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Testimony of Attorney General Janet T. Mills in Favor of LD 1554, An Act to Resolve Inconsistencies in the Drug Laws

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Senator Rosen, Representative Fowle, members of the Joint Standing Committee on Criminal Justice and Public Safety, I am Janet Mills, Attorney General For the State of Maine. I am pleased to be here today to testify in support of LD 1554, An Act to Resolve Inconsistencies in the Drug Laws. And thank you, Senator Rosen for sponsoring this bill on behalf of the Office of the Attorney General.

As this Committee knows, you voted unanimously in favor of LD 1246 last year. Then you dealt with LD 113. Then you re-reviewed LD 1246 and there were divided reports about the bills; ultimately, both bills passed the House and the Senate. Both bills went to the Governor's desk. Both bills were vetoed, but they were vetoed beyond the 10-day period. So both bills became law.

In some respects these two bills were compatible. In other respects they were – and are – incompatible. I've tried hard to figure out how they could be read together; and our Office has debated what to advise law enforcement officers on the street about whether to charge someone with a misdemeanor or a felony when both are on the books.

Both bills amended one particular provision of Maine's drug laws, specifically, 17-A M.R.S.A, §1107-A. LD 113 reduced the penalties for possession of Schedule W drugs from a Class C crime to a Class D crime if the offender has no prior convictions for a drug crime. The other bill, LD 1246, retained the felony penalties in the same section of law and made first offense possession of fentanyl a Class C crime.

So, today, there are two conflicting laws on the books. It is confusing for prosecutors; it is confusing for defense attorneys; it is confusing for the average citizen to figure out; and it is confusing for those who have to enforce the law.

Illegal drugs are devastating our communities. People are addicted to and dying from these deadly substances. They are doing anything they can to keep one step ahead of the sickness that comes from withdrawal. Short-term detox and long-term treatment are critical to breaking the dependence on these drugs and help people get their lives back on track.

As more people in Maine become addicted to very powerful opiates, the need for more resources grows. I am very proud of Maine's specialty drug treatment courts: Family Treatment Drug Court, Veteran's Court, Adult Drug Treatment Court and Co-Occurring Disorders Court. Diverting individuals from the traditional criminal justice system to these treatment courts is incredibly important in providing rehabilitation. Maine prosecutors – Assistant Attorneys General, District Attorneys and Assistant District Attorneys – are all helping make these courts work. The Legislature has increased its support for these efforts in recent years, and I thank you for that support.

I have practiced law for nearly 40 years. I have prosecuted major crimes and I have defended people charged with crimes. In private practice I represented people charged with trafficking and people charged with possession of opiates, people with severe addiction disorders. I could see it. Their family could see it. Sometimes, it took me, their defense attorney, laying out the consequences they were faced with before they saw it, a bit of "tough love," if you will. The consequences that caught their attention were not \$400 fines; what often hit people over the head and got them into rehab was the threat of prison, plain and simple. And it was the threat of prison that stopped them from using drugs in front of their families. It was the threat of prison that stopped them from stealing their kids' lunch money and shooting up and buying and selling drugs in front of their own children.

But today, under the law that took effect last October, if someone is summonsed for possession of heroin (mind you, they wouldn't necessarily be arrested for a misdemeanor charge) now all they will face, is a slap on the hand, a minimum \$400 fine, a suspended sentence and a misdemeanor criminal record. No bail conditions, no probation, no drug court, no treatment conditions.

I know that facing a lengthy sentence is sometimes the only motivating factor for someone to confront an addiction and get the treatment they need. Wearing my old defense attorney hat, if a prosecutor offered a deferred disposition on a misdemeanor drug charge in exchange for completing a 12 to 18 month drug treatment court course, I would probably tell them to take the fine and be done with it. And I'd no doubt see them later on another charge related to their addiction.

This is why I have submitted LD 1554. The bill represents a compromise between the two bills enacted last session. It keeps provisions of Sen. Katz's bill that reduced penalties for possession

of certain prescription opioids to a Class D crime if the defendant has no prior conviction. But it returns possession of methamphetamine, cocaine, cocaine base and heroin to a Class C crime, as it was before last October.

A felony charge brings with it the possibility of a significant period of probation, up to 2 years for a Class C crime, along with a long sentence hanging over the person. That kind of potential sentence gives the individual an incentive to get into treatment and to demonstrate their commitment to recovery. Very often we use a "split sentence," where someone serves a short period in jail then remains on probation for several years with a long sentence hanging over them and strict conditions of treatment and abstinence from drugs. See §1203 of Title 17-A. Very often prosecutors and defense attorneys use deferred disposition, with a felony charge up front and a misdemeanor conviction at the tail end, or perhaps no conviction at all, once the person has fulfilled their treatment obligation.

These tools are not available for someone facing only a misdemeanor.

For a misdemeanor drug charge, a sentence of less than one year is available; for a first offense, an individual is likely to get either no jail or a very short jail sentence. This results in a "catch and release" situation which benefits no one.

For a misdemeanor drug charge, only one year of probation is available, and a misdemeanor offender is not likely to be put on probation because the length of sentence is not a sufficient deterrent.

We often quote figures from the medical examiner – 208 people died from drug overdose in Maine in 2014, and we expect to see at least 230 overdose deaths for 2015 once the final numbers are tallied. That's more than five people a week.

You may hear from people who believe that a felony charge, regardless of the end result, is too harsh because it might mean the person has to spend some time in jail. Well, I for one would rather see that person in jail than in the morgue.

People may say a felony conviction is too harsh for someone who is "merely addicted."

Frankly, my drug prosecutors are hard pressed to recall any case in which an addict was not offered a deferred disposition or a lengthy continuance, conditioned on treatment, with a misdemeanor at the end of the case.

I hear from one individual in recovery recently who said, "The felony charge put pressure on me to get well. Seeing the consequence and potential for being a convicted felon was the impetus. And then the subsequent plea down to a misdemeanor and graduating my deferred disposition ensured my future would be intact."

We do not target addicts and try to put them in prison. We are too busy targeting *dealers*. And we do our best to get people help whenever possible.

You may also hear that possession of heroin is a victimless crime.

But it is folly to believe that addicts merely harm themselves.

It is addicts who are robbing pharmacies. Addicts who are committing assaults and burglaries, diving through strangers' medicine cabinets. Addicts who are shooting up in front of kids. Addicts who are too high to take care of an infant entrusted to their care.

And, while we're at it, let's talk about the *1,013 babies* born last year in Maine who were affected by drugs. Eight per cent of all live births. These are kids who were exposed to illegal drugs while still in the womb.

And what about all the calls to the Poison Center because of children exposed to dangerous fentanyl powder or kids ingesting heroin, cocaine and other drugs?

A 'victimless crime?' I think not.

This is a societal problem. It is a public health problem. But it is also a public safety problem, a criminal justice problem. And the criminal justice system has been a vital player in getting people into treatment, reducing recidivism, and saving lives.

But we need to restore to the criminal justice system the tools to prevent people from killing themselves, from committing other crimes, from hurting their families and hurting others. We must have the tools to divert people into treatment. LD 1554 will give prosecutors and the courts back these tools.

We are not talking about mandatory sentences. We are not proposing any drastic change in the law. We are simply asking you to go half way and restore the possibility of a felony charge for possession of certain serious illegal drugs.

I am happy to discuss any questions you have and I thank you for all your efforts to address the most critical crisis of our day.