

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-11456

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

NOEL PAGAN,
Defendant-Appellant.

On a reported question from the Marlborough Division
of the District Court Department

BRIEF FOR *AMICUS CURIAE*
FAMILIES AGAINST MANDATORY MINIMUMS

Barbara J. Dougan
B.B.O. 558392
Families Against Mandatory
Minimums
P.O. Box 54
Arlington, MA 02476
(617) 543-0878
bdougan@famm.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT OF THE CASE 1

INTEREST OF AMICUS CURIAE 1

LEGISLATIVE BACKGROUND 2

ARGUMENT

THE LEGISLATURE INTENDED THAT THE NEW,
SMALLER-SIZED SCHOOL ZONES ADOPTED IN
2012 SHOULD TAKE EFFECT IMMEDIATELY 4

A. The repealed version of the school zone law resulted in hundreds of convictions each year and had a disparate impact on racial and ethnic minorities, urban residents and low-income communities, while failing to drive drug offenses away from schools 4

1. The repealed version of the school zone law resulted in extreme and unjustified racial disparities 8

2. The repealed version of the school zone law had a disproportionate impact on low-income communities . . . 11

3. The repealed version of the school zone law had a disproportionate impact on urban residents. 12

4.	The repealed version of the school zone law resulted in inordinately long sentences	13
5.	The repealed version of the school zone law failed to protect children	13
B.	<u>The Legislature intended to put an immediate end to sentencing disparities, rather than perpetuate them for any length of time.</u>	16
C.	<u>The U.S. Supreme Court's 2012 decision in Dorsey v. U.S. provides a useful roadmap for analyzing sentencing reforms implemented on an emergency basis to end unjustified disparities</u>	22
D.	<u>Applying the new, smaller-sized school zones to pending cases is consistent with this Court's recent decision in Commonwealth v. Galvin</u>	25
CONCLUSION		27

TABLE OF AUTHORITIES

CASES

Boswell v. Zephyr Lines, Inc.,
414 Mass. 241 (1993) 26

Commonwealth v. Coughlin,
2006 Mass. Super. LEXIS 282 21

Commonwealth v. Galvin,
466 Mass. 286 (2013) 25, 26

Commonwealth v. Maloney,
447 Mass. 577 (2006) 17

Commonwealth v. Taylor,
413 Mass. 243 (1992) 3

Great Northern R. Co. v. United States,
208 U. S. 452 (1908) 23

Hanscom v. Malden & Melrose Gas Light Co.,
220 Mass. 1 (1914) 17

U.S. v. Dorsey,
567 U.S. ___, 132 S. Ct. 2321 (2012) 22, 24

STATUTES

G.L. c. 4, §6, Second 16

G.L. c. 94C 2

G.L. c. 94C, §32J *passim*

G.L. c. 211E, §2(4) 20

G.L. c. 277, §63 18

75 Fed. Reg. 66188 (2010) 24

St. 1989, c. 227, §2 2

St. 1993, c. 335 3

St. 1993, c. 432 4

St. 1998, c. 194, §146 3

St. 2010, c. 256, §72 3

St. 2012, c. 192 16

St. 2012, c. 192, preamble 18

St. 2012, c. 192, §14 25

St. 2012, c. 192, §30 *passim*

St. 2012, c. 192, §31 4

St. 2012, c. 192, §48 26

124 Stat. 2372 22

124 Stat. 2374 24

OTHER AUTHORITIES

W. Brownsberger & S. Aromaa, "An Empirical Study of the School Zone Law in Three Cities in Massachusetts" (2001) 11, 14, 15

J. Greene, K. Pranis, J. Ziedenberg, "Disparity by Design: How drug-free zone laws impact racial disparity - and fail to protect youth" (2006) 9, 10, 13, 15

A. Kajstura, P. Wagner & W. Goldberg, "The Geography of Punishment: Huge Sentencing Enhancement Zones Harm Communities, Fail to Protect Children" (2007). 10, 12, 15

A. Kajstura, P. Wagner and L. Sakala, "Reaching Too Far, Coming Up Short: How Large Sentencing Enhancement Zones Miss the Mark" (2009). 11, 13, 15

Massachusetts Department of Public Health, "Alcohol Use, Illicit Drug Use, and Gambling in Massachusetts, 2002" (2005)	9
Massachusetts House Journal, Emergency Measure, July 19, 2012	18
Massachusetts Sentencing Commission, "Survey of Sentencing Practices," FY 1994 to FY 2011	<i>passim</i>
R. Mulligan, "Symposium on Incarceration and Inequality: the Effects of 'Cracking Down' on Crime" (Oct. 17, 2007)	8
New Jersey Commission to Review Criminal Sentencing, "Report on New Jersey's Drug Free Zone Crimes & Proposal for Reform" (2005)	12
Sentencing - Habitual Offender - Conference Report: Question Came on Accepting the Conference Committee Report H.4286, Formal House Session, July 18, 2012	18
U.S. Census Bureau, 2000 Census Redistricting Data	8
U.S. Census Bureau, 2010 Census Redistricting Data	8

ISSUE PRESENTED

Amicus adopts Appellant Noel Pagan's description of the issue presented.

STATEMENT OF THE CASE

Amicus adopts Appellant Noel Pagan's statement of the case.

INTEREST OF AMICUS CURIAE

FAMM is a nonpartisan nonprofit organization that advocates for the repeal of mandatory minimum sentencing laws at the state and federal level. FAMM's Massachusetts Project focuses on mandatory minimum sentencing laws for drug offenses. It is the only organization in Massachusetts that works exclusively on this issue. FAMM advocates for the repeal of mandatory minimum sentencing laws, educates the public on drug sentencing laws and the legislative process, and participates in statewide criminal justice task forces and coalitions.

FAMM's Massachusetts Project has more than 2,000 members, including prisoners and their families, attorneys, legislators, academics, religious leaders and criminal justice activists. FAMM members have

served, are now serving or are facing mandatory minimum sentences for school zone offenses. Typically they lived within a school zone and the drug offense occurred at or near their residences - with no children involved or even present. For some, the mandatory school zone sentence extended the period of incarceration for the underlying drug offenses. For others, they were incarcerated only because of the school zone sentence, as the underlying offense did not warrant incarceration.

LEGISLATIVE BACKGROUND

In 1989, responding to perceptions that drug trafficking near schools was endangering children, a new section was added to the Controlled Substances Act, G.L. c. 94C, entitled "Controlled substances violations in, on, or near school property; eligibility for parole" (hereinafter the "school zone law"), St. 1989, c. 227, §2, now codified as G.L. 94C, §32J. It required the imposition of a two-year mandatory minimum sentence for most drug offenses committed within 1,000 feet of a public or private elementary, vocational or secondary school, with a maximum possible sentence of 15 years. No criminal

intent was required; indeed, the law specifically stated that “[l]ack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section.” Id. The school zone sentence was to be served consecutively to any sentence of incarceration for another drug offense. As stated by this Court in Commonwealth v. Taylor, 413 Mass. 243, 250 (1992), the law “furthers a legitimate state interest of protecting children and adolescents by establishing a drug-free school zone.”

In 1993, the law was amended to add 100 foot drug-free zones around public parks and playgrounds. St. 1993, c. 335.

In 1998, 1,000 foot drug-free zones were created around accredited preschools and Head Start facilities. St. 1998, c. 194, §146.

In 2010, amendments to the statute made certain county prisoners serving school zone sentences eligible for parole, St. 2010, c. 256, §72, but did not further alter the size or scope of the zones themselves.

In 2012, the size of school zones was reduced to 300 feet. St. 2012, c. 192, §30. The same

legislation also excluded drug offenses committed between midnight and 5 a.m. St. 2012, c. 192, §31.

ARGUMENT

THE LEGISLATURE INTENDED THAT THE NEW, SMALLER-SIZED SCHOOL ZONES ADOPTED IN 2012 SHOULD TAKE EFFECT IMMEDIATELY.

- A. The repealed version of the school zone law resulted in hundreds of convictions each year and had a disparate impact on racial and ethnic minorities, low-income communities and urban residents, while failing to drive drug offenses away from schools.

Data on the impact of the school zone law, in whatever iteration, was not readily available until the Massachusetts Sentencing Commission, created in 1994 by the "Truth in Sentencing" act, St. 1993, c. 432, began to issue annual surveys of sentencing practices. The first report was issued in 1998, analyzing sentencing data for FY 1997, followed by reports for every year from FY 1994 through FY 2011, except for 2001. Massachusetts Sentencing Commission, "Survey of Sentencing Practices," FY 1994 through FY 2011.

From the start, the Commission's data showed that the school zone law was having a substantial effect in

terms of convictions. Hundreds of drug offenders have been convicted of school zone offenses every year. In fact, from 1994 to 2006, among all drug offenses that require a mandatory minimum sentence, school zone offenses accounted for the *greatest number* of convictions, sometimes accounting for as many as 40% or more of all such drug convictions. See Table A.

From FY 2007 to FY 2011, the most recent data available, school zone convictions were the second most frequent drug offense requiring a mandatory minimum sentence.

Prior to FY 2000, the Sentencing Commission reported data about school zone convictions only when that conviction was the "governing offense," i.e., the offense resulting in the lengthiest sentence if a defendant was convicted of two or more offenses. See, e.g., Massachusetts Sentencing Commission, "Survey of Sentencing Practices FY 1994" (1999) at 34. Even then, as shown in Table A, school zone convictions were still the most frequent drug offense requiring a mandatory minimum sentence.

**Table A - School zone convictions and frequency
FY 1994 - FY 2011**

Year	School zone convictions (as governing offense)	Percentage of convictions for drug offenses requiring mandatory minimum sentences	Rank among convictions for drug offenses requiring mandatory minimum sentences
1994	339	42.1%	1
1995	288	36.2%	1
1996	317	38.9%	1
1997	325	39.2%	1
1998	316	37.1%	1
1999	302	36.5%	1
2000	259	36.5%	1
2001	--	--	--
2002	279	44.3%	1
2003	292	40.3%	1
2004	298	38.9%	1
2005	323	40.3%	1
2006	293	31.5%	1
2007	250	26.5%	2
2008	248	26.1%	2
2009	207	24.8%	2
2010	147	21.1%	2
2011	190	26.3%	2

Starting with its annual survey for FY 2000, the Commission began to report the total number of school zone convictions. See, e.g., Massachusetts Sentencing Commission, "Survey of Sentencing Practices FY 2000"

(2001) at 83, 87. As a result, the true impact of the school zone law became evident. The number of reported convictions skyrocketed, growing on average 28% a year. See Table B. Thus, the school zone law has had a significant impact on the criminal justice system, accounting for at least 3,555 convictions requiring a term of incarceration over the course of little more than a decade.

**Table B - Total number of school zone convictions
FY 2000 to FY 2011**

Year	School zone convictions (as governing offense)	All school zone convictions	Increase
2000	259	317	22%
2001	--	--	--
2002	279	356	20%
2003	292	350	20%
2004	298	349	17%
2005	323	382	18%
2006	293	377	29%
2007	250	340	36%
2008	248	332	34%
2009	207	294	42%
2010	147	203	38%
2011	190	255	34%

1. The repealed version of the school zone law resulted in extreme and unjustified racial disparities.

The Sentencing Commission's data reveal that racial and ethnic minorities make up the overwhelming majority of people sentenced to school zone mandatory minimums every year. In 2007, the Commission flagged the racial disparities in school zone convictions, noting that while racial and ethnic minorities made up only 18% of the state's adult population, they were serving 81% of the convictions for school zone offenses. Hon. Robert A. Mulligan, "Symposium on Incarceration and Inequality: the Effects of 'Cracking Down' on Crime" (Oct. 17, 2007).

These shocking conviction rates cannot be explained by the state's overall demographic composition. Racial and ethnic minorities comprised only 16.1% of the adult population in 2000, U.S. Census Bureau, 2000 Census Redistricting Data, and only 21.4% as of 2010, U.S. Census Bureau, 2010 Census Redistricting Data. See Table C.

Nor can these numbers be explained by greater drug use among racial and ethnic minorities. The Department of Public Health found a greater percentage

of whites (51%) had used illicit drugs than blacks (40%), Hispanics (35%) or Asians (15%). Massachusetts Department of Public Health, "Alcohol Use, Illicit Drug Use, and Gambling in Massachusetts, 2002" (2005) at 35 - 36.

Table C - Race of drug offenders convicted of school zone offenses compared to state population

Year	Drug offenders convicted of school zone offenses who are racial or ethnic minorities	Massachusetts adult residents who are racial or ethnic minorities
2000	84.9%	16.1%
2001	--	--
2002	85.4%	16.1% (based on 2000 census)
2003	88.2%	"
2004	79.9%	"
2005	82.7%	"
2006	81.0%	"
2007	75.6%	"
2008	78.3%	"
2009	72.8%	"
2010	71.4%	21.4%
2011	73.0%	21.4% (based on 2010 census)

In 2006, researchers surveyed school zone laws nationwide and their impact in several states, including Massachusetts. J. Greene, K. Pranis, J.

Ziedenberg, "Disparity by Design: How drug-free zone laws impact racial disparity - and fail to protect youth" (2006) (hereinafter "Disparity by Design"). Their findings were similar to those of the Commission. They found that Massachusetts drug offenders sentenced to mandatory school zone sentences overwhelmingly (80%) were people of color despite making up only 20% of the state's population. Id. at 17.

Evidence of the disparities continued to mount. That same year, researchers at the Massachusetts-based Prison Policy Initiative compared the impact of the school zone law on a single county, Hampden County. They found that Latinos were more than twice as likely to live in a school zone, compared to whites. A. Kajstura, P. Wagner & W. Goldberg, "The Geography of Punishment: Huge Sentencing Enhancement Zones Harm Communities, Fail to Protect Children" (2007) (hereinafter "The Geography of Punishment") at ii.

When the Prison Policy Initiative expanded its examination to the entire state, researchers found that black residents were *26 times* as likely to be convicted and receive a mandatory school zone sentence compared to white residents. For Latinos, it was even

worse: they were *30 times* as likely, compared to whites. The researchers noted that these results could not be explained by rates of drug use among different racial groups. A. Kajstura, P. Wagner and L. Sakala, "Reaching Too Far, Coming Up Short: How Large Sentencing Enhancement Zones Miss the Mark" (2009) (hereinafter "Reaching Too Far"), available at <http://www.prisonpolicy.org/toofar/report.html>.

2. The repealed version of the school zone law had a disproportionate impact on low-income communities.

Boston University's School of Public Health conducted an in-depth study of school zones in Massachusetts and found that school zones covered 56% of the high poverty areas within the cities studied. W. Brownsberger & S. Aromaa, "An Empirical Study of the School Zone Law in Three Cities in Massachusetts" (2001) (hereinafter "An Empirical Study") at 21.

The Prison Policy Initiative's researchers noted this inequity as well. They pointed to the 1998 amendment adding Head Start facilities to school zones, which made it more likely that poor residents would be affected, due to the fact that the Head Start

program targets low-income families. "The Geography of Punishment," supra, at 13.

3. The repealed version of the school zone law had a disproportionate impact on urban residents.

The Prison Policy Initiative studied the school zone law's impact on urban and suburban/rural communities within Hampden County and found that urban residents were five times more likely to live in a school zone than non-urban residents. Id. at 10. Disparities based on race, income and living in an urban neighborhood translated directly to an "urban effect"¹ -- higher incarceration rates for poor, minority *and* urban defendants.

The researchers found the same thing to be true when they looked at school zone convictions on a statewide basis:

The zone law inadvertently creates an unfair two-tier system of justice: a harsher one for dense urban areas with numerous schools and overlapping zones and a milder one for rural and suburban areas, where schools are relatively few and far between.

¹ The term "urban effect" was first used by the New Jersey Commission to Review Criminal Sentencing, which found that three-quarters of Newark was in a school zone. New Jersey Commission to Review Criminal Sentencing, Report on New Jersey's Drug Free Zone Crimes & Proposal for Reform (2005).

"Reaching Too Far," supra. They concluded that "the zone law places the burden of the mandatory prison sentences primarily on urban communities." Id.

4. The repealed version of the school zone law resulted in inordinately long sentences.

Under the repealed version of the school zone law, the mean sentence length for school zone offenders was twice as long as the sentences for drug offenders who were convicted of the same underlying offense but were not charged with school zone violations. "Disparity by Design," supra, at 18. Even after adjusting for the possible impact of a defendant's prior criminal history, a third of those sentenced to prison might have avoided incarceration altogether but for the school zone law. Id.

5. The repealed version of the school zone law failed to protect children.

Not only did the repealed school zone law unjustifiably result in harsher punishment for racial and ethnic minorities, low-income communities and urban residents, it did not accomplish its intended goal of protecting children.

The Boston University study made the surprising conclusion that the density of drug dealing offenses was actually *greater* within the zones than outside of them, "the precise opposite of what we would hope to find if the law were effective." "An Empirical Study," supra, at 20. This result was attributed to two main factors:

- School zones in each city were overlapping, irregularly shaped and their patterns "chaotic," making it difficult for drug offenders and children alike to distinguish drug-free zones, id. at 17, 19;
- Most offenses were committed near a drug offender's residence, and most drug offenders lived within a school zone, id. at 18, 19.

Using photographs and census mappings of Hampden County, the Prison Policy Initiative showed that it was often "extremely difficult to estimate reliably" whether a particular location was within 1000 feet. In fact, schools often could not even be seen from certain points within a zone due to other buildings and trees. A drug offender at such a location would not be aware of the school, let alone his distance

from it. Moreover, some urban areas were completely blanketed by overlapping 1,000 foot school zones.

When zones cannot be determined using common sense, an offender who wants to move to a non-zone area will be unable to do so. A statute that creates such a situation is by no means an effective deterrent.

"The Geography of Punishment," supra, at 4.

The "Disparity by Design" report echoed the finding that school zone laws were increasingly seen as ineffective at protecting children, primarily due to the large size of most zones and their interlocking nature within urban areas. It noted that other states were moving to smaller-sized zones (usually 100 to 200 feet) or laws that target specific behavior rather than its location. "Disparity by Design," supra, at 44.

The other studies recommended reducing the size of the school zone from 1,000 feet. "An Empirical Study" recommended 100 to 250 foot zones, supra, at 23. The Prison Policy Initiative recommended 100-foot zones in both of its studies. "Geography of Punishment," supra, at 17, and "Reaching Too Far," supra.

- B. The Legislature intended to put an immediate end to sentencing disparities resulting from the previous school zone law, rather than to perpetuate them for any length of time.

There can be no doubt the Legislature was aware of the demographic and sentencing disparities plaguing the school zone law. In 2012, the Legislature responded by including school zone reforms as part of "An Act Relative to Sentencing and Improving Law Enforcement Tools" (hereinafter "2012 sentencing reforms"), St. 2012, c. 192. One of the reforms reduced the size of the zones from 1,000 feet to 300 feet. Id. at §30. Another excluded drug offenses committed within school zones between midnight and 5:00 a.m. from triggering the school zone penalty. Id. at §31.

G.L. c. 4, §6, Second is the starting point for determining whether the new 300 foot zones should apply to drug offenses that occurred prior to the effective date of the 2012 reforms. It states that the repeal of a statute shall not affect any punishment or penalty incurred before the repeal takes effect. However, it is well-settled law that the Legislature's intent for a statute to apply retroactively, even if not explicitly stated, may be

discerned from the subject matter, the pre-existing state of the law and the effect upon existing rights, remedies and obligations. Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1 (1914). See, also, Commonwealth v. Maloney, 447 Mass. 577 (2006).

Appellant Noel Pagan has thoroughly briefed this issue, showing that the Legislature intended the new, smaller-sized school zones to apply to cases pending as of the effective date of the 2012 sentencing reforms. Amicus need not repeat that discussion. The Legislature's intent to address the geographic and demographic inequities of the previous school zone law was best articulated by Rep. Eugene O'Flaherty, House Chairman of the Joint Committee on the Judiciary, on July 18, 2012, when he introduced the bill drafted by a conference committee, H.4286:

School zones - I hope you will understand what some of the urban districts have been dealing with. In Charlestown and Chelsea, you can't stand anywhere in my district and not be in a school zone. If you are in Worthington, you can stand in Worthington and you are probably not going to be in a school zone. The current law states that if you are within 1,000 feet of a school zone you are impacted by the mandatory minimum.

In urban areas, all the individuals have this minimum mandatory sentence hanging over their head. In other places, that district attorney

will treat it as a possession charge. It has resulted in disparate sentencing. I use that as an analogy when you are talking about the disparate impact on urban communities to suburban. We decided it was a fair compromise to reduce it from 1,000 feet to 300 feet and when school is not in session, the idea is that the law would not apply. We think that was a fair compromise.

Sentencing - Habitual Offender - Conference Report:

Question Came on Accepting the Conference Committee Report H.4286, Formal House Session, July 18, 2012.

The bill was passed by both the House and the Senate on July 19, 2012, with the addition of an emergency preamble stating that the act should take effect immediately because "[t]he deferred operation of this act would tend to defeat its purpose, which is to . . . update sentencing laws." St. 2012, c. 192, preamble. Massachusetts House Journal, Emergency Measure, July 19, 2012.

In light of the Legislature's emergency directive, the Legislature can hardly have meant to continue application of the repealed school zone law after enactment. This would defeat the clear statement that the act was to take effect immediately and would instead continue to subject defendants to the flawed 1,000 foot zones. Such a state of affairs

could last for some time, given the six-year statute of limitations for drug offenses, G.L. c. 277, §63.

Rather, a person charged with a school zone offense whose case was pending on the effective date of the 2012 sentencing reforms must be allowed to benefit from the intent of the act, if his or her offense occurred more than 300 feet from a school. To hold otherwise would perpetuate the well-documented disparities created by the previous 1,000 foot zones. It would serve no public safety purpose in light of the Legislature's conclusion that 1,000 foot zones do not protect children.

By the time this case is argued, school zone offenses that were committed before the 2012 sentencing reforms took effect on August 2, 2012 can be prosecuted for almost *five more years*. If the Court were to adopt the Commonwealth's position -- that the new, smaller school zones do not apply to drug offenses that occurred before the effective date -- the following scenarios could occur.

Scenario 1: On December 31, 2011, before the 2012 sentencing reforms, Defendant Smith sells a small quantity of cocaine to a friend who is visiting Smith's home, which is located 900 feet from school

property. In 2013, Smith is charged with distribution of a Class B controlled substance and a school zone offense. On December 31, 2016, he is convicted and sentenced to a mandatory minimum sentence of two years, in addition to whatever sentence he receives for the distribution offense.

Defendant Jones lives in the same building. He commits the very same offense but on December 31, 2012, after the enactment of the 2012 sentencing reforms. He will not be charged with a school zone violation. He too is sentenced on December 31, 2016 but will not face an additional sentence, let alone a mandatory one.

Both defendants committed the same offense at the same location but on different dates. Yet years later, when both are sentenced, only Defendant Smith will receive the mandatory minimum sentence for a school zone offense. This outcome seriously undermines the objective that sentencing policies should "provide certainty and fairness in sentencing, avoiding unwarranted sentencing disparities among defendants with similar criminal records who have been found guilty of similar criminal conduct," G.L. c. 211E, §2(4). A sentence of incarceration should bear

a reasonable relationship to other sentences imposed for the offenses in question. Commonwealth v. Coughlin, 2006 Mass. Super. LEXIS 282.

Scenario 2: Defendant Smith commits the same offense described above on December 31, 2011. He lives in a city and his home is within several overlapping school zones, even though the schools cannot even be seen from his home due to other buildings between his home and the schools. As in the previous example, he is convicted and sentenced in 2016 to a two-year mandatory minimum sentence.

Defendant Jones commits the same offense on December 31, 2011. But in this second example, his home is in a suburban community where the nearest school is a mile away, far beyond the 1,000 foot school zone. He is never charged with a school zone offense. When he is sentenced in 2016, the court is able to take into consideration the facts of his case in order to arrive at a just sentence for the distribution offense.

Both defendants committed the same offense on the same date, but at different locations. Yet years later, only Defendant Smith will receive the mandatory minimum sentence for a school zone offense. This

outcome also seriously undermines the goal of avoiding unwarranted sentencing disparities, by treating two similarly situated defendants in very different ways.

If the Commonwealth's position is adopted, "business as usual" will continue for nearly *five more years* until the statute of limitations runs on school zone offenses that occurred before August 2, 2012. The high number of school zone convictions each year would not be expected to decrease until that time. This result clearly would be contrary to the Legislature's intent that the new, 300 foot school zones should take effect immediately and apply to cases pending as of the effective date of the 2012 sentencing reforms.

- C. The U.S. Supreme Court's 2012 decision in *Dorsey v. U.S.* provides a useful roadmap for analyzing sentencing reforms implemented on an emergency basis to end unjustified disparities.

Just last year, the U.S. Supreme Court was faced with a similar issue concerning federal drug sentencing laws in *U.S. v. Dorsey*, 567 U.S. ___, 132 S. Ct. 2321 (2012). In 2010, the federal Fair Sentencing Act (hereinafter "FSA"), 124 Stat. 2372, was signed into law. Among other reforms, the FSA

reduced the disparities between mandatory minimum sentences for crack cocaine and powder cocaine from a 100-to-one ratio to an 18-to-1 ratio. As a result, the mandatory minimum sentences for certain crack cocaine offenses were reduced. The Court held that the new, shorter sentences for crack offenses should apply to defendants whose offenses took place before the FSA was enacted, but were sentenced afterwards.

Like Massachusetts, the general rule under federal law is that a penalty is incurred when a crime is committed. Great Northern R. Co. v. United States, 208 U. S. 452, 464-470 (1908). And as with the instant case, Congress did not explicitly state in the legislation its intention that the FSA should apply to defendants whose cases were pending on the date when the FSA was signed into law. However, like Massachusetts, federal law also provides for an exception to the general rule when, by "necessary implication, arising from the terms of the law as a whole," that rule would lead to a result contrary to Congressional intent. Id. at 465.

The court noted that numerous reports and opinions had been issued over the past two decades that criticized the crack-to-powder ratio as both

unjustified and disproportionately harsh. It also compared possible sentences for pre-FSA and post-FSA defendants who commit the same crimes and are sentenced at the same time. In one scenario, the pre-FSA defendant would be sentenced to a mandatory minimum sentence more than double that faced by the post-FSA defendant. In another scenario, only the pre-FSA defendant would face a mandatory minimum sentence. In light of the number of crack cocaine convictions each year, "one cannot treat such problems as if they were minor ones." Dorsey, 132 S. Ct. at 2333. Thus, the Court found that failing to apply the new, shorter sentences to pre-FSA defendants would seriously undermine the federal sentencing objectives of uniformity and proportionality. Id.

The FSA also instructed the U.S. Sentencing Commission (hereinafter "U.S.S.C.") to make conforming amendments to the federal sentencing guidelines so as to incorporate the FSA's new sentences as soon as practicable. 124 Stat. 2374. The U.S.S.C. complied and promulgated emergency amendments to the guidelines. 75 Fed. Reg. 66188 (2010).

Dorsey offers many parallels to the case at bar. Both the FSA and the 2012 sentencing reforms were

enacted on an emergency basis to remedy well-documented inequities in drug sentencing laws. While the general rule under both federal and Massachusetts law is that a statute will not be applied retroactively unless Congress or the Legislature so specifies, it is also well-settled law at both the federal and state level that legislative intent can be discerned from the context in which the statute is enacted. In both cases, applying the new law retroactively accomplishes the legislative intent to put an immediate end to sentencing disparities. It will avoid inconsistent sentences for years to come.

D. Applying the new, smaller-sized school zones to pending cases is consistent with this Court's recent decision in Commonwealth v. Galvin.

Applying the smaller-sized school zones to pending cases would also be consistent with this Court's recent decision in Commonwealth v. Galvin, 466 Mass. 286 (2013). The 2012 sentencing reforms reduced the mandatory minimum sentence for distribution of cocaine as a second or subsequent offense from five years to three and one-half years. St. 2012, c. 192, §14. Galvin held that the new, shorter mandatory

minimum sentence applies to a defendant who committed his offense prior to the effective date of the reduction, but whose conviction and sentencing did not occur until after that date.

Granted, defendant Galvin was able to point to a related section of the new law that retroactively conferred parole eligibility on a drug offender convicted of Galvin's offense after three and one-half years. St. 2012, c. 192, §48. But the Court also found that:

In reviewing all of the provisions of the [2012 sentencing reforms], it is apparent that one of its primary purposes was to significantly reduce the sentences to be served by individuals under the mandatory minimum provisions of a wide range of drug-related offenses.

Galvin at 291.

A new statute must be construed so as to give rise to a consistent body of law. Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 247 (1993). Applying the new, smaller school zones to cases that were pending as of the effective date of the 2012 sentencing reforms will further reduce the mandatory minimum sentences to be served for drug offenses. Even if the length of a school zone sentence was not changed, the number of mandatory school zone sentences imposed will

be reduced, which certainly will help fulfill the purpose of the new law.

CONCLUSION

For the reasons set forth above, this Court should find that the new 300 foot school zone applies to cases pending as of the effective date of the 2012 sentencing reforms.

Respectfully submitted,

BARBARA J. DOUGAN
BBO #558392
Families Against Mandatory
Minimums
P.O. Box 54
Arlington, MA 02476
(617) 543-0878
bdougan@famm.org

September 23, 2013

CERTIFICATE OF SERVICE

I, Barbara J. Dougan, certify under the pains and penalties of perjury that on September 23, 2013, I served two copies of this brief on each of the following counsel of record for the parties, by first-class mail:

Counsel for the Commonwealth:

Brook S. Lane
Assistant District Attorney
Office of the Middlesex District Attorney
15 Commonwealth Avenue
Woburn, MA 01801

Counsel for Noel Pagan:

Jennifer A. Sunderland
Committee for Public Counsel Services
144 Main Street, 4th Floor
Brockton, MA 02301

Barbara J. Dougan

Dated: September 23, 2013