



Testimony on SB 401 from District Attorneys John Hummel, Mike Schmidt and Matt Ellis

- March 23, 2021 -

As the elected District Attorneys of Deschutes, Multnomah and Wasco Counties, we write today in support of Senate Bill 401, which would return control of the sentencing of the most important criminal cases to judges. We believe that while Ballot Measure 11 has succeeded in ballooning Oregon's prison costs, deepening racial disparities in the criminal justice system and consolidating power in the hands of prosecutors, it has not made Oregon safer.

We were also moved to submit this testimony due to our shared alarm over some of the representations recently made by the Oregon District Attorneys Association (ODAA), in which we are members, in a recent memorandum regarding the effect and history of Ballot Measure 11.¹ We urge legislators to approach this memorandum with caution. ODAA asserts that BM 11 is causally responsible for the overall drop in crime rates in Oregon following its passage in 1994. We do not believe the data supports this conclusion. While crime did drop in Oregon after its historic peak in the early 90's, this trend was generally true across the country. Crime dropped in states which adopted mandatory minimum structures similar to Oregon's and in those which did not. A Harvard study noted a 58% drop in serious crime in New York City between 1994 and 2014 at the same time the combined jail and prison population was cut by 55%.² When California reduced its prison population by 25%, reports of violent

¹ https://washcoda.s3-us-west-2.amazonaws.com/s3fspublic/FINAL_ODAASStatement.pdf?MhvoQIydZYgcqm6EHV7.LIfW_RdVbX3z and https://f089a6f3-e440-4f12-9600-0d9903293503.filesusr.com/ugd/818f22_93baf9ce1d8d4f1b94f0303c14bab6d2.pdf

² Judith A. Green and Vincent Schiraldi, "Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety," *Federal Sentencing Reporter* 29, no. 1., 2016.

crime dropped by 21% during the same period.³ When New Jersey reduced its prison population by 25%, reports of violent crime dropped by 31%.⁴ A comprehensive report by the National Academy of Sciences issued in 2014 concluded that on balance, higher incarceration rates had at best a “modest” impact on these declining crime rates.⁵ A 2017 study by Portland State University focusing on a wide range of Oregon criminal cases found no correlation between the length of sentence imposed and the likelihood that a person would reoffend.⁶ These are a small sampling of the many studies which have called into suspicion the correlation between mandatory minimum sentencing regimes like BM 11 and a lower crime rate or lower rate of recidivism among those sentenced. We simply cannot endorse the assertion made by ODAA that BM11 itself somehow “caused” a decline in crime that occurred simultaneously in almost every corner of the country.

BM 11 did, however, come at significant cost. BM11 has deepened disparities in our criminal justice system, led to a ballooning of prison costs, and given the right to determine the sentence in our most serious crimes over from judges to unfettered prosecutorial discretion. In a system of criminal justice where over 90% of cases are resolved via plea offer rather than trial, the incredible leverage provided by BM 11 provides prosecutors – and prosecutors alone – the ability to decide the sentence by voluntarily declining to pursue a BM 11 charge, often by electing to reduce a charge to a lesser offense or an “attempt.”

A 2011 study by Oregon’s Criminal Justice Commission noted that over 70% of those indicted in Oregon for committing a BM11 offense will ultimately be sentenced to a lesser crime at the sole discretion of the prosecutor’s plea bargain.⁷ This same report notes that a defendant who takes a BM 11 charge to trial is four times as likely to receive a full length BM 11 sentence. This suggests that a person who refuses to accept a prosecutor’s plea offer is extremely likely to be punished for it at trial, a very strong incentive to plea. Contrary to representations that BM11 has created “truth in sentencing,” the primary

³ Marc Mauer and Nazgol Ghandnoosh, “Fewer Prisoners, Less Crime: A Tale of Three States,” The Sentencing Project, 2014.

⁴ Mauer and Ghandnoosh, “Fewer Prisoners, Less Crime: A Tale of Three States,” The Sentencing Project, 2014.

⁵ Jeremy Travis, Bruce Western and Steve Redburn, “The Growth of Incarceration in the United States: Exploring Causes and Consequences,” Committee on Law and Justice, Division of Behavioral and Social Sciences and Education National Research Council on the National Academies, 2014.

⁶ Mark Leymon, Christopher Campbell, Kris Henning and Brian Renauer, “Effect of Prison Length of Stay in Oregon,” Criminal Justice Policy and Research Institute, Portland State University, 2017.

<https://www.oregon.gov/cjc/CJC%20Document%20Library/PSU-CJC-LOSonRecidivismFinalReport.pdf>

⁷ “Longitudinal Study of the Application of Measure 11 and Mandatory Minimums in Oregon.” Oregon Criminal Justice Commission, 2011.

effect has been to provide prosecutors with leverage. A judge is powerless to modify that sentence – no matter the mitigation, no matter the prospects of rehabilitation, no matter the attendant circumstances. Nor has the effect fallen evenly on all communities. The overrepresentation of people of color at every phase of the criminal justice system guarantees that mandatory minimums will fall most heavily on our diverse populations. ODAA’s assertion that allowing judges to determine sentences will somehow increase disparity relies on the dubious assumption that the prosecutor driven system of plea bargaining is somehow less prone to bias than the actions of a judge in open court. We believe that judges are uniquely well positioned to impose a fair sentence, based on an official record made in open court and within a system where both sides get to make their case. ODAA’s own polling suggests that a majority of Oregonians would like to see judges, not prosecutors, determine sentences for even our most violent offenders. As elected District Attorneys, we agree.



John Hummel, Deschutes County DA



Mike Schmidt, Multnomah County DA



Matt Ellis, Wasco County DA