

**Testimony of
George Mosee, Deputy
Narcotics Division
of the
Philadelphia District Attorney's Office**

before the

**House Of Representatives
Judiciary Committee**

**Public Hearing on
House Bill 2165**

August 29, 2000

INTRODUCTION

Good morning. My name is George Mosee. I am the Deputy of the Narcotics Division of the Philadelphia District Attorney's Office. I also address you today on behalf of the Pennsylvania District Attorneys Association ("PDAA"). Thank you for inviting me to testify before the Committee on this very important piece of legislation, House Bill 2165.

House Bill 2165 would amend Section 7508 of Title 18, Drug Trafficking Sentencing and Penalties, by adding a section to create a five-year mandatory sentence for drug trafficking while in possession of a firearm.

PDAA POSITION

While the PDAA supports existing mandatory sentences, it generally has been the position of the PDAA to oppose any new mandatory sentencing. Except for those crimes where there is a widespread and chronic pattern of unduly lenient sentencing, sentencing upon conviction of a particular offense should be left to the discretion of the judge. In general, a sentence should be crafted to fit the facts of the crime, as well as the individual person, taking into account all aggravating and mitigating circumstances.

Having said that, the PDAA reviewed House Bill 2165 and concluded that there nonetheless is a compelling case for this bill. Pennsylvania prosecutors have passed a Resolution (see attached) supporting the idea of adding a mandatory sentence for drug traffickers who are in possession of a firearm. Drug trafficking is made all the more dangerous when the traffickers carry firearms. Innocent bystanders are too often the victims of drug shootings, and our law enforcement officers face great danger while trying to enforce the narcotics laws.

House Bill 2165 does not create an altogether new type of mandatory sentence, but rather adds to an existing statute. Moreover, it is consistent with the current mandatories; the policies behind it are the same – deterrence, retribution, uniformity in sentencing, public safety.

The PDAA voted unanimously to support the mandatory minimum provisions of House Bill 2165, but urged that it be amended to only apply to drug dealers, and not to a person who is convicted of mere possession of a controlled substance. It is lawful under many circumstances to possess a firearm. Making it a five-year mandatory for possession of a firearm while merely possessing illegal drugs for personal use is, therefore, unduly harsh. The PDAA suggests that House Bill 2165 be amended to remove the reference to sections 13(a)(14) and (37) of the Controlled Substance, Drug, Device and Cosmetic Act, relating to unlawful delivery by a practitioner and possession of anabolic steroids, and simply include section 13(a)(30), possession with intent to deliver a controlled substance.

DANGERS OF DRUG TRAFFICKING

Drugs are plaguing neighborhoods, not only in Philadelphia and Lancaster, but more and more in communities throughout the Commonwealth. Over the years, the Legislature has enacted numerous statutes to address this scourge. Brave and faithful law enforcement officers throughout this Commonwealth work in drug-riddled communities every day to enforce these laws and put an end to dangerous illegal drug trafficking. When the drug dealers carry firearms, they pose an unacceptable threat to the lives of our police officers, not to mention the innocent citizens who live in these areas.

We are all too familiar with stories in the media of innocent bystanders, often young children, getting caught in the crossfire during shoot-outs by rival drug dealers.

Our office is currently prosecuting a case where three armed men approached an apparent rival drug dealer and opened fire. The shooters not only shot and injured the intended target, but shot a sixteen year old girl in the neck. She is now paralyzed from the neck down and needs a computer to print out what she says so that she can talk, and testify against the men who shot her.

Our police officers put their lives on the line every time they battle drug traffickers in crime-riddled neighborhoods, every time they work undercover making drug buys, every time they set up a surveillance on a known drug house, and every time they execute a warrant to search a premises for drug activity. When these drug dealers are in possession of firearms, the lives of police officers are in jeopardy. The police in this Commonwealth deserve all the protection we can give them.

COMMONWEALTH V. PATTERSON

The Pennsylvania Superior Court, in its decision in Commonwealth v. Patterson, 591 A.2d 1075, took “judicial notice of the fact drug dealers are likely to be armed and dangerous.” 591 A.2d at 1078. This case is important in that it shows that this problem – the use of firearms in the drug trafficking trade – is so prevalent that our trial courts are permitted to take judicial notice that drug dealers may be armed. Where even our judiciary recognizes the dangerous mix of guns and drugs, the need for legislation such as House Bill 2165 must be clear. The only law we currently have to address the problem is the misdemeanor offense, Possession of an Instrument of Crime, 18 Pa.C.S. §907, which is inadequate to address these terribly dangerous situations.

The court recognized that this problem exists, yet there is no statute to specifically address it. I commend Representative Bard for her initiative in this area, and I commend this Committee for carefully considering it.

SUCCESS OF MANDATORY SENTENCING

Mandatory sentences have been shown to decrease the rate of premeditated crime. First and foremost, the longer an offender is incapacitated, the longer the neighborhood is safe from his criminal activity. Additionally, it has been shown that after the five-year gun mandatories went into effect, the number of robberies with guns declined. (There was little decline, however, in aggravated assaults which are much less likely to be premeditated crimes). This indicates that mandatories have the most effect on premeditated offenses. And what is more premeditated than drug trafficking? It is a well-organized, well thought through criminal enterprise. Thus, we believe that enacting a mandatory sentence provision for drug trafficking while in possession of a firearm would reduce the number of criminals who carry a firearm while dealing drugs. This, in turn, makes the street just that more safe for members of the community and for the police officers working to end the drug trade altogether. That is the purpose of this legislation, and that is why prosecutors support it.

TYPICAL DRUG TRAFFICKING PRACTICES

It is our experience in Philadelphia that those who deal drugs in the open-air drug market often do not carry a gun on their person, but instead have an accomplice carry the gun. This sort of drug trafficking is a well-organized business, and each participant is assigned a separate job. Usually, one person makes the actual drug transactions, and

another person is the “enforcer,” that is, the person who wields the gun to “protect” the business.

Another situation that we encounter is when the police raid a drug house. Typically, police find quantities of drugs in the house along with a stash of guns in another location of the house. Clearly, these weapons are used to facilitate the drug trafficking business, but there may not be a single person within the house who is in possession of both drugs and guns. Below we recommend amendments to the bill to ensure that its provisions effectively address these situations.

SIMILAR FEDERAL PROVISIONS

Under federal law, an offender faces a mandatory sentence for using or possessing a firearm while engaging in drug trafficking. Section 924(c) of Title 18 of the United States Code, An Act to Throttle Criminal Use of Guns, provides for at least a five-year sentence enhancement for a person “who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm. . .”

The Philadelphia District Attorney’s Office, through the Federal Alternative to State Trials (“FAST”) Unit, works with the U.S. Attorney’s Office to have the most serious drug and gun cases adopted into the federal court system. We have had great success with achieving stronger sentences for these crimes than we would be able to get in the Philadelphia court system. Although we in Philadelphia are able to try the most serious offenders in the federal system, not all counties throughout the Commonwealth are so fortunate to have the U.S. Attorney’s Office so readily available for this type of

program. Additionally, even in Philadelphia we can't possibly transfer all such cases. Pennsylvania needs its own state law to address this issue.

Third Circuit Court decisions have been very restrictive in applying this federal law. They hold that utilizing a firearm to commit a drug trafficking violation is not enough. In order to be convicted of possession of a firearm pursuant to section 924(c), the offender must have the gun on his person or within easy access. See, United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989); United States v. Hill, 967 F.2d 902 (3d Cir. 1992). We can easily predict that the Pennsylvania courts will follow the federal caselaw on this point. Therefore, we suggest other language changes for House Bill 2165 clarifying that it is the utilization of the firearm to facilitate the drug trafficking violation that gives rise to the five-year mandatory.

SUGGESTED AMENDMENTS (see attached draft language)

As mentioned above, we suggest that House Bill 2165 only apply to section 13(a)(30), Possession With Intent to Deliver, and not to mere possession. We respectfully request that this Committee delete paragraphs 13(a)(14) and (37).

We further submit that House Bill 2165 will not properly address the typical scenarios of drug activity and where the guns are actually found. We, therefore, recommend the following amendment to the legislation: "a firearm found in close proximity to controlled substances possessed, manufactured or delivered in violation of section 13(a)(30) shall be rebuttably presumed to be used or intended for uses to facilitate such a violation." (See attachment for full text). This mirrors language in the Controlled Substances Forfeitures Act at 42 Pa.C.S. §6801(a)(7). Since the Pennsylvania Superior Court in the Patterson decision has already permitted the courts to take judicial notice that

drug traffickers are armed and dangerous, the Legislature can rest assured that the evidentiary presumption is well-founded.

The language we propose would address those situations where the police enter a “drug fortress,” discovering drugs in one area of a house and an arsenal in another room. We are unable to bring a charge for a violation of the Uniform Firearms Act when a person has a gun in their house, and judges often throw out the charge of Possession of an Instrument of Crime.

As I mentioned before, it is common with street dealing that one offender holds the drugs and another holds the gun. It is rare that the individuals actually selling the drugs are apprehended with guns on their person. Thus, it is essential that this legislation address the issue of co-conspirators. A further amendment, adding language to include co-conspirator liability would do just that. We could then ask for the mandatory sentence to apply to both the person possessing the drugs and the person with the gun.

STAYING WITHIN THE STATUTORY LIMITS

Mandatory sentencing statutes may not give rise to sentences which exceed the statutory maximums. In McMillan v. Pennsylvania, 106 S.Ct. 2411 (1986), the United States Supreme Court held that mandatory minimum sentencing statutes are constitutional if they do not increase the statutory maximum sentences. See also, Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). If the mandatories lead to sentences which exceed the statutory maximum otherwise available, then the defendant is entitled to have the required facts giving rise to the mandatory proven beyond a reasonable doubt before a jury. Apprendi.

Unless corrective language is added to the bill, adding the 5-year gun mandatory could, in certain situations, lead to a sentence exceeding the statutory maximum, thus running afoul of McMillan and Apprendi. For example, the Controlled Substance Act statutory maximum sentence for trafficking in marijuana is five years imprisonment

(without the current mandatory sentencing provisions of 18 Pa.C.S. 7508(a)(1), this would mean that the toughest sentence a judge could impose would be two and one-half to five years). Adding a five-year mandatory sentence to the current marijuana trafficking mandatories would, in every case, lead to a sentence exceeding the five-year statutory maximum. The same difficulty arises in application to various other drug mandatory offenses.

Thus, in order to comply with the requirements of McMillan and Apprendi, we recommend language specifying that the aggregate sentence may not exceed the statutory maximum. Specifically, we recommend the following:

§7508(c.1) Aggregate penalties not to exceed statutory maximum.- Where a defendant is subject to a mandatory minimum sentence under paragraph (a)(1), (2), (3), (4), (5), (6), or (7), and is also subject to an additional penalty under paragraph (a)(8), and where the court elects to aggregate these penalties, the combined minimum sentence may not exceed the statutory maximum sentence of imprisonment allowable under The Controlled Substance, Drug, Device and Cosmetic Act.

We believe this language avoids any potential McMillan problem with this proposed legislation.

CONCLUSION

We must enhance the sentences of these traffickers to eradicate the drug trade and ensure the safety of our citizens and law enforcement personnel. The purpose behind House Bill 2165 is an important one. We feel that, with some changes, this legislation would be an effective weapon in the battle against violent drug trafficking.

Thank you again for allowing me this opportunity to testify on a very important issue.

PROPOSED CHANGES TO HOUSE BILL 2165

§7508(a)(8) A person who is convicted of violating section 13(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act while that person or that person's co-conspirator is possessing, or is using or intending to use a firearm to facilitate the violation, shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment of five years. A firearm found in close proximity to controlled substances possessed, manufactured or delivered in violation of section 13(a)(30) shall be rebuttably presumed to be used or intended for use to facilitate such violation.

§7508(c.1) Aggregate penalties not to exceed statutory maximum.- Where a defendant is subject to a mandatory minimum sentence under paragraph (a)(1), (2), (3), (4), (5), (6), or (7), and is also subject to an additional penalty under paragraph (a)(8), and where the court elects to aggregate these penalties, the combined minimum sentence may not exceed the statutory maximum sentence of imprisonment allowable under The Controlled Substance, Drug, Device and Cosmetic Act.

RESOLUTION

“Mandatory Sentence for Drug Trafficking While in Possession of a Firearm”

WHEREAS, the General Assembly has promulgated mandatory sentencing statutes for drug dealers who traffic in dangerous and illegal controlled substances; and

WHEREAS, drug trafficking is made even more dangerous by the possession and use of firearms by those involved in the drug trade; and

WHEREAS, often large quantities of drugs are discovered in a residence with a stash of firearms, which is clearly used in the furtherance of the illegal drug trafficking; and

WHEREAS, House Bill 2165 would amend 18 Pa.C.S. §7508, Drug Trafficking Sentencing and Penalties, to include a paragraph mandating a minimum sentence of five years if a person is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act (relating to possession or delivery of a controlled substance) while in possession of a firearm; and

WHEREAS, given that it is lawful, under many circumstances, to possess a firearm, a five-year mandatory for possession of a firearm while possessing illegal drugs for one's personal use is unduly harsh; and

WHEREAS, given the danger to innocent citizens and law enforcement posed by drug traffickers who simultaneously possess firearms, a five-year mandatory sentence is appropriate.

NOW, THEREFORE, BE IT RESOLVED that the Pennsylvania District Attorneys Association urges the amendment of the mandatory minimum provisions of House Bill 2165 to apply only to drug traffickers, and urges enactment of that legislation as so amended or any other legislation with the same or similar provisions.

Carried, unanimously.

Adopted by the Pennsylvania District Attorneys Association
July 12, 2000