "moral right to punish" in accordance with the values and opinions of the law abiding majority. E.g., Ronald J., Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 *TUL. L. REV.* 299, 337-38 (1990).

¹⁰ *Mandatory minimum sentencing busts budgets and bloats non-violent prison rolls*, *The Jurist—Legal News and Research*. University of Pittsburgh School of Law, March 12, 2010.
<http://jurist.law.pitt.edu/hotline/2010/03/mandatory-minimum-sentencing-busts.php>

¹¹ Aos, Steve, Polly Phipps, Robert Barnoski, and Roxanne Lieb. 2001. *The comparative costs and benefits of programs to reduce crime*. Olympia: Washington State Institute for Public Policy.

In August 2011 the National Council of State Legislators released a report¹²:

Providing for justice and protecting the public are fundamental concerns of criminal justice systems. Sentencing and corrections policies should be designed with the goals of preventing offenders' continued and future criminal activity. State approaches to sentencing and corrections have been characterized by traditional views that lean toward incapacitation or rehabilitation. More contemporary policies to reduce recidivism look to evidence-based strategies that hold offenders accountable, are sensitive to corrections costs, and reduce crime and victimization.

State legislatures set both the tone and the framework for sentencing and corrections policies. The principles identified and described below resulted from the bipartisan NCSL work group and are not aligned with any particular opinion or approach. Their intended purpose is to provide broad, balanced guidance to state lawmakers as they review and enact policies and make budgetary decisions that will affect community safety, management of criminal offenders, and allocation of corrections resources.

The report contained seven principles of effective sentencing, the first principle states:

1. Sentencing and corrections policies should embody fairness, consistency, proportionality and opportunity.

- Establish sentences that are commensurate to the harm caused, the effects on the victim and on the community, and the rehabilitative needs of the offender.
- Strive to balance objectives of treating like offenders alike with allowing discretion to select correctional options that meet individual offender needs and contribute to crime reduction.
- Consider whether sentencing and corrections policies adversely or disproportionately affect citizens based on race, income, gender or geography, including, but not limited to, drug crimes.
- Review policies that affect long-term consequences of criminal convictions, including housing and employment opportunities.

An article in the NCSL magazine about the study stated about Principle 1¹³:

States have modified drug sentencing laws, including allowing many nonviolent offenders to be under community supervision and receive substance abuse treatment. Since 1973, New York has had some of the nation's toughest mandatory sentences for drug offenses, referred to as the Rockefeller drug laws because they were signed into law by then-Governor Nelson Rockefeller. Over several years, the New York Legislature has revised the penalties for nonviolent drug crimes, expanded eligibility for treatment, and, most recently, allowed some offenders sentenced under the Rockefeller laws to apply for resentencing.

This year in Kentucky, the General Assembly established new drug quantity thresholds to distinguish drug users from more serious drug traffickers. Increasingly, state policies call for

¹² Principles of Effective State Sentencing and Corrections Policy - A Report of the NCSL Sentencing and Corrections Work Group. www.ncsl.org

¹³ *Seven Sentencing Principles*, NCSL, December 2011
<http://www.ncsl.org/issues-research/justice/seven-sentencing-principles.aspx>

broadly screening felony defendants for substance abuse, diverting some to community supervision and sending others to secure treatment.

“For possession offenses, we always just locked them up and they come back out in the same position, with the same problems as before, but now they also have a criminal record,” says Kentucky Senator Tom Jensen. “By deferring prosecution and providing an opportunity for treatment, there is a chance to turn your life around and avoid that record.”

South Carolina last year eliminated mandatory minimums for drug offenses below trafficking, but added certain violent crimes to those that require the inmate to serve 85 percent of the sentence.

“The 2010 reforms were balanced,” says Senator Gerald Malloy of South Carolina. “Violent and career criminals belong behind bars, and for a long time, and the expense of locking them up is well justified. We recognize other nonviolent, lower-level offenders also fill our prisons and that there are other, more effective approaches for dealing with them.”

What is interesting is that the above states that enacted these reforms are red. What is happening in blue Hawai'i?

An article in the National Law Journal¹⁴ by Jim Walden, who describes himself as a person who supports the war on drugs and “can fairly be called a hawk”, says”

No one would describe Judge John Gleeson of the Eastern District of New York as “soft” on drug crime, and some might describe him as fairly “hawkish” himself. His prestigious career as a federal prosecutor, spanning almost two decades, bears this out. After all, he relentlessly attacked the crew of the Gambino family that most flagrantly flouted the mob’s supposed “rule” against drug dealing, and put away its leader, John Gotti, for the remainder of his life. He certainly knows a kingpin when he sees one.

In a recent case, *U.S. v. Dossie*, Gleeson called on U.S. Attorney General Eric Holder Jr. to reform DOJ’s inconsistent and irrational use of mandatory-minimum sentences in drug cases, reserving them for drug kingpins, as Congress intended. In clear and terse prose, Gleeson described a system that works to “strip criminal defendants of the due-process rights we consider fundamental to our justice system.” The specific case concerned — of course — a young, black, street-level dealer, who turned to drug distribution to support his habit. This did not stop DOJ from seeking to enforce a harsh mandatory-minimum sentence. Gleeson’s conclusion is clear: “This case illustrates how mandatory minimum sentences in drug cases distort the sentencing process and mandate unjust sentences.” He respectfully urged the attorney general to reform DOJ’s policy, reserving the use of mandatory-minimum penalties for the managers and leaders of drug enterprises whom Congress intended to target.

It is time for Hawai'i to understand the consequences of mandatory minimum sentencing and to restore judicial discretion and the integrity of our judicial system. Mahalo for this opportunity to testify.

¹⁴ Mandatory minimums for kingpins only - It is unjust for DOJ to seek harsh mandatory sentences for street-level drug traffickers, Jim Walden, *The National Law Journal*, May 7, 2012.
<http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202551920075&slreturn=1>