

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON JUDICIARY and LABOR

Chair: Sen. Gil Keith-Agaran

Vice Chair: Sen. Maile Shimabukuro

Monday, February 23, 2015

9:00 a.m.

Room 016

OPPOSITION TO SB 513 - MANDATORY MINIMUM SENTENCING

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Committee!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered always mindful that 6,000 Hawai'i individuals are living behind bars, including 1,800 men who are serving their sentences abroad, thousands of miles from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 513 requires a mandatory minimum sentencing period of imprisonment for any person who is convicted for and has a prior conviction or prior convictions for unauthorized entry into a motor vehicle in the first degree.

Community Alliance on Prisons opposes mandatory sentencing. However, we also contend that Hawai'i has more than enough laws to address this crime. The Justice Reinvestment Initiative has recommended ways to enhance public safety and make our justice system more efficient. Proposals to increase mandatory minimum sentencing are counter to the research and findings of the analysts from the Justice Center.

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 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, 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 Poll ¹

- 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 Indictment ²

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)³

Even three current Supreme Court Justices have publicly spoken out against these penalties.(332)⁴

Even among prosecutors, who are currently empowered with wide discretion under mandatory minimums, only half viewed these provisions in a favorable light.(333)⁵

Additionally, some argue that certain areas of governmental policy should not be overly guided by public opinion.(334)⁶

¹ FAMM Poll Fielded July 31 – August 3, 2008, Margin of error = ±3.1% in 95 out of 100 cases

² 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

³ (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.”).

⁴ (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.

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

⁶ (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)⁷

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)⁸

In sum, mandatory minimum sentencing does not eliminate sentencing disparities; instead it shifts decision-making authority from judges to prosecutors, who operate without accountability. Nor does mandatory sentencing deter crime.

Hawai'i's Penal Code has enough penalties for this crime and we respectfully ask that the committee review the research (and we can supply much more) and rely on our existing statutes to address the crimes in this measure. We respectfully ask that the committee HOLD this measure and RESTORE JUDICIAL DISCRETION!

Mahalo nui for this opportunity to testify.

⁷ (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").

⁸ (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).

Testimony on support of SB 513

I, Robert Paul M. Cledera support this bill. My support for this bill is based on direct experience. I had an encounter of this nature in the morning of August 09, 2014. But being ignorant of the law, was not able to put the full effect of this kind of felony on the offender.

In supporting this measure, I believe will help others who like me are not well versed in law and put a chronic offender behind bars.