

Testimony of Jeffrey A. Manning

President Judge, Court of Common Pleas, Fifth Judicial District

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The mandatory sentencing scheme that this Senate is considering today is essentially the same that became effective six weeks after I took the bench in 1988. I have dealt with the provisions of this and other mandatory sentencing statutes for as long as I have been a lawyer. As an assistant United States attorney and first assistant United States attorney for the 12 years before my appointment to Common Pleas bench, I dealt with the federal Anti-Drug Abuse Act which required mandatory sentences for certain drug offenses based on the quantities involved and the extent of criminal participation.

As an experienced prosecutor and as a Judge, I considered mandatory minimum sentences as unnecessary infringements on the proper role of judges in imposing sentences. They provided no appropriate assistance to me as a prosecutor and, as a Judge, have forced me to impose sentences that I considered unjust and counterproductive to the purpose and goals of sentencing.

Shortly after taking the bench in 1988, I presided over a case where the Commonwealth sought the 5 year minimum mandatory sentence in a marijuana trafficking case. I refused to impose that mandatory sentence, finding that the statute violated the due process rights of the defendants and was contrary to the sentencing scheme of the Commonwealth. The District Attorney appealed and the Supreme Court reversed. In their opinion they cited statements by the legislative sponsors saying:

We have to try to provide some deterrence. This bill is more about deterrence than punishment ... These are people we all want to get off the street.

This argument is being repeated in favor of the legislation now being considered by you, claiming mandatory sentences will deter crime, reduce recidivism, and provide transparency and consistency in sentencing. I have even heard the argument that we need these laws to combat the opioid epidemic. All of these arguments were made nearly thirty years ago. The justifications made back then were understandable because, quite frankly, in 1988 there was no data or evidence to contradict them. The honest assumptions held by those who favored mandatory sentencing thirty years ago have been shown to be wrong.

Simply put, mandatory sentencing laws do not deter crime. They do not reduce recidivism, and they eliminate a judge's discretion in sentencing based on facts of the case.

Cases in point: In mid-1980's before my appointment to the bench, I prosecuted, incidentally with Linda Kelly as co-counsel, former Attorney General and now District Court Administrator, Dean Felton, a local man at the top of the international marijuana trade would fly to Belize with *Krugerrands* in 35 mm film containers to purchase marijuana. When the DEA captured him he had a warehouse in McKees Rocks. In the back of the warehouse was a Ryder Truck. In the back of the Ryder Truck was seven tons of marijuana. He received a mandatory 10 year sentence for conducting a Continuing Criminal Enterprise. Who did that sentence deter? Did the threat of 10 years stop the use, abuse and sale of marijuana?

In 1987 Hilmer Sandini and 11 co-conspirators were convicted of smuggling more than 200 kilos of cocaine, that's 200 kilos worth 11 million dollars, from Columbia through Panama to Kokomo, Indiana,

Miami, Florida and on to Pittsburgh. By reason of his prior convictions and his corruption of an undercover FBI agent in the FBI's first drug trafficking sting operation, he received a mandatory federal sentence of life without parole. The first such sentence imposed in the United States. Who did that deter? Well, him, because he died in a federal prison several years later. Did it deter anyone else? We need only look at the present explosion in heroin use and addiction to acknowledge the law of supply and demand.

As a federal prosecutor I was a major combatant in the "war on drugs." WE LOST THAT WAR. Lost because we only attacked the supply side. Simple economics. Reduce or attack the supply doesn't reduce the demand. It makes supply a more lucrative business

The ongoing war on drugs can only be won by reducing the DEMAND.

That's why, including saving lives, that we have created treatment courts.

So I respectfully suggest that imposing new mandatory sentences to deter crime and recidivism is Einstein's definition of insanity: doing the same thing over and over and expecting different results.

The State House of Representatives requested the Pennsylvania Commission on Sentencing, on which I was pleased to serve 7 years, to analyze the effectiveness of mandatory sentences. The commission concluded:

...that neither length of sentence nor the imposition of a mandatory minimum sentence alone was related to recidivism... "...and that those sentenced to a drug mandatory were more likely to be re-arrested for a drug offense..."

As Chief Justice McLachlin of the Supreme Court of Canada put it: A person cannot be made to suffer a grossly disproportionate

punishment simply to send a message to discourage others from offending.

Mandatory sentences shift sentencing discretion from the courts to the police and prosecutors.

Instead of judges having discretion to impose the appropriate sentence, mandatory sentencing encourages judges, prosecutors and sometimes juries to circumvent mandatory sentencing when they consider the result unjust. Furthermore, prosecutors have knowingly charged people with lesser offenses than the conduct would warrant or entered into plea agreements dropping mandatory sentence counts to avoid the imposition of a mandatory. In effect, this shifts sentencing discretion from appropriately experienced and trustfully wise judges to police and prosecutors who decide – behind closed doors – whether or not a charge that carries a mandatory sentence should be sought.

When Judges impose a sentence, they do so in a courtroom that is open to the public. The sentence imposed must consider: confinement that will protect the public; the gravity of the offense; the impact of the crime on the life of the victim and the community; and the rehabilitative needs of the defendant. There are Sentencing Guidelines that must be considered and applied. A statement of the reasons must be made, and every sentence imposed is subject to appellate review.

Mandatory sentencing statutes remove that transparency completely. The judge is no longer accountable, as he or she has no choice in the matter. The appropriateness of the sentence is not reviewable on appeal. The only thing reviewable is the failure of the Court to impose the one sentence the prosecution deemed appropriate.

The prosecutor does not need to consider the things that Judges are required to consider. No deference need be given to the circumstances of the defendant or the crime, other than whether it is a crime for which a mandatory is imposable. Guidelines don't matter.

The decision as to whether to impose a mandatory is within the unfettered, and unreviewable discretion of the prosecutor.

The 2009 Sentencing Commission report found that fewer than half of all convictions for mandatory eligible offenses resulted in the mandatory sentence. There is no record as to why one half of defendants received a mandatory term and the other half did not.

Mandatory sentences are too often used as a cudgel to compel a defendant to give up the sacred individual rights provided to him or her by our United States and Pennsylvania Constitutions. Defendants can be compelled, under threat of a lengthy prison sentence, to give up their right to challenge the admissibility of illegally obtained evidence; their right to a jury trial; and their right to have the Commonwealth prove them guilty beyond a reasonable doubt. District Attorneys seek to justify mandatory sentences as necessary to flip or turn lower level dealers against those closer to the top. The reality is that the rate of cooperation in cases involving mandatory minimum sentences has been found to be comparable to the average rate of cooperation in any and all other cases that come before the court.

I want to make it clear that these observations are not a condemnation of prosecutors in general, who do their best to not abuse the power that the mandatory sentencing statutes provide them. That power, however, should not be theirs. Leave the judging to the judges.

Lastly, mandatory sentences are just NOT FAIR. Fairness is the most fundamental standard of justice. If it is not fair it cannot be just.

A mandatory sentence might be appropriate in 99 out of 100 times, but it's that one time where it is unfair and an injustice.

Adam Scheloske, 19 was drinking in a bar and drinking heavily under age. At closing he left in a two seater Pontiac Fiero. He had two passengers in the single passenger seat, a young woman on the lap of an older man. At a high rate of speed he collided with a bridge abutment and the car literally split in two. Adam and the girl walked

away, uninjured. The man was ejected and struck his head on the abutment. He died and Scheloske was charged with Homicide by Vehicle (DUI).

After conviction, the Commonwealth reaffirmed their demand for the mandatory minimum 3 to 6 year sentence.

You might say: well that's o.k. He killed somebody while driving drunk. That's the appropriate imposition of a mandatory sentence. But there are two other small but important facts you might say a judge would consider:

- 1) The man who died was the bartender who served him under age; and
- 2) The man was also his father.

A sentencing scheme that provides guidelines but allows judges to exercise their judgment within those parameters in imposing sentence is what is just and fair for the people of this great Commonwealth. I respectfully urge you to reject the proposed legislation.

JEFFREY A. MANNING
President Judge, Fifth Judicial District