

**ADOPTED AS REVISED**

**AMERICAN BAR ASSOCIATION**

**MASSACHUSETTS BAR ASSOCIATION  
CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1           RESOLVED, That the American Bar Association opposes the imposition of a mandatory  
2 minimum sentence in any criminal case;

3  
4           FURTHER RESOLVED, That the American Bar Association urges Congress, state **and**  
5 **territorial** legislatures to repeal existing criminal laws requiring minimum sentences, and to refrain  
6 from enacting criminal laws punishable by mandatory minimum sentences in the future.



## REPORT

### Summary

This resolution provides a clear statement that the American Bar Association opposes mandatory minimum sentences in all cases and for all offenses.

### Existing ABA Resolutions and/or Standards

Current ABA policy (as discussed in I., below) recognizes the problems that arise from mandatory minimum sentences and the deleterious impact mandatory sentences schemes have on society. This resolution is consistent with existing ABA policy and the Criminal Justice Standards; however, it seeks to provide a clear, concise statement that the ABA opposes all mandatory sentencing schemes, with updated and current research and support.

#### **I. The ABA's Efforts to End Mandatory Minimums**

The ABA has opposed mandatory minimum sentencing—which it believes raises grave issues of public policy—for almost fifty years.<sup>1 2</sup> All senses of “fairness, due process and the rule of law” require that criminal sentencing be uniform amongst similarly situated offenders and proportional to the criminal conduct.<sup>3</sup> Mandatory minimum sentences are inconsistent with both of these principles. For almost twenty-five years, the ABA has adopted resolutions and issued recommendations challenging mandatory minimum sentences as unjust and as a driving force in over incarceration:

- (1995) The ABA adopts a resolution calling for the equalization of the federal penalties for crack and powder cocaine.<sup>4</sup>
- (2003-2004) The ABA establishes the Justice Kennedy Commission to further investigate the state of sentencing and corrections in the United States and to make recommendations to address the problem of over-incarceration. The Kennedy Commission issues a series of recommendations urging broad reforms to address

---

<sup>1</sup> See 1968 ABA Standards Relating to Sentencing Alternatives and Procedures § 2.1(c); Proceedings of the 1974 Midyear meeting of the ABA House of Delegates, Report No. 1 of the Section of Criminal Justice, at 443-44; 1980 ABA Standards Relating to Sentencing Alternatives and Procedures (2d Ed.) § 18-4.3(a).

<sup>2</sup> Letter from ABA President Karen Mathis to Committee Leadership regarding the House of Representatives Hearing on Mandatory Minimum Sentencing Laws (July 3, 2007), [https://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03\\_minimumsenth.l.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth.l.authcheckdam.pdf) (“Mathis Letter”) Mandatory minimum sentences are also against the ABA’s Standards for Criminal Justice on Sentencing. The Standards state clearly that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” Standard 18-3.21(b). In addition, Standard 18-6.1(a) directs that “[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized,” and “[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender’s criminal history, and the personal characteristics of an individual offender that may be taken into account.”

<sup>3</sup> Mathis Letter.

<sup>4</sup> Recommendation 129, Annual 1995 (Special Committee on the Drug Crisis).

# 10B

sentencing policy, racial and ethnic disparities in the justice system, use of clemency and sentence reduction, and prison conditions and prisoner reentry.<sup>5</sup> The Kennedy Commission issues a recommendation urging all jurisdictions, including the federal government, to “[r]epeal mandatory minimum sentence statutes.”<sup>6</sup>

- (2005) The ABA expresses its concerns regarding over-reliance on imprisonment in a policy adopted in response to the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), urging Congress to permit increased judicial discretion in departing from the ranges of imprisonment advised by the federal Sentencing Guidelines.<sup>7</sup>
- (2010) The ABA advocates against mandatory minimum sentencing before the Sentencing Commission, offering testimony that “[s]entencing by mandatory minimums is the antithesis of rational sentencing policy.”<sup>8</sup>
- (2011) The ABA recognizes the unwarranted severity of the federal guidelines for the sentencing of high loss economic crimes and issues a recommendation urging the Sentencing Commission to complete a comprehensive assessment of the guidelines for these offenses to ensure that they are proportional to offense severity and adequately take into consideration individual culpability and circumstances.<sup>9</sup>
- (2011) The ABA advocates for further reform of drug quantity laws through the retroactive application of the amendments to the federal guidelines enacted pursuant to the Fair Sentencing Act of 2010.<sup>10</sup>
- (2011) The ABA issues a resolution urging the Sentencing Commission to complete a comprehensive assessment of the guidelines for child pornography offenses, taking into account the severity of each offense and factors pertaining to the current nature of these offenses, offenders, victims, and the role of technology in these offenses.<sup>11</sup>
- (2015) The ABA advocates for further reform of economic crime guidelines and publishes a report drafted by the ABA Criminal Justice Section Task Force on The Reform of Federal Sentencing for Economic Crimes. The report provides an entirely new model for sentencing economic crimes.<sup>12</sup>

---

<sup>5</sup> Recommendation 121A, Annual 2004 (Criminal Justice Section).

<sup>6</sup> *Id.*

<sup>7</sup> Recommendation 301, Midyear 2005 (Criminal Justice Section).

<sup>8</sup> See Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission, June 2, 2010.

<sup>9</sup> Recommendation 104C, Midyear 2011 (Criminal Justice Section).

<sup>10</sup> See, e.g., Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission (June 1, 2011).

<sup>11</sup> Resolution 105A, available at

[https://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_105a.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_105a.authcheckdam.pdf).

<sup>12</sup> See Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission (March 12, 2015).

The ABA’s Criminal Justice Standards on Sentencing 18-3.21 (b) provides that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” This means no mandatory minimum sentences. Such sentences would be inconsistent with the notion of individualizing sentences within a guided discretion regime.<sup>13</sup> There should be no need for mandatory minimum sentences in a jurisdiction that insists upon four elements in sentencing: guidance to judges as to sentencing norms for offenses and repeat offenders, judicial discretion to vary from the norms, on-the-record explanations for any variance upward or downward, and judicial review of any variance from a sentencing norm. All of these elements are found in the Sentencing Standards and are reflected in our recommendations.

## II. History and Rationale Behind Mandatory Minimum Sentences

Mandatory minimum sentences have sharply different origins than Guidelines sentences. Through the Sentencing Reform Act of 1984, Congress tasked the Sentencing Commission with establishing sentencing guidelines that would both reconcile the purposes of punishment (i.e., just punishment, deterrence, incapacitation, and rehabilitation) and promote uniformity and proportionality. *See* 28 U.S.C. § 991(b)(1)(A). The Commission set out to base these sentencing guidelines on empirical data by analyzing “10,500 actual past cases in detail . . . along with almost 100,000 other less detailed case histories.”

Although the Commission initially decided upon an empirical approach to crafting the guidelines, political forces were also at play. While the Commission worked toward its congressionally directed deadline of November 1, 1987, “rates of violent crime in America, particularly in cities, were high, and the public saw increasing drug use and the drug trade as major contributors to the violence.” There was sentiment that violence was “veering out of control, and new approaches were needed” because “efforts toward rehabilitation of offenders had failed and that harsh punishments were needed.”

In the midst of this period of violence and fear, on June 19, 1986, college basketball star Len Bias died of a cocaine overdose. Congress responded quickly—it passed the Anti-Drug Abuse Act of 1986 that included tough mandatory minimum sentences for drug crimes. The 1980’s “War on Drugs” fueled drug sentencing, not empirical data.

## III. Mandatory Minimums are Detrimental to Society

The United States imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe and 12 times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are behind bars here in the United States. The federal sentencing scheme contributed to these statistics. In the 25 years since the advent

---

<sup>13</sup> On their face, the Standards are not entirely consistent. Standard 18-3.11 states that “[t]he legislature should not mandate the use of the sanction of total confinement for an offense unless the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction.” This could be read supporting mandatory minimum sentences.

# 10B

of the mandatory minimum sentences for drug offenses and the adoption of the Sentencing Guidelines, the average federal sentence has tripled in length.

Sentencing by mandatory minimums is the antithesis of rational sentencing policy. There are few, if any, who would dispute the proposition that criminal sentencing should take into account a wide array of considerations, including the nature and circumstances of the offense, the history and characteristics of the defendant, the defendant's role in the offense, whether the defendant has accepted responsibility for his or her criminal conduct, and the likelihood that a given sentence will further the various purposes of sentencing, such as "just desserts," deterrence, protection of the public and rehabilitation. Mandatory minimum sentencing reflects a deliberate election to jettison this entire array of undisputedly relevant considerations in favor of a solitary fact—usually a quantity of drugs that may bear no relationship to the defendant's particular culpability. Mandatory minimum sentencing declares that we do not care even a little about the defendant's personal circumstances. Mandatory minimum sentencing announces as a policy that we are utterly uninterested in the full nature or circumstances of the defendant's crime. Mandatory minimum sentencing blinds the court to the defendant's role in the offense and his or her acceptance of responsibility. Mandatory minimum sentencing is uniformly indifferent to the evaluation of whether the result furthers all or even any of the purposes of punishment.

As a matter of policy, mandatory minimum sentences raise a myriad of troubling concerns. To satisfy the basic dictates of fairness, due process and the rule of law, sentences should be both uniform among similarly situated offenders and proportional to the crime that is the basis of the conviction. Mandatory minimum sentences are inconsistent with these twin commands of justice.

## **A. Mandatory Minimums Lead to Excessively Severe Sentences**

First, mandatory minimum sentencing laws have resulted in excessively severe sentences. Mandatory minimum sentences set a floor for sentencing. As a result, all sentences for that crime, regardless of the circumstances of the crime or the offender, are arrayed above the mandatory floor. The Justice Kennedy Commission found that mandatory minimum sentencing was one of an "array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in the population of the nation's prisons and jails," despite a decrease in the number of serious crimes committed in the past several years.<sup>14</sup> The mandatory minimum sentences for drug offenses enacted in 1986 not only resulted in excessively severe sentences for those offenses, but also had an overall impact of increasing federal sentences virtually across the board. By imposing penalties higher than those imposed by federal courts over many years, Congress impelled the Sentencing Commission to increase many sentences to maintain some consistency in the

---

<sup>14</sup> Justice Kennedy Commission Report at 16-17; see also USSC Special Report, *supra* note 1, at 63 ("Overwhelmingly, the most frequent response given by judges, defense attorneys, and probation officers to the question about the effects of the mandatory minimums was that they are too harsh").

Guidelines.<sup>15</sup> Had Congress not enacted mandatory minimum penalties in 1986, the sentencing guidelines overall would have likely been less harsh and offenders would have received lower sentences in many cases. Thus, the effect of the mandatory minimums is not simply to incarcerate individuals who receive these sentences longer than a judge would have regarded as necessary. It is also to incarcerate many individuals who do not receive mandatory minimum sentences for longer than necessary as a result of the impact that mandatory minimum sentences have had on the federal sentencing guidelines as a whole.

Second, mandatory minimum statutes lead to arbitrary sentences. When the considerations in sentencing shifted from the traditional wide focus on both the crime itself and “offender characteristics” to an exclusive focus on a single fact—typically drug quantity or the presence of a firearm—a host of mitigating circumstances could no longer be considered in determining the sentence. As a result, persons with sympathetic mitigating factors based on degree of culpability, role in the offense, personal circumstances and background frequently face severe sentences.

### **B. Sentencing Disparities**

Mandatory minimums are intended to more uniform sentences for similar crimes but practical experience has taught that they tend to create sentencing disparities—just what determinate sentencing was intended to eliminate. Drug offenses, which contribute to a large proportion of mandatory minimum sentences, can give rise to arbitrary, severe punishments. Even minor differences in drug quantities can lead to similar offenses where only some trigger mandatory minimums, leading to a resulting “cliff effect” between similarly situated offenders. For instance, someone arrested with 0.9 gram of LSD will not likely spend much time incarcerated, while an arrest for one gram will trigger a mandatory minimum sentence of five years behind bars.

Application of mandatory minimum sentencing is also more harsh for one specific racial community—African Americans. The Commission’s 2011 Report to Congress explains that “Blacks account for 30.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty” but they account for a higher percentage of drug offenders who receive a mandatory minimum at sentencing—40.4 percent. The Commission states that this disparate application is “largely attributable to the cumulative effects of criminal history and weapon involvement.”

### **C. Undermining the Judiciary**

Mandatory minimums undermine judicial discretion and disturb a just allocation of authority among the parties. In the United States adversarial criminal justice system, the

---

<sup>15</sup> See Statement of Stephen A. Saltzburg (DOJ Ex Officio Sentencing Commissioner, 1989-90) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, July 22, 2009; see also USSC Special Report, *supra* note 1, at ii (“The Sentencing Commission drafted the new guidelines to accommodate ... mandatory minimum provisions by anchoring the guidelines to them”).

# 10B

judge serves as an impartial arbiter of the case, neither on the side of the prosecution nor the defense. Because of this, judges are entrusted to determine appropriate sentences. Mandatory minimum sentencing regimes, however, deprive judges of the discretion they need to fashion sentences tailored to the circumstances of the offense and the offender. And while judges are stripped of the discretion they need to do justice, at the same time, mandatory minimums often shift that discretion to prosecutors, who do not have the incentive, training or even the appropriate information to properly consider a defendant's mitigating circumstances at the initial charging stage of a case. To give prosecutors such unchecked authority dangerously disturbs the balance of power between the parties in an adversarial system, and deprives defendants of access to an impartial decision-maker in the all-important area of sentencing.

## **D. Opposition to Mandatory Minimums is Widespread and Bipartisan**

In addition to the ABA's objections to mandatory minimum sentencing regimes, mandatory minimum sentencing is opposed by an unusually wide ideological array of thoughtful groups and individuals. The Judicial Conference of the United States has consistently opposed mandatory minimum sentences for almost 60 years.<sup>16</sup> In 1990, the Judicial Conference approved a recommendation of the congressionally directed Federal Courts Study Committee urging Congress to "reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act."<sup>17</sup>

In 1993, Chief Justice William Rehnquist criticized mandatory minimums as "perhaps a good example of the law of unintended consequences" and observed the politically unfortunate circumstances under which they are often enacted:

Mandatory minimums ... are frequently the result of floor amendments to demonstrate emphatically that legislators want to "get tough on crime." Just as frequently they do not involve any careful consideration of the effect they might have on the Sentencing Guidelines, as a whole. Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.<sup>18</sup>

---

<sup>16</sup> See Statement of Honorable Julie E. Carnes (on behalf of the Judicial Conference) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, July 14, 2009, <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf> (reviewing Judicial Conference opposition to mandatory minimums in 1953, 1962, 1965, 1967, 1971, 1976, 1981, 1990, 1991, 1993, 1994, 1995, 2006, and 2009).

<sup>17</sup> Report of the Proceedings of the Judicial Conference of the United States, March 13, 1990, published in USSC Special Report, *supra* note 1, at App. G.

<sup>18</sup> William H. Rehnquist, Luncheon Address (June 18, 1993), published in United States Sentencing Commission, Proceedings of the Inaugural Symposium on Crime and Punishment in the United States 286 (1993).



Justice Stephen Breyer has spoken out against mandatory minimums, noting their fundamental inconsistency with the guidelines system:

[S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. ... Every system, after all, needs some kind of escape valve for unusual cases. ... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. ... In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.<sup>19</sup>

In 2013, Attorney General Eric Holder issued a second memorandum on mandatory minimum sentences (“2013 Holder Memo”).<sup>20</sup> This memo “refine[d]” the DOJ’s charging policy for crimes carrying a mandatory minimum sentence. He instructed that the most severe mandatory minimum sentences for drug offenses be reserved for “serious, high-level, or violent drug traffickers,” as long sentences for low level offenders have led to unduly harsh sentences that do not advance public safety, rehabilitation, or deterrence. The 2013 Holder Memo directed that such charges should not be brought for low-level drug offenders without significant ties to gangs; whose conduct did not involve violence, death or injury, the use of weapons, or involvement of minors; and where the defendant did not have a significant criminal history.

Prosecutors were also instructed to limit using severe mandatory minimum sentencing enhancements under 21 U.S.C. § 851 to only those defendants whose history or conduct made such increases appropriate.

In 2014, the Attorney General forbade prosecutors from threatening or imposing a so-called “trial penalty,” by manipulating severe mandatory minimum enhancements under 21 U.S.C. § 851 in plea negotiations. The need to secure a plea agreement was not, he said, an appropriate factor to be considered when determining whether to seek the recidivist enhancement which could double a five or ten year sentence and result in a life sentence in certain cases.

The Department of Justice recently released a report entitled “Review of the Department’s Implementation of Prosecution and Sentencing Reform Principles under the *Smart on Crime* Initiative.”<sup>21</sup> The report found that between 2010 and 2015,

<sup>19</sup> Speech of Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited* (Nov. 18, 1998), reprinted at 11 FED. SENT. REP. 180, 184-85 (1999); see also *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

<sup>20</sup> Memorandum from the Attorney General Eric H. Holder, Jr. to The United States Attorney and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013) (“2013 Holder Memo”).

<sup>21</sup> United States. Department of Justice. Office of the Inspector General. June 2017. <https://oig.justice.gov/reports/2017/e1704.pdf>.

# 10B

sentencing outcomes in drug cases had shifted in a manner that was consistent with the first two principles of *Smart on Crime* [“prioritize prosecutions to focus on most serious cases” and “reform sentencing to eliminate unfair disparities and reduce overburdened prisons”]. This was reflected by significantly fewer mandatory minimum sentences being imposed in drug cases nationwide, as well as a decrease in mandatory minimum sentences for those defendants who might otherwise have received such a sentence...”<sup>22</sup>

Many others have noted the defects of mandatory minimums, including the Federal Judicial Center<sup>23</sup>, Families Against Mandatory Minimums<sup>24</sup>, Senator Rand Paul (R-KY)<sup>25</sup>, Senator Cory Booker (D-NJ)<sup>26</sup>, Senator Mike Lee (R-UT)<sup>27</sup>, Dick Senator Durbin (D-IL)<sup>28</sup>, the Constitution Project’s Sentencing Initiative<sup>29</sup>, and numerous judges, and academics.

## **E. Mandatory Minimum Sentencing Policy Punishes Ethnic Minorities Disproportionately**

Mandatory minimum sentences have an adverse effect on minority defendants, who are more likely to be charged with a mandatory minimum offense than other defendants.<sup>30</sup> In California, for example, where the well-known “three strikes” rule (which also applies to offenders with two strikes) has had greatest application, the African-American incarceration rate for third strikes is twelve times higher than the third strike incarceration rate for whites, and the Latino incarceration rate is forty-five percent higher than the third strike incarceration rate for whites.<sup>31</sup> When second and third strike sentences are combined, the African-American incarceration rate is more than 10 times higher and the

---

<sup>22</sup> Id.

<sup>23</sup> Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Prison Terms*, Federal Judicial Center (1994) (“evidence has accumulated indicating that the federal mandatory minimum sentencing statutes have not been effective for achieving the goals of the criminal justice system”).

<sup>24</sup> Families Against Mandatory Minimums, *FAMMGRAM, The Case Against Mandatory Minimums* (Winter 2005), available at <http://famm.org/Repository/Primer/Final.pdf>.

<sup>25</sup> (June 7, 2017), <https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED>

<sup>26</sup> (June 7, 2017), <https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED> <http://www.politico.com/blogs/under-the-radar/2017/03/jeff-sessions-drug-policy-cory-booker-dick-durbin-patrick-leahy-236309>

<sup>27</sup> (June 7, 2017), <https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED>

<sup>28</sup> (June 7, 2017), <https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED> <http://www.politico.com/blogs/under-the-radar/2017/03/jeff-sessions-drug-policy-cory-booker-dick-durbin-patrick-leahy-236309>

<sup>29</sup> The Constitution Project Sentencing Initiative, *Principles for the Design and Reform of 16 Sentencing Systems* (June 7, 2005).

<sup>30</sup> Sonja B. Starr & M. Marit Rehavi, “Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker,” *Yale Law Journal*, Vol. 123 (Oct 2013) (finding that “prosecutors file mandatory minimums twice as often against black men as against comparable white men. Moreover, for those concerned about mass incarceration of black men, expanding mandatory minimums would be counterproductive.”).

<sup>31</sup> Scott Ehlers, Vincent Schiraldi & Jason Ziedenberg, *STILL STRIKING OUT: TEN YEARS OF CALIFORNIA’S THREE STRIKES* (March 2004).

Latino incarceration rate more than 78% higher than the white incarceration rate. In Massachusetts, where the racial minority composition of the state population in 2009 was determined to be 20%, a Massachusetts Bar Association concluded that 74.6% of defendants convicted of mandatory drug distribution offenses were racial/ethnic minorities and only 25.4% of defendant's convicted of such mandatory minimum offenses were white.<sup>32</sup> Studies like these have tended to bear out the findings of the U.S. Sentencing Commission's 1991 Special Report to Congress on mandatory minimum sentences, that "whites are more likely than non-whites to be sentenced below the applicable mandatory minimum" and the ominous, deeply troubling conclusion that "available data strongly suggest that [whether] a mandatory minimum is applicable appears to be related to the race of the defendant ...."<sup>33</sup>

### Conclusion

While incarceration has a role in the criminal justice system, mandatory minimum sentences exploit that role by imposing unduly long sentences on only certain classes of offenders. Because mandatory minimum sentences are not in line with the purposes of sentencing and, rather, lead to indeterminate sentencing, racial disparity, and mass incarceration, we urge the adoption of this resolution.

Respectfully submitted,

---

Jeffrey N. Catalano  
President, Massachusetts Bar Association

August 2017

---

<sup>32</sup> *"The Failure of the War on Drugs: Charting a New Course for the Commonwealth"*, Report of the Massachusetts Bar Association Drug Policy Task Force, 2009, p. 18-19 & n.55, available at <http://www.massbar.org/media/520275/drug%20policy%20task%20force%20final%20report.pdf>.

<sup>33</sup> U.S. Sentencing Commission, *"Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System"*, August 1991, Summary, pp. ii, available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991\\_Mand\\_Min\\_Report.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf).

# 10B

## GENERAL INFORMATION FORM

Submitting Entity: Massachusetts Bar Association, ABA Criminal Justice Section

Submitted By: Jeffrey N. Catalano (MA Bar), Matthew Redle, Chair (ABA Criminal Justice Section)

1. Summary of Resolution(s).

This Resolution urges the House of Delegates to review the ABA's multiple resolutions and recommendations that challenge mandatory minimum sentences as unjust and a driving force in over incarceration. With many prominent individuals, such as Chief Justice William Rehnquist and former Attorney General Eric Holder, speaking out against mandatory minimum sentencing, the movement against mandatory minimum sentencing retains bipartisan support. As such, this resolution calls for the end of mandatory minimum sentencing, as it significantly disadvantages people of color in terms of sentencing, is a significant factor in incarcerating more individuals in the United States than any other country, and ultimately leads to an unfair application of the law.

2. Approval by Submitting Entity. This resolution was passed by Massachusetts Bar Association in July 2017 and by the American Bar Association Criminal Justice Council in July 2017.

3. Has this or a similar resolution been submitted to the House or Board previously?

As noted in the Report, previous ABA policy (some of it fifteen to twenty years old) is consistent with this resolution; however, this resolution provides a clear statement against mandatory minimums in all cases, supported by up to date research and analysis.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

As noted in #3, and in the report, existing policies address sentencing schemes, mandatory minimums in drug cases, and criminal justice reform. This resolution draws upon all of them, but provides a clear, concise, and up to date statement on mandatory minimum sentencing schemes.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Given the recent announcements from the Department of Justice and others calling for an increased use of mandatory minimum sentences, along with pending

legislation in the House and Senate, it is necessary for the ABA to speak out and reinforce its commitment to opposing mandatory sentencing schemes.

6. Status of Legislation. (If applicable)

Legislation is pending before a number of federal House and Senate committees. States are also looking at their mandatory sentencing laws.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This policy, if adopted, will be used by the ABA Government Affairs Office in its efforts to work with members of Congress to repeal mandatory minimum sentences. ABA Members can also utilize this resolution in their own constituent contact efforts at the state and federal levels to push for a reform of sentencing laws. Practitioners can point to this resolution in sentencing hearings and plea negotiations as further support for relief from mandatory minimum sentences.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Commission on Veteran's Legal Services  
Legal Aid & Indigent Defense  
Commission on Disability Rights  
Special Committee on Hispanic Legal Rights & Responsibilities  
Commission on Homelessness and Poverty  
Center for Human Rights  
Commission on Immigration  
Racial & Ethnic Diversity  
Racial & Ethnic Justice  
Youth at Risk  
Young Lawyer's Division  
Civil Rights and Social Justice  
Government and Public Sector Lawyers  
International Law  
Federal Trial Judges

# 10B

State Trial Judges  
Law Practice Division  
Science & Technology  
Health Law  
Litigation

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Rebecca Brodey  
Cozen O'Connor  
1200 19<sup>th</sup> Street NW  
Washington, D.C. 20036  
T: (202) 912-4892  
Email: [rbrodey@cozen.com](mailto:rbrodey@cozen.com)

James E. Felman  
Kynes, Markman & Felman  
100 S. Ashley Drive, Suite 1300  
Tampa, FL 33602  
T: (813) 229-1118  
Email: [jfelman@kmf-law.com](mailto:jfelman@kmf-law.com)

Kevin J. Curtin  
200 Trade Center, 3<sup>rd</sup> floor  
Woburn, MA. 01801  
T: (508) 423-0140  
Email: [kevinjcurtin@icloud.com](mailto:kevinjcurtin@icloud.com)

Sara Elizabeth Dill  
American Bar Association – Criminal Justice Section  
1050 Connecticut Avenue NW, Suite 400  
Washington, D.C. 20036  
T: (202) 662-1511  
Email: [sara.dill@americanbar.org](mailto:sara.dill@americanbar.org)

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Stephen Saltzburg  
2000 H Street, NW  
Washington, D. C. 20052  
T: 202-994-7089  
E: [ssaltz@law.gwu.edu](mailto:ssaltz@law.gwu.edu)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution urges the House of Delegates to review the ABA's multiple resolutions and recommendations that challenge mandatory minimum sentences as unjust and a driving force in over incarceration. With many prominent individuals, such as Chief Justice William Rehnquist and former Attorney General Eric Holder, speaking out against mandatory minimum sentencing, the movement against mandatory minimum sentencing retains bipartisan support. As such, this resolution calls for the end of mandatory minimum sentencing, as it significantly disadvantages people of color in terms of sentencing, is a significant factor in incarcerating more individuals in the United States than any other country, and ultimately leads to an unfair application of the law.

### 2. Summary of the Issue that the Resolution Addresses

This resolution addresses the current trend towards increasing use of mandatory minimum sentences in a broader list of crimes and offenses.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This policy sets a clear statement that mandatory sentencing schemes should be eliminated and provides research and analysis to support that conclusion. This policy can be used in lobbying efforts, amicus briefs, and by ABA members in their litigation of criminal cases and sentences.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

None.