SUPPORTING MASSACHUSETTS PROSECUTORS

MDAA

Massachusetts District Attorneys Association

October 23, 2017

The Honorable Stanley C. Rosenberg
President, Massachusetts Senate
State House, Room 332
Boston, MA 02133

The Honorable William S. Brownsberger
Chair, Judiciary Committee
State House, Room 504
Boston, MA 02133

Dear President Rosenberg and Senator Brownsberger:

Over the past several weeks, the state's District Attorneys have spent many, many hours working their way through S. 2185, the Senate's Omnibus Crime Bill. It is a massive, sprawling piece of legislation. The District Attorney's views on each element of the bill are not uniform, but this letter will convey the prevailing opinion of an overwhelming majority of the District Attorneys.

If the District Attorneys could share just one word to convey what we would hope to see passed to achieve true, forward progress in our criminal justice system, it is this: balance. We respect the thoughtful approach of Chair Brownsberger and respect his views. There are aspects of the bill which we believe hold out promise and which we embrace, but still feel that too many aspects of the bill throw it far out of balance. This undermines the cause and pursuit of fair and equal justice for all, largely ignores the interests of victims of crime, and puts at risk the undeniable strides and unparalleled success of Massachusetts' approach to public safety and criminal justice for at least the last 25 years.

Massachusetts' success was achieved without resorting to the costly, draconian and self-defeating measures that other states embraced. As other states undertake criminal justice reform, they are most often trying to emulate what we have already had in place in Massachusetts. Our Commonwealth is one of the few places in the country that has achieved an incredibly low (and still declining) incarceration rate, one of the lowest rates of violent crime in the country, and even sharply declining arrest rates. None of this was accomplished by ignoring or minimizing criminal activity that is obviously detrimental to victims and communities, but by reserving prison cells for the most violent and recidivist, by focusing on early intervention and prevention, and by the exercise of discretion carefully informed by all of the available facts. We strongly believe that all public officials should be wary of putting this type of success at risk.

We should be especially wary of embracing supposedly "new ideas" that are no more than a return to the old and discredited ways of the past. Those old policies resulted in the highest violent crime rates in Massachusetts' history; a massive exodus of businesses, jobs and residents from urban areas where crime hit hardest; and even the same racial disparities we all decry today. Further, many of the proposals contained in this legislation turn the clock back on important measures put in place by the Legislature establishing victim's rights and truth in sentencing so that there is real transparency for both victims and the public.

We would prefer to see legislation passed where there is already broad-based consensus built on rigorous, independent vetting of the facts (and not merely opinions or suppositions) that underlie it. To that end, the state's District Attorneys fully support, and urge the Senate to adopt, legislation as recommended by the Council of State Governments Report (H. 74). As the Council found, Massachusetts' most significant criminal justice reform challenge is not mass incarceration (we are 49th in the nation) or overly draconian drug laws (Massachusetts' mandatory minimum drug laws are aimed at drug traffickers), but recidivism. The recommendations of the Council to address recidivism are noteworthy because they were the culmination of a carefully thought out, independent and fact-driven process with input from all of the stakeholders in the criminal justice system. No one who participated got exactly the answers that they wanted and every stakeholder was confronted with evidence forcing them to accept certain changes they might not have otherwise embraced. Again, we believe that this approach is best and holds forth the greatest promise of achieving its stated aim of breaking the cycle of the recidivism.

We further believe that this approach holds forth the greatest promise of transformational change in the lives of those who too often and for too long remain before the criminal justice system. Breaking the cycle of recidivism by giving people the support, guidance, and tools they need to lead healthy, independent lives is the surest strategy within the actual reach of the criminal justice system to eliminating decades old racial disparities while strengthening entire communities and further reducing crime.

Unfortunately, many of the stated aims of S. 2185 are not so similarly supported. In the spirit of a mutual desire to achieve true progress, we share with you a list of areas where the District Attorneys voice their support, their opposition, or their hopes for an amended approach. Due to the sheer size and reach of the bill, this list is not all encompassing.

- **Rape of a Child** – The recommended changes are both unnecessary and dangerous, especially to girls and young women. Judges and prosecutors have little trouble distinguishing cases where young people are engaged in the proverbial "Romeo and Juliet" relationship from those that rise to the standard of rape of a child. Legislators can feel confident that existing laws are clear, reasonable and being properly applied.
- **Raising the Age of Criminal Majority to 19** – There is nothing in the "new" science around juvenile brain development that human beings haven't understood for millennia i.e. an 18 or 20 year old does not make decisions as well as a 30 or 40 year old. But science also shows conclusively that 18 and 19 year olds well understand the difference between right and wrong and can act on them. District Attorneys and judges take youth and other factors into consideration all the time when assessing cases. But adopting a law that enables anyone to declare that "I am not responsible for my actions, my brain is!" is something no rational parent would accept, and creates a slippery slope that cannot be limited to only those within a given age

range. The implications of making 18, 19 and even potentially 20 and 21 year olds declared juveniles, with less legal accountability for their actions, cannot possibly be limited to the massive costs of re-ordering of the criminal justice system alone, but will have broad based economic and societal costs.

- **Raising the Age for Criminal Prosecution to 12** – To our collective knowledge, we know of no cases where young children are being "prosecuted", but can attest to many, many cases where police and prosecutors are called by families, schools and others for help. In these instances charges might issue not to pursue a criminal prosecution but to establish standing so that the courts can provide the child and his or her family the intervention, counseling and assistance they need. This section is the proverbial solution in search of a problem, the unintended consequences of which would be quite serious.
- **Creating an Absolute Parent/Child Privilege** – Parents and children are rarely expected to testify "against" one another. When it does occur, the case and underlying harm to the victims is typically quite serious. In many instances, parents insist that their children cooperate with authorities because they expect them to be honest and take responsibility for their actions. Creating a blanket prohibition on parents and children testifying where the other is involved undercuts parental judgment. It also does grave harm to victims of crime whose pursuit of justice will be stymied for want of crucial evidence. This is especially true when one considers how broadly the language and even the definition of "parent" is applied. This section has never been subjected to proper scrutiny (or even hearings) that would surely expose this as a solution in search of a problem.
- **Changes to Mandatory Minimum Laws Against Drug Trafficking –** Every District Attorney in Massachusetts opposes mandatory minimum sentences for low-level, non-violent drug offenders. The vast majority also believes that the current structure of drug weights is appropriately high to create a bright line that separates drug traffickers from either users or those engaged in low-level dealing to support their own habit. A close look at the full records of the relatively small number of people who are incarcerated overwhelmingly proves that prosecutors exercise their discretion with judgment, balance and care so that prison cells are reserved for only the most violent and recidivist offenders. The arguments to eliminate mandatory minimum laws for drug traffickers lose support the more the public understands the facts, and virtually collapses when this idea is advanced amidst the worst drug epidemic in American history. For these reasons, the majority of District Attorneys oppose most of the changes recommended in S. 2185. This includes eliminating the lowest weights for cocaine from 18 to 100 grams. 18 grams of cocaine represents a very large amount of drugs, valued in the multiple thousands of dollars. (With 100 grams, we go from very large to truly massive.)
- **Retroactive Application of Proposed Changes to Mandatory Minimum Laws Against Drug Trafficking -** The amendment that would make these changes retroactive and permit the early release of hundreds of already convicted drug traffickers is simply wrong. Once again, the facts and the data show that the relatively small number of people who occupy state prison cells have incredibly long criminal records, most replete with serious violence, and this includes those who stand convicted for drug trafficking. How does their early release improve public safety? Where exactly are the residents eager for violent drug traffickers to be returned to their neighborhoods?
- **School Zones/Second and Subsequent Offenses** - While certain District Attorneys have different views on school zones (DA Conley favors their abolition), there remains a strong belief among us that those who deal deadly, addictive drugs to children and teenagers should face a higher penalty. Similarly, while DA Conley has also expressed willingness to consider ideas

around changes to second and subsequent offenses, the facts bear out that almost no one facing a second and subsequent is ever really facing just their second offense, but many more than that. The majority of District Attorneys caution against changes that strip prosecutors of a tool that is not used nearly as often as the law would allow, but is still necessary in many instances.

- **Decriminalization by Cities and Towns** – The prospect of 351 cities and towns all making different determinations as to what offenses will and will not be decriminalized represents a nightmare for prosecutors and raises major equal protection issues.
- **District Court Diversion** – Allowing judges to divert cases over the objection of the prosecutor prior to arraignment is unconstitutional. The District Attorneys enthusiastically embrace diversion but also respectfully submit that this goal can be achieved without infringing on important constitutional separation of powers. Beyond even the constitutional issues at stake, this section effectively permits judges to "divert" people as old as 26, for an incredibly broad array of serious and even violent offenses, to programs that don't exist or whose effectiveness has never been verified. This is patently deceptive and does nothing to either protect public safety or provide offenders with the support they need to turn their lives around.
- **Raising the Felony Threshold to $1,500** – the District Attorneys support the effort to raise the felony threshold but believe the suggested amount is too high. The median income in Massachusetts in 2016 was $75,300. The suggested threshold of $1,500 represents more than a weeks' gross pay for more than half the households in Massachusetts. Setting the threshold this high would fall disproportionately hard on the households and small businesses that can least afford that sort of loss. We recommend instead, a new threshold of $750 and suggest that anything above this would make Massachusetts an outlier.
- **Attempt** – The language here is confusing, impractical and unworkable. It also places an unfair burden on prosecutors as they would be required to read into the mind, and thus prove the motive, of the offender.
- **Collateral Consequences –** the District Attorneys are generally supportive of efforts to assess the actual and unintended consequences and effectiveness of the various collateral consequences included in our criminal statutes and to do away with those that are ineffective or counter-productive.
- **Fines and Fees** – the District Attorneys similarly offer general support for efforts to assess the necessity of certain fines and fees but also offer the following very serious caveats: First, victim restitution must be preserved. The bill unfairly shifts a disproportionate and onerous burden onto victims while at the same time making it much easier for defendants to avoid paying proper restitution, thus making it much more difficult for victims to be compensated for harm caused by the defendants' crime. Second, the District Attorneys express general concerns with the practical and philosophical ideas that seem to be driving how everything from fines and fees to restitution and even bail are being considered and changed. Practically speaking, the movement towards basing everything from bail to fines and fees with the first consideration being the defendants' ability to pay must be properly balanced. There must be mechanisms in place to document and verify a defendant's ability to pay bail or any fines or fees. Additionally, we need to be careful that as various aspects of the legislation come together (this section's language aiming to eliminate fines and fees, this section lowering the standards for what is subject to fine and how it is determined and how much can be assessed, and still another section decriminalizing offenses and moving them to the civil courts) that we remember that the only outcome of a civil case is … fines and fees. Whether in the criminal or civil courts, we must not send victims down dead end streets in pursuit of justice.

- **Bail Reform** - Many of the District Attorneys have significant questions and concerns around the language and structuring of the sections addressing bail and intend to submit particularized amendments.
- **Sealing and Expungement** – The District Attorneys believe in ending the cycle of recidivism and giving people a true opportunity to lead law-abiding and productive lives. We believe in eliminating barriers to achieving this goal. However, the proposed language to seal and expunge records is too absolutist, does not fully consider employers, law enforcement and the public's legitimate need to have certain facts (not all, but some) and thus goes too far.

As was previously stated, this is not a complete list of elements of the bill that we support, oppose or would like to see amended. One of our concerns, quite candidly, is the sheer size, density and breadth of the bill and the risk this creates for legislators and citizens to fully understand the true, practical implication of its many details. As noted at the beginning, it took Chair Brownsberger many months to construct this bill and many weeks for us, all experienced attorneys, to arrive at just this point of understanding.

The District Attorneys are the elected officials responsible for public safety in our communities. We serve as the sole voice for victims in the criminal justice system. We are keenly interested in working with the Legislature and all stakeholders to advance reform that will enhance a defendant's chances of turning away from a life of crime and at the same time protecting victims and keeping our communities safe.

We serve the cause of justice and so, to that end, we hope you will accept this letter in the spirit with which it is communicated.

Sincerely,

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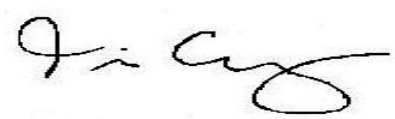

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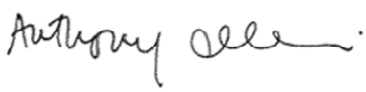

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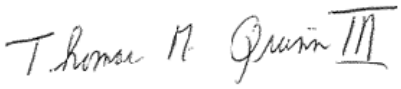

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Cc: Members of the Senate