



Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 5, 2019

The Honorable Representative Jennifer Williamson, Chair
House Judiciary Committee, Members

Re: Testimony in Opposition to HB 2797

Dear Chair Williamson and Members of the Committee:

Thank you for the opportunity to submit the following comments in opposition to HB 2797.

First and foremost, OCDLA would like to extend our deepest condolences to the Martinek family. The death of Taylor Martinek was nothing short of a tragedy, and our hearts go out to his parents. OCDLA's concerns with the revisions of ORS 475.925 and 475.930 are both legal and policy-driven, and we do not seek in any way to minimize the very real tragedy that has befallen the Martinek family through the death of their son Taylor.

HB 2797 seeks to create a mandatory minimum of 58 to 130 months for *any person* involved in the delivery or manufacture of a controlled substance, *even if that substance was only one of many factors in causing another's death, and even if the person did not directly give the drugs to the other person*, regardless of the mitigating circumstances, and regardless of how many drugs another may have ingested at the time.

This bill also seeks to retroactively consider any prior conviction for unlawful delivery of a controlled substance to be a person felony (even though controlled substance crimes have never been considered person crimes before), which would make the mandatory minimum sentence for someone with one prior 91-110 months.

This bill is essentially seeking to create a state version of a disfavored federal law known as "Len Bias" laws. I have uploaded a 2016 NBC news article that offers a compelling critique and provides history on the subject of "Len Bias" laws.

OCDLA is in opposition to these changes because:

- Similar laws have been shown to cast an ineffective and overly broad net that fails to catch higher-level drug manufacturers and distributors and instead entangles street-level operatives and folks tangentially involved in the drug business.^[1]

^[1] Jon Schuppe, *30 Years After Basketball Star Len Bias' Death, Its Drug War Impact Endures*, NBC NEWS (June 19, 2016), <https://www.nbcnews.com/news/us-news/30-years-after-basketball-star-len-bias-death-its-drug-n593731> (last visited March 5, 2019).

- This bill perpetuates the overcriminalization of addiction, which is directly adverse to the State’s push to treat drug addiction as a public health crisis;^[2]
- This bill will strongly disincentivize people calling for help;
- Nationally, enforcement of similar laws has disproportionately fallen on people of color;^[3]
- Significant penalties already exist for these types of crimes under current federal and state law; and
- This proposal is distressingly broad and seeks to create another mandatory minimum sentencing scheme.

HB 2797 Casts An Ineffective and Overly Broad Net

Laws similar to HB 2797, often called Len Bias laws, have been found to cast an ineffective and overly broad net in which high-level distributors and manufacturers escape culpability, while imposing liability on low-level street dealers and drug addicts, who have no knowledge as to the purity of the drugs in their possession.¹ This lack of knowledge is particularly troubling, as HB 2797 seeks to impose what equates to a manslaughter or murder sentence, but without the traditional foreseeability or requisite mental state requirements.

The majority of charges sought under these laws are against family, friends, acquaintances, and folks selling small amounts of drugs to support their own drug dependence—the people who are in the best position to seek medical assistance for overdose victims.² Laws like HB 2797 have been found to discourage these people from calling 911 and seeking medical assistance, thus, HB 2797 actually further endangers the very people it was written to protect.³

It is illuminating and worth noting that “not a shred of evidence” exists to suggest that laws like HB 2797 have *any* effect on reducing drug use, sales, or overdose deaths.⁴ Despite similar laws across the country, drug overdose death tolls continue to rise in the states and counties with the most aggressive prosecution rate of death-induced homicide cases.⁵ Furthermore, decades of research has shown that punitive sentences for drug offenses have no deterrent effect.⁶

HB 2797 Criminalizes Drug Addiction

As mentioned above, laws similar to HB 2797 have been shown to disproportionately criminalize drug addicts, which OCDLA points out is directly adverse to the State’s push to consider drug addiction a public health emergency in Governor Brown’s bill, [HB 2257](#), which seeks to consider substance use disorder a chronic illness.⁷

^[2] HB 2257

^[3] *Id.*

¹ *Id.*; see also DRUG POLICY ALLIANCE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 17 (2017) (“In reality, the vast majority of street-level heroin sellers, as well as the family, friends, and acquaintances who share their heroine supplies, likely do not know when the heroin has fentanyl added to it.”).

² DRUG POLICY ALLIANCE, *supra* note 3, at 3.

³ *Id.*

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.*

⁷ HB 2257

For questions or comments contact:
 Mary A. Sofia, OSB # 111401
 Legislative Director
 Oregon Criminal Defense Lawyers Association
 503.516.1376 * msofia@ocdla.org

OCDLA urges the committee to support legislation like [HB 2257](#), which acknowledges that drug addiction is a chronic illness, not a life choice that can be deterred through harsher punishments, and thus should be treated as a public health issue with solutions such as overdose education, wider distribution of, and access to, naloxone, implementation of safe consumption sites, drug checking, and access to therapy and treatment.⁸

HB 2797 Disincentivizes People Calling 911 for Help

This bill will result in more deaths—a collateral consequence here will be that friends, acquaintances, and loved ones will fear calling the police or 911 when someone is overdosing. As HB 2797 is currently written, it would largely affect drug users and addicts while high-level drug manufacturers and distributors escape culpability.^[4]

By criminalizing the people who are in the best position to seek medical assistance for overdose victims, thus discouraging them from calling 911 or seeking medical assistance,^[5] HB 2797 further endangers the very people it was written to protect.^[6] Thus, the only message it sends to the “criminals” is that it’s safer to let someone overdose than it is to call 911, and the only message it sends “victims” is that the punishment of low-level drug dealers, users, and addicts is more important than preventing their deaths by ensuring that those around them are able to seek medical help.

HB 2797 Will Disproportionately Criminalize Communities of Color

It is well established that while “rates of reported drug use do not differ substantially among people of different races and ethnicities, black people are far more likely to be criminalized for drug possession than white people.”⁹

This disproportionate criminalization of black people is readily apparent in laws similar to HB 2797. For example, in McHenry County, Illinois, 35% of drug-induced homicide cases were brought against black men, while the county has a black population of under 2%.¹⁰ In Minnesota, 72% of Hennepin County Attorney Mike Freeman’s drug-induced homicide prosecutions have been against black people, despite the black population being only 13% of the county.¹¹ Laws similar to HB 2797 further perpetuate the already stark racial disparities resulting from drug law enforcement.¹²

HB 2797 is Not Necessary—Significant Penalties Already Exist Under Current Federal and State Law

Significant penalties exist for these types of crimes as people can be prosecuted under the Federal “Len Bias” law or prosecuted under Oregon law.

Under current law, depending on the charge (Unlawful Delivery/Manufacture), the crime seriousness level (1-10), the type of controlled substance, the quantity of controlled substance (user amount versus substantial

⁸ DRUG POLICY ALLIANCE, *supra* note 3, at 52–54.

^[4] *Id.*

^[5] *Id.* at 3.

^[6] *Id.*

⁹ *Id.* at 47.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (“[I]t has been demonstrated that likelihood of arrest is associated with skin tone.”).

For questions or comments contact:
Mary A. Sofia, OSB # 111401
Legislative Director
Oregon Criminal Defense Lawyers Association
503.516.1376 * msofia@ocdla.org

quantity), the person's criminal history (I-A), and the aggravating factors plead, they could be facing probation all the way up to 260 months in prison, on just one count.

Oregon does have laws that can enhance punishment, and they are used frequently in courts every day. They are called "aggravating factors" that are plead as "enhancement facts."

Under current law, enumerated and unenumerated aggravating factors including but not limited to "resulted in death of another," "harm or loss significantly greater than typical," and "vulnerable victim" can be plead as enhancement facts. If proven, these can double (called an "upward dispositional departure") or quadruple (called a "double barrel upward dispositional departure") a person's presumed grid block sentence which could result in incarceration time from 12 months all the way up to 260 months. This is the law now, and it is at the DA's disposal now.

HB 2797 is Written Broadly and Seeks to Create Another Mandatory Minimum Sentencing Scheme

This proposal is distressingly broad. This bill is written so broadly that it does not differentiate between small or large quantities of drugs, whether people are sharing or selling drugs, or whether people actually know the drugs they are sharing/selling are impure. This bill does not require people to actually know the drugs they are sharing or selling may be contaminated nor does it require foreseeability that they will be shared/resold, and instead imposes a strict liability mental state on anyone who manufactured or delivered a controlled substance that ultimately ends up in the hands of someone who overdoses.

This results in low-level dealers who sell small quantities or share with their friends who then share with their friends to be as legally culpable as top-tier drug dealers/makers even though they didn't know the drugs were contaminated or impure. These nuances matter because the bill will allow prosecutors to prosecute people with addictions and low-level dealers who deal to support their own addiction as well third parties who are unaware that the drugs are then being re-sold or re-shared—not just "drug kingpins" as they claim.

This bill creates yet another mandatory minimum sentencing scheme that gives the DA leverage to force a plea, does not allow the parties to negotiate a fair agreement, and removes the judge's ability to consider mitigation or the facts of the case at hand. Under this law, a judge would be obligated to impose a minimum sentence of 5 to 11 years no matter what—someone who directly sold drugs, someone who directly shared drugs, a person upstream who knew their drugs would be shared or resold, a person upstream who had no idea their drugs would be share or resold, someone upstream who knew their drugs were contaminated, someone upstream who had no idea they were contaminated would all be treated the same. Facts matter, and the sentencing judge should have the discretion here. This bill is essentially seeking to impose a manslaughter or murder sentence on someone who did not intend or foresee another's death, and it is written in such a broad way that the only person who decides whether this is charged or the incredible sentenced imposed is the DA, and they are telling us to "trust" them.

Mandatory minimum sentencing laws were passed to (a) end sentencing disparities between defendants and (b) deter crime.¹³ They have failed to do both. By taking away a judge's discretion to decide how differently situated defendants are sentenced, it was thought general disparities, including racial disparities, would

¹³ See e.g. United States Sentencing Commission, *Overview of the United States Sentencing Commission*, (2011) (providing history of the Sentencing Reform Act by stating "[to] provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct") https://www.uscc.gov/sites/default/files/pdf/about/overview/USCC_Overview.pdf (last visited Feb.12, 2019).

For questions or comments contact:
Mary A. Sofia, OSB # 111401
Legislative Director
Oregon Criminal Defense Lawyers Association
503.516.1376 * msofia@ocdla.org

dissipate. They did not.¹⁴ Instead, mandatory minimum laws simply transferred sentencing discretion to prosecutors, who bargain under an array of overlapping criminal statutes based on their corresponding terms of incarceration.¹⁵ In practice, this means “one size fits all” sentences end up as plea bargaining tools, often leveraging a “cliff effect”¹⁶ for guilty pleas in exchange for lesser sentences.¹⁷ Nationally, evidence shows mandatory minimums did not affect racial disparities in sentencing,¹⁸ nor is there evidence that they deterred any crime.¹⁹ On the State level, Oregon’s mandatory minimum law had the same goals, and unsurprisingly, the same results.²⁰

OCDLA has significant concerns about this proposal, and we cannot support it. For all of the reasons outlined above, OCDLA strongly urges this committee to vote “no” on HB 2797. Thank you for your consideration.

For questions or comments contact:
Mary A. Sofia, OSB # 111401
Legislative Director
Oregon Criminal Defense Lawyers Association
503.516.1376 * msofia@ocdla.org

About OCDLA

The Oregon Criminal Defense Lawyers Association (OCDLA) is a private, non-partisan, non-profit bar association of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment, and post-conviction relief proceedings throughout the state of Oregon. The Oregon Criminal Defense Lawyers Association serves the defense and juvenile law communities through continuing legal education, public education, networking, and legislative action.

OCDLA promotes legislation beneficial to the criminal and juvenile justice systems that protects the constitutional and statutory rights of those accused of crime or otherwise involved in delinquency and dependency systems as well as to the lawyers and service providers who do this difficult work. We also advocate against issues that would harm our goals of criminal justice reform within the criminal and juvenile justice systems.

¹⁴ Joshua B. Fischman, et al., *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, Vol. 9:4, Journal of Empirical Legal Studies, 729, 757 (2012).

¹⁵ Jeffrey T. Ulmer, et al, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIM. & DELINQ. 427, 451 (2007) (“Our findings support the long-suspected notion that mandatory minimums are not mandatory at all but simply substitute prosecutorial discretion for judicial discretion.”); Criminal Justice Commission, *Longitudinal Study of the Application of Measure 11 and Mandatory Minimums in Oregon*, 45 (2011) (“M11 has combined in the prosecutorial function both the charging and the sentencing decision.”).

¹⁶ See e.g. O.R.S. § 164.405(1)(b) (explaining Robbery II requires mandatory minimum sentence of seventy months, if the individual is aided by another person present); see also *id.* §164.395 (showing that the Robbery III Statute proscribes same elements except for aid by another individual, allows a sentence starting at probation).

¹⁷ Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993); Criminal Justice Commission, *supra* note 3, at 44.

¹⁸ See Joshua B. Fischman, *supra* note 2, at 736 (“The U.S. Sentencing Commission [1991] qualitatively categorized cases in which a mandatory minimum could have been applied, and found that 46 percent of white defendants were sentenced below the mandatory minimum, compared to 32 percent of black defendants.”).

¹⁹ Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, FEDERAL JUDICIAL CENTER (1994), [http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/\\$file/conmanmin.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf). (last visited Feb. 12, 2019).

²⁰ See Criminal Justice Commission, *supra* note 3, at 45 (“In conclusion, M11 did not eliminate the tough choices about what the appropriate sentence is in a specific case. It did change who makes that decision from the judge to the prosecutor.”); see Criminal Justice Commission, *supra* note 3, at 36 (showing growth of overall prison population from M11 charges from 1%–21%); Criminal Justice Commission, *supra* note 3, at 47, Appendix A, https://www.oregon.gov/cjc/SAC/Documents/measure_11_analysis_final.pdf (last visited Feb. 12, 2019).

For questions or comments contact:
Mary A. Sofia, OSB # 111401
Legislative Director
Oregon Criminal Defense Lawyers Association
503.516.1376 * msofia@ocdla.org