

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

NO. SJC-11970

COMMONWEALTH

v.

IMRAN LALTAPRASAD

BRIEF FOR THE CONSTITUTION PROJECT, DRUG POLICY
ALLIANCE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, AS AMICI CURIAE

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INTRODUCTION

For the reasons articulated by the defendant Laltaprasad and amici Committee for Public Counsel Services, Families Against Mandatory Minimums, and Thirty-Nine Others, a Massachusetts sentencing judge has statutory and/or constitutional authority to impose a sentence below the mandatory minimum terms set forth in G.L. c. 94C, §§ 32(b), 32A(d) (2012). Amici here write separately to provide context: since mandatory minimum sentencing statutes were first adopted by the federal government and states across the nation, a consensus has emerged that such sentencing schemes fail to effectuate the basic purposes of sentencing. The federal government and many states have therefore enacted safety valve statutes and repealed and reduced mandatory minimum sentencing laws. Indeed, safety valve statutes are the norm: at least twenty-nine states and the federal government have statutes that provide judicial discretion to depart below certain mandatory minimum sentences.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are national organizations united in their commitment to reforming mandatory minimum sentencing.

The Constitution Project ("TCP") is a national nonpartisan organization based in Washington, D.C., that promotes and defends constitutional safeguards. Founded in 1997, TCP brings together legal and policy experts from across the political spectrum to promote consensus-based solutions to pressing constitutional issues. TCP undertakes original research; develops policy recommendations; issues reports, statements, and policy briefs; files amicus briefs; testifies before Congress; and holds regular briefings with legislative staff and policymakers. Its work includes reforming the nation's broken criminal justice system, strengthening access to justice, protecting civil liberties, and ensuring government transparency and accountability. TCP's criminal justice advocacy includes sentencing reform. In 2006, TCP's Sentencing Committee issued two reports recommending reform of criminal sentencing systems. The bipartisan Committee comprised judges, prosecutors, defense attorneys, scholars, and other sentencing experts and was co-chaired by former U.S. Attorney General Edwin Meese III and former U.S. Deputy Attorney General Philip Heymann. In the Committee's view, "mandatory minimum sentences are generally incompatible with the

operation of a guidelines system." Since then, TCP has advocated for changes to criminal sentencing laws to reduce the use of mandatory minimums and expand the use "safety valves" to allow judges to consider the circumstances of each unique case.

The Drug Policy Alliance ("DPA") is a 501(c)(3) nonprofit organization that leads the nation in promoting drug policies that are grounded in science, compassion, health, and human rights. The organization is governed by a board of directors who bring a wealth of public health, science, civil liberties, social justice and criminal justice experience to the drug policy reform movement. DPA's honorary board includes prominent figures from both the left and the right of the political spectrum who are renowned for their leadership in the fields of business, law, medicine, media and politics, nationally and internationally. DPA is actively involved in the legislative process and seeks to roll back the excesses of the drug war, block new, harmful initiatives, and promote sensible drug policy reforms.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of

criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 9,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case as NACDL has long opposed mandatory minimum sentences, which deprive judges of the ability to fashion sentences that suit the particular offense and offender.

STATEMENTS OF THE CASE AND FACTS

Amici adopt the statement of the case and the statement of facts set forth in the defendant's brief.

SUMMARY OF THE ARGUMENT

When, in 1996, the Massachusetts legislature enacted G.L. c. 211E, § 3(e) (2012), authorizing a sentencing judge to “impose a sentence below any mandatory minimum term prescribed by statute,” the legislature placed Massachusetts at the forefront of mandatory minimum reform. In the two decades since, a national consensus has emerged: mandatory minimum sentences, especially for non-violent crimes, do not further the policy purposes of sentencing and should be repealed or subject to safety valves that permit individualized sentencing. Strict mandatory sentences fail to account for an offender’s individual characteristics or other mitigating circumstances and therefore are neither proportional to the severity of the crime nor just. There is no evidence that such severe and inflexible sentences have made any measurable impact on crime rates, public safety, recidivism, or rehabilitation and re-entry of prisoners. (Pp. 7-12.)

In light of the substantial evidence against mandatory minimums, safety valves statutes - especially for drug offenses - are increasingly widespread. In addition to the federal government,

thirty states - not, for the purposes of this tally, including Massachusetts - have statutes or other mechanisms that permit sentencing judges to exercise discretion and depart below mandatory minimum sentences. (Pp. 13-23.) A handful of states have largely eliminated mandatory minimum sentences for drug offenses altogether, while the vast majority of states have enacted at least some mandatory minimum reforms. (Pp. 23-25.)

This Court should, for the reasons articulated by Laltaprasad and amici Committee for Public Counsel Services, Families Against Mandatory Minimums, and Thirty-Nine Others, conclude that a Massachusetts sentencing judge has statutory and/or constitutional authority to impose a sentence below the mandatory minimum terms set forth in G.L. c. 94C, §§ 32(b), 32A(d). To hold otherwise - especially where the Massachusetts legislature has expressed its intent to authorize below-minimum sentences - would place Massachusetts far outside the mainstream by preserving a widely-repudiated method of sentencing.

ARGUMENT

I. THERE IS BROAD NATIONAL CONSENSUS THAT STRICT MANDATORY MINIMUM LAWS FAIL TO FURTHER THE PRIMARY PURPOSES OF SENTENCING

Mandatory criminal penalties - including statutory mandatory minimum sentences, automatic sentence enhancements, and "three strikes" laws for habitual offenders - were enacted in the 1980s and 1990s based on the then-prevailing belief that severe mandatory sentences were necessary to get tough on crime and protect public safety. Over the last two decades, this prevailing "wisdom" has been upended by the factual consequences of such harsh sentencing policies: skyrocketing prison populations, drained correctional budgets, disproportionate punishments particularly for non-violent drug offenses, and failed rehabilitation and re-entry of prisoners. See, e.g., Marc A. Levin & Vikrant P. Reddy, The Verdict on Federal Prison Reform: State Successes Offer Keys to Reducing Crime & Costs (Tex. Pub. Policy Found., Austin, Tex.), July 2013, at 1, at texaspolicy.com/library/doclib/2013-07-PP24-VerdictOnFederalPrisonReform-CEJ-LevinReddy.pdf (recognizing as "alarming" the 700 percent rate of growth of federal prisoners since 1980 and attributing it in large part

to inflexible sentencing); Alison Lawrence & Donna Lyons, Principles of Effective State Sentencing and Corrections Policy (Nat'l Conference of State Legislatures Sentencing & Corr. Work Grp., Wash., D.C.), Aug. 2012, at ncsl.org/documents/cj/pew/WGprinciplesreport.pdf (recognizing that incarceration is not an effective way to deal with low-level drug offenders and costs of treating drug offenders accounts for substantial portion of state corrections budgets).

Based on this reality, a national consensus has emerged among social science researchers, policymakers (including legislators on both sides of the aisle), and practitioners (including a number of judges) that mandatory sentences are not now and were never an effective way to deter crime, improve public safety, or rehabilitate offenders. See, e.g., Michael Tonry, The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings, 38 Crime & Justice 94-96 (2009) (reviewing decades of social science research on mandatory minimums and concluding they are utterly ineffective); Carl Hulse & Jennifer Steinhauer, Sentencing Overhaul Proposed in Senate With Bipartisan Backing, N.Y. Times, Oct. 1, 2015,

nytimes.com/2015/10/02/us/politics/senate-plan-to-ease-sentencing-laws.html (noting broad bipartisan support for major overhaul of federal sentencing laws, including cuts of mandatory sentences for nonviolent offenders); Judge Mark W. Bennett, How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison, The Nation, Oct. 24, 2012, thenation.com/article/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri/.

This consensus has emerged because mandatory minimums do not further the primary goals of sentencing, which are to ensure that a sentence is proportionate to the seriousness of the crime and reflects the need for just punishment, deterrence, protection of the public, and rehabilitation of the offender. See, e.g., 18 U.S.C. § 3553 (2010) (in federal context, setting forth well-settled factors to be considered in imposition of sentence). A mandatory minimum sentencing scheme that has no mechanism for individualized assessment, such as a safety valve, cannot address the first goal of proportionality and fair punishment; a low level drug offender receives the same sentence as the leader of the drug ring

because the sentence does not account for the offender's role in the crime, his or her personal circumstances, or other mitigating facts. See Barbara S. Vincent & Paul J. Hofer, The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings (Fed. Judicial Ctr., Wash., D.C.), 1994, at 13, at [fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/\\$file/conmanmin.pdf](http://fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf). The sentence only depends on the amount and type of drugs at issue, and fails to address the question of how much punishment a particular individual deserves. Id. Similarly, mandatory school zone enhancements fail to account for whether the defendant actually intended to sell drugs near schools and, therefore, are essentially strict liability sentencing statutes.

Likewise, there is no credible evidence that lengthy mandatory sentences have a significant deterrent effect on crime. See Tonry, at 94-96 (2009) ("[T]he clear weight of the evidence is, and for nearly 40 years has been, that there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects."). Studies have shown that, although mandatory sentencing regimes purport to call for predictable severe sentences, they

actually promote lack of certainty and transparency because they are not uniformly applied due to prosecutorial charging decisions, plea bargaining, and judicial circumvention. Id. Mandatory sentences are especially futile in deterring potential low-level drug offenders because such individuals are easily replaceable and their removal cannot realistically disrupt major drug rings. See Vincent & Hofer, supra, at 11-12.

Research has also shown that incarceration has, at best, only a limited impact on crime rates more generally. See The Pew Center on the States, State of Recidivism: The Revolving Door of America's Prisons (Pew Charitable Trusts, Wash., D.C.), Apr. 2011, at pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/staterecidivismrevolvingdooramericaprison20pdf.pdf; Don Stemen, Reconsidering Incarceration: New Directions for Reducing Crime (Vera Institute of Justice, New York, N.Y.) Jan. 2007, at vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf. In order for incapacitation to have a measurable impact on public safety, there must be a mechanism to assess whether an offender has a high risk of recidivism. Among other

problems, many mandatory minimum statutes base punishment solely on the charge at issue, such as the type and amount of drug. Mandatory minimum sentencing based on features of crimes rather than individualized assessments of offenders falls particularly short of furthering the public safety goal of incarceration. See Vincent & Hofer, supra, at 11-12.

Finally, mandatory minimum sentences do nothing to further the rehabilitative purpose of sentencing. Studies have shown that mandatory lengthy penalties actually create an increased risk of recidivism. See, e.g., Marc Mauer, Viewpoint: The Impact of Mandatory Minimum Penalties in Federal Sentencing, 94 Judicature 1, 7 (2010), at sentencingproject.org/doc/publications/s_Viewpoint.pdf. Furthermore, re-entry into society is more challenging where a prisoner is removed from the community and physically separated from support networks, including family and friends, for an extended period of time. Id.

In sum, a mandatory minimum sentencing scheme that offers no mechanism for a judge to evaluate an offender's individual characteristics does not further any of the policy purposes of sentencing.

II. A MAJORITY OF STATES AND THE FEDERAL SYSTEM HAVE SAFETY VALVES OR HAVE ENACTED SUBSTANTIAL MANDATORY MINIMUM REFORMS

A. Safety Valves Are the Norm and Exist in a Majority of States and the Federal System

In light of the widespread recognition that mandatory minimum sentencing schemes fail to effectuate the purposes of sentencing, numerous states and the federal government have enacted safety valve statutes that provide judicial discretion and permit judges to make individualized determinations at sentencing. While not the first safety valve statute,¹ the federal statute is, perhaps, the most well-known. It was enacted in 1994, amid a broad national discussion about mandatory minimum sentencing, and permits departures below mandatory minimum sentences for drug offenses.² See 18 U.S.C. § 3553(f). Shortly

¹ For instance, South Dakota and Montana enacted versions of their safety valve statutes in 1989 and 1991 respectively. See S.D. Codified Laws §§ 22-42-2.3, 22-42-19 (2016); Mont. Code Ann. § 45-9-202 (2015).

² See Molly M. Gill, Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums (Families Against Mandatory Minimums, Wash., D.C.), 2008, at 19, at famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf ("By 1994, harsh mandatory minimum drug sentences had been imposed on thousands of minor drug offenders, and stories of over-punishment were rampant. Congress responded to mounting public pressure to change mandatory minimums by enacting the 'safety valve.'");

after this substantial federal sentencing reform, Massachusetts enacted G.L. c. 211E, § 3(e).

Two decades later, at least thirty states and the federal government have statutes or other mechanisms that permit judges to exercise judicial discretion and depart below statutory mandatory minimums. At least twenty-three states have safety valve or judicial sentencing discretion statutes that reach drug offenses, including the following:

Alabama: Under the state's Split Sentence Act, most sentences of twenty years or less including mandatory minimum sentences can be suspended or split between a term of incarceration and probation. Ala. Code § 15-18-8(a) (2016); see also Ex parte McCormick, 932 So.2d 124 (Ala. 2005) (permitting incarceration portion of split sentence to be suspended).

Connecticut: A sentencing judge may depart from the mandatory minimum sentences for certain nonviolent drug offenses where the defendant makes a showing of good cause; the judge must articulate reasons for departing from the mandatory minimum. Conn. Gen. Stat. § 21a-283a (2016).

Delaware: A sentencing judge may modify, defer, reduce, or suspend minimum mandatory sentences of one year or less based on serious medical treatment needs where the individual "does not constitute a substantial risk to the community." Del. Code. Ann. tit. 11, § 4221 (2016).

Vincent & Hofer, supra (influential critique of mandatory minimum sentencing published shortly before the federal safety valve was enacted).

Florida: A sentencing judge need not sentence a defendant as a "habitual offender," "habitual violent felony offender," or "violent career criminal" if the court finds that a habitual offender sentence is "not necessary for the protection of the public." Fla. Stat. § 775.084(3)(a)(6), (3)(c)(5), (4)(e) (2012).³

Georgia: Under a safety valve statute that largely tracks the federal safety valve statute, a sentencing judge may impose a sentence 50% below the mandatory minimum sentence for a broad range of drug offenses, including trafficking and manufacturing cocaine, ecstasy, marijuana, and methamphetamines, and the sale and cultivation of large quantities of marijuana. Ga. Code Ann. §§ 16-13-31, 16-13-31.1 (2015).

Hawaii: For Class B or Class C felony drug offenses (subject to ten and five year mandatory minimum sentences respectively), a sentencing judge may depart from the standard minimum mandatory sentence to a lower statutory range. Haw. Rev. Stat. § 706-660 (2015). Hawaii has also expanded eligibility probation from first-time drug offenders to first- and second-time drug offenders. Haw. Rev. Stat. 706-622.5 (2015).

Indiana: For adult felonies convicted when an individual has certain qualifying prior convictions as a juvenile, a sentencing judge may suspend the required sentence of incarceration if the judge makes certain findings. Ind. Code. § 35-50-2-2.1(b) (2016).

Maine: Under a safety valve for drug trafficking offenses, a sentencing judge may sentence below a mandatory minimum when applying the minimum mandatory minimum sentence would result in a "substantial injustice," and not imposing such

³ "Prison release reoffenders" in Florida may also be sentenced below the required mandatory minimum where the prosecutor makes a determination that extenuating circumstances make prosecuting an individual as a prison release reoffender unjust. Fla. Stat. § 775.082(6) (2016).

sentence would have no adverse effect on public safety or impair the deterrent effects of the state's sentencing regime. Me. Rev. Stat. Ann. tit. 17-A, § 1252(5-A)(B) (2015)

Maryland: A sentencing judge may depart below the mandatory minimum for repeat offender drug offenses that carry minimum mandatory sentences of two to forty years if the court determines that imposing the statutory sentence would yield a "substantial injustice" and is not necessary to protect the public. Md. Code Ann., Crim. Law § 5-609.1 (2016).

Michigan: A sentencing judge may depart below the mandatory minimum for certain drug offenses carrying mandatory minimum sentences of two years to life imprisonment if there are "substantial and compelling reasons to do so." Mich. Comp. Laws § 333.7410(5) (2016) (school zone offenses); Mich. Comp. Laws. § 333.7413(4) (2016) (second or subsequent drug offenses); Mich. Comp. Laws. § 333.7416(3) (2016) (recruiting or inducing a minor to commit an act that is an adult felony).

Minnesota: A sentencing judge may sentence below the mandatory minimum sentence for certain subsequent drug possession or sale offenses, upon a finding that there are "substantial and compelling" reasons to depart from the minimum sentence. Minn. Stat. § 152.025 (2010).⁴

Mississippi: A sentencing judge may reduce the mandatory minimum sentence for a drug trafficking offense if the defendant had a minor role, was non-violent, the offense did not result in serious bodily injury or death, and the judge concludes that the interests of justice are not served by the mandatory sentence.⁵ Miss. Code. Ann. § 41-29-139(h) (2014).

⁴ Minnesota also has a safety valve for certain gun offenses. Minn. Stat. § 609.11 (2015).

⁵ Mississippi has a safety valve for a gang-related statutory enhancement. Miss. Code Ann. § 97-44-19(5) (2016).

Missouri: A sentencing judge may reduce any sentence for a non-violent first-time drug offense where an individual has successfully committed a detoxification and rehabilitation program. Mo. Rev. Stat. § 558.046 (2016).

Montana: A sentencing judge can depart from mandatory minimum sentences for most offenses that carry such sentences based on factors including age, mental capacity, duress, and role in the offense. Mont. Code Ann. § 46-18-222 (2015). In a case that involves a "dangerous drug felony offense," where a sentencing judge determines that incarceration "is not appropriate," the judge may suspend or defer the sentence and impose specific conditions, including a fine, drug treatment, community service, or intensive probation. Mont. Code Ann. § 45-9-202 (2015).

New Jersey: A sentencing judge may sentence below the minimum mandatory sentence for drug trafficking offenses in a school zone after consideration of certain enumerated factors, including the defendant's criminal record and whether school was in session at the time of the offense. N.J. Stat. Ann. § 2C:35-7 (2010).

New Mexico: A sentencing judge may sentence below the minimum mandatory sentence for a non-violent habitual offender with one prior felony conviction if justice will not be served by imposing the mandatory sentence and there are "substantial and compelling" reasons for departing from the minimum sentence. N.M. Stat. § 31-18-17(A) (2016).

New York: A sentencing judge may depart below a minimum mandatory sentence for certain second-time drug offenders where the judge determines that imprisonment is necessary, but the minimum sentence is "unduly harsh." N.Y. Penal Law § 70.70(2)(c) (2011).⁶

⁶ New York also has a safety valve for the five-year minimum mandatory sentence prescribed for criminal use

North Dakota: A sentencing judge may depart from the mandatory minimum for certain drug offenses if after considering the nature of the crime, the character of the defendant, and the defendant's chances for successful rehabilitation, the judge concludes that imposing the minimum sentence would "result in manifest injustice to the defendant" and is "not necessary for the protection of the public." N.D. Cent. Code § 12.1-32-02.3 (2015).

Oklahoma: A sentencing judge may depart below the mandatory minimum for many nonviolent crimes, including certain drug crimes, where the judge determines that the minimum sentence would be unfair and the defendant does not pose a risk to public safety. Okla. Stat. tit. 22, § 985.1 (2016).

South Carolina: A sentencing judge may depart below the minimum mandatory sentence for certain second and third drug possession convictions. S.C. Code Ann. §§ 44-53-370, 44-53-375 (2015).

South Dakota: A sentencing judge may depart below the minimum mandatory sentence for certain manufacturing, distributing, and dispensing drug crimes, as well as school zone drug offenses if the court finds that "mitigating circumstances" exist and makes written findings of such circumstances. S.D. Codified Laws §§ 22-42-2.3, 22-42-19 (2016).

Tennessee: Under Tennessee's judicial diversion statute, many first-time offenders are eligible for pre-sentencing diversion after conviction or entry of a guilty plea; because judicial diversion precedes sentencing, a defendant is eligible for diversion even where a mandatory minimum statute would otherwise apply. See State v. Dycus, 456 S.W.3d 918 (Tenn. 2015).

of a firearm in the first degree. N.Y. Penal Law § 265.09 (2013).

Virginia: Under a five-part safety valve test that tracks the federal safety valve statute, a sentencing judge may depart below a mandatory minimum sentence for drug offenses. Va. Code Ann. § 18.2-248 (2014).

Six more states have safety valve provisions that apply to non-drug offenses.⁷

In addition, in Louisiana, under a narrow constitutional exception to mandatory minimum sentencing, a judge may depart from a mandatory minimum sentence if a defendant makes a clear and convincing showing that the mandatory minimum sentence

⁷ Kansas has a safety valve for serious sex offenses with a twenty-five year mandatory minimum sentence, Kan. Stat. Ann. § 21- 6627(d) (2013). Oregon permits departures from mandatory minimum sentences for crimes including manslaughter, kidnapping, assault, and certain sex offenses based on enumerated factors and where there is a "substantial and compelling" reason to depart. Or. Rev. Stat. § 137.712 (2016). Pennsylvania permits county intermediate punishment for offenses under the Vehicle Code even when such offenses are subject to a mandatory minimum sentence. 42 Pa. Cons. Stat. Ann. § 9763 (2012); see also Commonwealth v. Stotelmyer, 110 A.3d 146, 151 (Pa. 2015). Rhode Island has a safety valve for discharge of a firearm from a motor vehicle. R.I. Gen. Laws § 11-47-51.1(b) (2016). Vermont permits departures from mandatory minimums for certain sex offenses and murder. Vt. Stat. Ann. tit. 13, § 2602(c)(2) (2016) (lewd or lascivious conduct with a child under age 16); Vt. Stat. Ann. tit. 13, § 3253(c)(2) (2016) (aggravated sexual assault); Vt. Stat. Ann. tit. 13, § 2303(b), (c) (2016) (first and second degree murder). Wisconsin has a safety valve for certain child sex crimes. Wis. Stat. § 939.617(2) (2016).

is unconstitutionally excessive. See La. Const. art. I, § 20 (1974); see also State v. Ambeau, 6 So.3d 215, 221 (La. Ct. App. 2009).⁸

Safety valve statutes come in many permutations: some provide judges with broad discretion, while others - like the federal statute - cabin judges' discretion by enumerating permissible factors for departures; some reach a broad array of offenses, while others are specifically targeted.

In terms of how judicial discretion is framed, the Massachusetts statute is most similar to another early safety valve statute, namely South Dakota's 1989 statute. Chapter 211E specifies that a judge may depart from a mandatory minimum sentence by setting forth in writing the reasons for doing so, "based on a finding that there exists one or more mitigating circumstances," while South Dakota's safety valve statute permits below-minimum sentencing for certain offenses if a judge makes written findings of

⁸ While not a true safety valve in that the statute requires agreement by the prosecution, Louisiana permits departures from mandatory minimum sentences both with a guilty plea and after conviction by agreement. La. Code. Crim. Proc. Ann. art. 890.1 (2015).

"mitigating circumstances." See G.L. c. 211E, § 3(e); S.D. Codified Laws §§ 22-42-2.3, 22-42-19 (2016).

Other state statutes likewise frame a judge's departure authority in broad terms. In Montana a judge may depart from the mandatory minimum for a serious drug felony offense where the judge determines that incarceration "is not appropriate," Mont. Code Ann. § 45-9-202 (2015), while in New York, a judge may sentence below the mandatory minimum for certain drug offenses if the minimum sentence would be "unduly harsh," N.Y. Penal Law § 70.70(2)(c) (2011). Several state statutes combine notions of justice (for the defendant or in the abstract) with considerations of the public interest and public safety. See Ala. Code § 15-18-8(a) (2016) (departure permitted where "the ends of justice and the best interests of the public as well as the defendant will be served"); Md. Code Ann., Crim. Law § 5-609.1 (2016) (departure permitted where the minimum sentence would yield a "substantial injustice" and is not needed to protect the public); N.D. Cent. Code § 12.1-32-02.3 (2015) (departure permitted where imposing the minimum sentence would "result in manifest injustice to the defendant" and is "not necessary for the protection of the public"); see

also Conn. Gen. Stat. § 21a-283a (2016) (departure permitted where a defendant shows "good cause"); Fla. Stat. § 775.084(3)(a)(6) (2012) (departure permitted where mandatory minimum "not necessary for the protection of the public"). In Michigan and Minnesota, a judge may depart below the minimum for certain offenses where there are "substantial and compelling" reasons to do so. See Mich. Comp. Laws. § 333.7410(5) (2016); Mich. Comp. Laws. § 333.7413(4) (2016); Mich. Comp. Laws. § 333.7416(3) (2016); Minn. Stat. § 152.025 (2010); Minn. Stat. § 609.11 (2015).

Safety valve statutes nationwide apply to a wide range of offenses. While several are written in broad terms, others focus on specific offenses. As a practical matter, these targeted statutes are not necessarily narrower in scope; in states with narrowly-targeted mandatory minimum laws, narrowly-targeted safety valve statutes can in fact reach all or most of the relevant minimum mandatory sentences.

In terms of the offenses covered, some of the broadest safety valve statutes include those in Montana, Alabama, and Oklahoma. Montana's safety valve statute, which was enacted in 1991, applies to most mandatory minimum sentences. Mont. Code Ann. § 46-18-

222 (2015). In Alabama, a judge may suspend or defer sentences of twenty years or less other than for child sex offenses. Ala. Code § 15-18-8(a) (2016); see also Ex parte McCormick, 932 So.2d 124 (Ala. 2005) (permitting incarceration portion of split sentence to be suspended). In Oklahoma, a sentencing judge may depart below a minimum sentence for most non-violent crimes. See Okla. Stat. tit. 22, § 985.1 (2016) (specifically enumerating exceptions to the safety valve).

All told, at least 30 states and the federal government have safety valve statutes or other mechanisms that permit judicial discretion to depart below mandatory minimum sentences. To interpret G.L. c. 211E, § 3(e) not to permit below-minimum sentences would place Massachusetts squarely outside the mainstream of states that permit judicial discretion in sentencing.

B. Reforms Across the Country Reflect the National Consensus That Mandatory Minimums Should Be Limited or Eliminated

The national consensus that minimum mandatory sentencing schemes should be curtailed or repealed is manifested in the wide range of reforms enacted by states in the past two decades. These reforms include

enacting many of the safety valves described above, as well as repealing minimum mandatory sentences and sentence enhancements. States have also reduced minimum mandatory sentences by shortening the term of incarceration or raising the threshold for such sentences (e.g., by increasing the drug quantity that triggers a mandatory minimum). All told, at least thirty-five states have enacted mandatory minimum reforms.⁹

Among the most substantial reforms are those in Michigan and New York. Both states have enacted comprehensive drug law reform that has eliminated most mandatory minimum sentences for drug crimes. In 2003, Michigan repealed almost all drug mandatory minimums, eliminated lifetime probation, and removed mandatory consecutive sentencing. 2002 Mich. Pub. Acts 665, 666, 670. New York in 2009 eliminated mandatory minimum sentences for first-time offenders convicted of a Class B, C, D, or E drug felony, second-time drug offenders convicted of a Class C, D, or E drug felony, and second-time offenders convicted of a Class B drug felony who are drug dependent. 2009 N.Y. Sess. Laws

⁹ A summary of major reforms enacted in the past two decades is attached as Addendum A.

Ch. 56 (McKinney) (S. 56-B). The legislation also substantially reduced mandatory minimum sentences for non-violent second-time Class B and C offenders, while creating a safety valve for second-time Class C, D, or E offenders. Id.

While Michigan and New York provide some of the most prominent examples of minimum mandatory reforms, they are not outliers. The majority of states - at least thirty-five states - have enacted safety valves or repealed and reformed mandatory minimum sentencing. These reforms reflect the widely-acknowledged fact that strict mandatory minimum sentences do not further the underlying purposes of criminal punishment.

III. CONCLUSION

For the foregoing reasons, and the reasons articulated by Laltaprasad and amici Committee for Public Counsel Services, Families Against Mandatory Minimums, and Thirty-Nine Others, amici The Constitution Project, the Drug Policy Alliance, and the National Association of Criminal Defense Lawyers urge this Court to conclude that a Massachusetts sentencing judge has statutory and/or constitutional authority to impose a sentence below the mandatory

minimum terms set forth in G.L. c. 94C, §§ 32(b),
32A(d).

Respectfully Submitted,



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March 25, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. App. P. 17.



Monica R. Shah

CERTIFICATE OF SERVICE

I, Monica R. Shah, do hereby certify under the pains and penalties of perjury, that on this 25th day of March, 2016, I caused two copies of the foregoing document to be served by U.S. Mail on the following counsel: Thomas C. Maxim, Assistant District Attorney, Office of the Middlesex District Attorney, 15 Commonwealth Ave., Woburn, MA 01801; Keith Nicholson, Matthew Segal, Adriana Lafaille, Nancy Gertner, ACLU Foundation of Massachusetts, 211 Congress Street, Boston, MA 02110.



Monica R. Shah

March 25, 2016

ADDENDUM

ADDENDUM A

Mandatory Minimum Reforms

Since 1996, at least 35 states have repealed, reduced, or modified mandatory minimum sentencing schemes.

Alabama	In 2000, Alabama amended its "Split Sentence Act," which permits the court to "split" sentences for crimes other than certain child sex offenses, and to thereby suspend or otherwise defer a sentence, including mandatory sentences. While the Act had previously permitted split sentences for sentences up to fifteen years, the amendment expanded the statute to include sentences from fifteen to twenty years. (H.B. 30).
Arkansas	In 2011, the state enacted shorter mandatory minimums for certain drug users than for drug manufacturers. (S.B. 750.)
California	Proposition 36 (2012) modified the state's three strikes law by changing the predicate offenses to exclude less serious offenses.
Colorado	In 2013, the state removed the enhancement for a second drug distribution conviction. (S.B. 250.) In 2011, the state excluded Class 6 felony drug possession from offenses that trigger habitual offender sentencing enhancements. (S.B. 96.)

	<p>In 2010, the state altered the application of the special offender sentencing range, which requires a judge to sentence an offender to the minimum sentence of the applicable presumptive sentencing range. (H.B. 1352.) The same year, the state loosened the restrictions on probation eligibility, permitting individuals with two or more prior non-violent felony convictions, who had previously been ineligible for probation, to apply for probation. (H.B. 1338.)</p>
Connecticut	<p>In 2015, Connecticut repealed mandatory minimum sentences for possession offenses in drug-free school zones. (S.B. 952.)</p> <p>In 2001, the state created a safety valve that permits a court to depart from the mandatory minimum sentence for non-violent drug offenses where the defendant makes a showing of good cause. (S.B. 1160.)</p>
Delaware	<p>In 2011, Delaware repealed much of the existing drug code and created three main types of drug crimes: possession, aggravated possession, and drug dealing. Only Class B drug felonies now trigger mandatory sentences, and drug thresholds necessary to reach Class B have been increased substantially. (H.B. 2011.)</p> <p>In 2010, the state authorized a sentencing judge to modify, defer, reduce, or suspend minimum mandatory sentences of one year or less based on serious medical treatment needs where the individual "does not constitute a substantial risk to the community." (H.B. 338.)</p>
Florida	<p>In 2015, Florida eliminated mandatory minimums for aggravated assault. (H.B. 135.)</p>

	<p>In 2014, the state eliminated mandatory minimums for certain low-level drug offenses, reduced mandatory minimum sentences for other offenses by up to 50%, and increased drug threshold weights for triggering mandatory minimum sentences. (S.B. 360.)</p>
Georgia	<p>In 2013, Georgia enacted an expanded drug safety valve statute that largely tracks the federal statute. The statute permits a sentencing judge to impose a sentence 50% below the mandatory minimum sentence for a broad array of offenses, including trafficking and manufacturing of cocaine, ecstasy, marijuana, and methamphetamine; and the sale or cultivation of large quantities of marijuana. (H.B. 349.)</p> <p>In 2012, Georgia repealed the sentence enhancement for a second-time drug offender, which had previously resulted in a five- to thirty-year mandatory minimum or a one to ten-year mandatory sentence, depending on the drug at issue. (H.B. 1176.)</p>
Hawaii	<p>In 2013, the state enacted a safety valve that permits departure from a mandatory sentence for Class B or Class C felony drug offenses, previously subject to ten and five year mandatory minimum sentences, where the judge finds that departure is "appropriate to the defendant's particular offense and underlying circumstances." (H.B. 68.)</p> <p>In 2012, Hawaii enacted safety valve legislation that permits a court to sentence second-time felony drug possession offenders to probation. (H.B. 2515.)</p>
Illinois	<p>In 2013, Illinois repealed its felony sentence enhancement for prostitution. (S.B. 1872.)</p>

Indiana	<p>In 2013, the state reduced the size of its drug-free school zone from 1000 feet to 500 feet and repealed the automatic sentence enhancement for certain subsequent drug offenses. (H.B. 1006.)</p> <p>In 2001, Indiana exempted most drug offenders from the state's "three strikes law" (S.B. 358), eliminated mandatory minimums for some nonviolent drug offenses, and provided a defense to enhanced penalties for drug-free zone violations (H.B. 1892).</p>
Kentucky	<p>In 2011, Kentucky reduced its drug-free school zone from 1000 yards to 1000 feet. (H.B. 463.)</p>
Louisiana	<p>In 2012, Louisiana enacted legislation permitting departures from mandatory minimum sentences – by agreement with a prosecutor – for certain guilty pleas and criminal convictions. (H.B. 1068.)</p> <p>In 2010, Louisiana repealed statutory language permitting juvenile adjudications of delinquency to be used to enhance penalty provisions for felony offenses. (H.B. 191.)</p> <p>In 2001, Louisiana repealed mandatory minimum sentences for a range of non-violent crimes including drug offenses, reduced drug possession and sales sentences, and amended the habitual offender law by increasing the number of felonies required to trigger its provisions. (S.B. 239.)</p>
Maine	<p>In 2003, Maine enacted a safety valve for drug trafficking mandatory minimum sentences, permitting a judge to depart from the minimum where</p>

	the mandatory sentence would result in “substantial injustice” and departing would not diminish the gravity of the offense nor endanger public safety. The state also reduced the mandatory minimum sentence for murder from twenty-five to twenty years. (L.D. 856.)
Maryland	In 2015, the state authorized a sentencing court to depart below a mandatory minimum drug sentence where imposing such sentence would yield “substantial injustice” and the sentence is not necessary to protect the public. The legislation also reduced mandatory minimum sentences for certain drug offenses. (H.B. 121.)
Massachusetts	In 2012, Massachusetts lowered mandatory minimums for certain drug offenses and changed the drug quantity required to trigger a mandatory minimum for trafficking offenses. (H. 3818.)
Michigan	In 2003, the state repealed drug mandatory minimums, eliminated lifetime probation, and removed mandatory consecutive sentencing. (P.A. 665, 666, and 670.) In 1998, Michigan repealed mandatory life without parole sentences for certain drug offenses. (P.A. 319.)
Minnesota	In 2009, the state enacted a safety valve statute for certain subsequent drug possession or sale offenses, permitting a below-minimum sentence upon a finding that there are substantial and compelling reasons to depart from the minimum sentence. (S.F. 802.)
Mississippi	In 2014, the state enacted a broad criminal law reform that largely reduced sentences for drug offenses and created a safety valve for drug trafficking. (H.B. 585.)

Missouri	In 2012, the state lowered mandatory minimum sentences for certain crack cocaine offenses. (S.B. 628.)
Nevada	In 2009, Nevada redefined "habitual criminal" status, increasing the threshold for triggering such status by limiting the predicate offenses to felonies. (A.B. 2009.) In 2007, the Nevada legislature repealed mandatory sentencing enhancements for certain felony convictions (including enhancements for felonies committed on school property, with the assistance of a minor, certain domestic violence offenses, and crimes against the elderly). (A.B. 510.)
New Jersey	In 2010, the state enacted a safety valve for drug-zone sentencing that permits a judge to sentence below the minimum mandatory sentence after consideration of certain enumerated factors, including the defendant's criminal record and whether school was in session at the time of the offense. (S.B. 1866/A. 2762.)
New Mexico	In 2002, New Mexico repealed a mandatory sentence enhancement that required prosecutors to charge defendants with prior drug convictions as habitual offenders. Judges are now permitted to determine whether the sentence enhancement is appropriate. (H.B. 26.)
New York	In 2009, the state enacted broad mandatory minimum reform, creating a safety valve for certain offenses, eliminating many mandatory minimum sentences, and reducing others. Under the new safety valve, a judge may depart below the minimum for a second-time offender convicted of a

	<p>Class C, D, or E drug felony, if imposing the minimum sentence is “unduly harsh.” The legislation also eliminated mandatory minimum sentences for first-time offenders convicted of a Class B, C, D, or E drug felony, second-time drug offenders convicted of a Class C, D, or E drug felony, and second-time offenders convicted of a Class B drug felony who are drug dependent. Mandatory minimum sentences for non-violent second-time Class B and C offenders were also reduced substantially. (S 56-B.)</p>
North Dakota	<p>In 2015, the state enacted legislation allowing judicial departures from certain mandatory minimums if after considering the nature of the crime, the character of the defendant, and the defendant’s chances for successful rehabilitation, the judge concludes that imposing the minimum sentence would “result in manifest injustice to the defendant” and is “not necessary for the protection of the public.” (H.B. 1030.)</p> <p>In 2001, North Dakota repealed mandatory minimum sentences for first-time drug offenders. (H.B. 1364.)</p>
Ohio	<p>In 2011, the state modified sentencing enhancements for major drug offenders, decreased mandatory minimum offenses for some crack cocaine offenses by eliminating the crack-powder differential, and raised the drug quantity threshold for a mandatory eight-year sentence for marijuana trafficking or possession. (H.B. 86.)</p>
Oklahoma	<p>In 2015, the state enacted safety valve legislation permitting departures below mandatory minimum sentences for many non-violent offenses, including some drug offenses. (H.B. 1518.) The state also reduced – from life without parole to twenty years – the mandatory minimum for</p>

	<p>individuals convicted of two or more felony violations of the state's Uniform Controlled Dangerous Substances Act. (H.B. 1574.)</p> <p>In 2012, the state halved mandatory minimums for repeat marijuana and low-level drug offenders for whom 10 years had passed since the completion of their first offense sentence. (H.B. 3052)</p>
Oregon	<p>In 2013, the state repealed mandatory minimum sentences for certain drug offenses. (H.B. 3194.)</p> <p>In 2001, Oregon enacted safety valve legislation permitting departures below mandatory minimum sentences for certain sex offenses. (H.B. 2379.)</p>
Pennsylvania	<p>In 2012, Pennsylvania enacted a safety valve permitting certain low-level offenders to be sentenced to county-run intermediate punishment even where a mandatory minimum would otherwise apply. (S.B. 100.)</p>
Rhode Island	<p>In 2009, Rhode Island eliminated mandatory minimums for manufacture, sale, or possession with intent to manufacture or sell a Schedule I or II controlled substance. (S.B. 39aa.)</p>
South Carolina	<p>In 2010, South Carolina enacted a safety valve permitting a sentence of probation for certain second and third drug possession offenses, repealed the ten-year mandatory minimum for school zone offenses, and repealed the mandatory minimum for first-time possession offenses. (S. 1154.)</p>

Tennessee	In 2015, the Tennessee Supreme Court held that individuals facing mandatory minimums are eligible for pre-sentence diversion. <u>See State v. Dycus</u> , 456 S.W.3d 918 (Tenn. 2015).
Texas	In 2011, HB 3384 (2011) removed the sentence enhancement for a previous conviction for a state jail felony offense.
Utah	In 2015, Utah reduced all possession offenses from felonies to misdemeanors until the third conviction and reduced drug-free zones from 1000 feet to 100 feet. (H.B. 348.)
Virginia	In 2000, Virginia adopted a five-part safety valve for drug offenses that mirrors the federal safety valve. (S.B. 153.)