

**District Attorney Mike Schmidt**

**Senate Bill 401 Oral Testimony**

**March 23, 2021**



Chair Prozanski, Vice Chair Thatcher members of the committee, my name is Mike Schmidt and I am the District Attorney of Multnomah County here in support of Senate Bill 401.

In many ways, Ballot Measure 11 was a creature of its time. Passed by voters in 1994, BM11 was born at a time when crime was at near historic highs in Oregon and nationally, though it had already started to decline in Oregon prior to its enactment. This was an era when many now misguided practices were ascendant in the criminal justice system, including the War on Drugs, officially sanctioned racial profiling by law enforcement, and other now discredited policies. In the 27 years that have followed the passage of BM11, we have learned much about what works in criminal justice. We've become educated about the troubling racial and ethnic disparities that occur at every level of our system, from policing to sentencing. We've learned that much of what we believed was true 27 years ago was not only untrue but actively harmful, creating deep systems of inequity that we are still wrestling with today.

As a prosecutor, I am very troubled by Ballot Measure 11.

I am troubled by its one size fits all approach, an approach that ignores the fact that underneath every crime in the criminal code is a huge range of circumstances. An Oregon Criminal Justice Commission report noted that the typical Ballot Measure 11 defendant has no prior felony criminal history. But that person with no criminal history will receive the same sentence under BM 11 as someone who has committed many crimes prior. This is a one-strike-and you're out policy. A person who shows exceptional cruelty will receive the same sentence as someone who played a very small or passive role in a crime. A person who shows authentic remorse, strives to make amends and participates enthusiastically in treatment will receive the same sentence as a person who refuses any rehabilitation.

I am troubled by the extent to which Ballot Measure 11 has contributed to the mass incarceration along racial and ethnic lines. 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.

I am troubled by the argument that Ballot Measure 11 has made us safer. As you'll hear from my colleague Wasco County DA Matt Ellis, to jump to that conclusion one must follow a very flawed causal reasoning analysis.

But most of all, I am troubled by the extreme extent that Ballot Measure 11 has concentrated power in the hands of the prosecutor. In a system of criminal justice where over 90% of cases are resolved via a plea offer, Ballot Measure 11 gives overwhelming control over the most serious criminal sentences to one person: the prosecutor. 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. 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, creating a very strong incentive to plea. The role of the judge in all of this? Mostly mechanical. They will generally carry out the sentence agreed upon in the plea agreement, so as long as it's legal, and regardless of whether they personally feel it to be correct or fair. Unless you're willing to throw the dice at trial – and very few people are – you will ultimately take the prosecutor's deal.

We as prosecutors work very, very hard to wield this incredible power with the responsibility that it requires and deserves. Prosecutors do their absolute best to strive for consistency and fairness in the application of Ballot Measure 11, just as we do with any other sentence of law, and I believe Oregon's prosecutors are true professionals who work very hard to maintain the integrity of our system of justice.

But the system simply does not work when it's structured to give prosecutors all the power. Defendants are afraid to assert their rights at trial, and judges lose their ability to judge. That is not justice.

Senate Bill 401 is a tremendously important bill, arguably the most important public safety bill in recent memory. For all of its importance, it's an incredibly easy bill to explain. It simply returns control over sentencing to judges. They're free to impose a harsher sentence when the circumstances require it, and a more lenient sentence when the defendant is deserving. They are free to treat these charges, in other words, the same way they treat all others – by weighing the facts, hearing from both sides, and making a fair and reasoned decision – the thing that they, and not we, were elected to do.

Thank you.