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TESTIMONY

Senate Judiciary Committee

Senate Appropriations Subcommittee on Public Safety & Criminal Justice

Joint Public Hearing on Mandatory Minimum Sentences

**North Office Building
Hearing Room 1
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*The Commission is an agency of the General Assembly affiliated with
The Pennsylvania State University.*



Good morning Chairman Greenleaf and members of the Senate Judiciary Committee and Senate Appropriations Subcommittee on Public Safety and Criminal Justice. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. Thank you for providing this opportunity to testify before this joint public hearing on mandatory minimum sentences.

We have been here before, engaged in a public discussion of sentencing policy and the role of mandatory minimum sentences. In 1976, legislation was introduced in the General Assembly to require the imposition of a one-year mandatory minimum sentence for second convictions for serious felonies. The projected impact if enacted was an increase in the state prison population of 3,100 inmates at a time when the prison population was 7,700. As detailed in his book, *Sentencing Guidelines: Lessons from Pennsylvania*, Professor John Kramer, my predecessor as Commission executive director, traced the impetus for establishment of the Commission on Sentencing to this bill and two other bills introduced during that session that sought to enact mandatory sentencing provisions. Sentencing guidelines were viewed as a compromise between retaining the unfettered sentencing discretion of judges and enacting restrictive mandatory minimum sentencing statutes. Of particular concern were sentences viewed as excessively lenient for serious violent offenses.

While most agree that some exercise of discretion is required, there is less agreement as to the amount of discretion that should be available, how transparent that exercise of discretion should be, and whether that discretion should be exercised by the prosecutor or the sentencing judge.

Since the establishment of the Commission in 1978 and the implementation of the first sentencing guidelines in 1982, the General Assembly and the Commission have worked to advance policies that promote the protection of the public, the restoration of victims and the rehabilitation of offenders. This work involves reconciling the often competing goals of uniform sentences and individualized sentences: uniform sentences that promote proportionality and sufficiency and individualized sentences that consider the characteristics of the offense and the offender. It also involves consideration of competing sentencing purposes: retribution, incapacitation, deterrence, rehabilitation and restoration.

The sentencing guidelines have been effective in establishing a statewide framework for sentencing, and providing a common starting point for sentencing, with recommendations taking into account the seriousness of the conviction offense and the offender's criminal history, as well as other factors determined by the court. The guidelines also provide a mechanism for the collection of statewide sentencing data, and the analysis of sentencing practices, including conformity to the guidelines and the use of mandatory minimum sentences.

The recommendations contained in the guidelines provide judges with substantial discretion regarding disposition and duration of sentences, particularly for less serious offenders. Courts are required to consider the guidelines, and the Commonwealth or the defendant may file an appeal based on an erroneous preparation of the guidelines, a departure from the guidelines, or other discretionary aspects of a sentence. However, the standard of review for departures, manifest abuse of discretion, is relatively weak since the guidelines "... are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence."¹

¹ Commonwealth v. Walls, 926 A.2d 957, 965 (PA, 2007)



In 2015, 75% of sentences imposed were within the standard range of the guidelines, with 8% in the aggravated range or above the guidelines, and 15% in the mitigated range or below the guidelines. And while certain categories of offenses have more departures below the guidelines, the most common reasons reported for those departures include guilty pleas, recommendation of the prosecutor, and sentences on multiple counts. Even with weak appellate review, Pennsylvania enjoys relatively high compliance with the guidelines. In addition to the wide ranges of the guidelines, some judges have suggested that the guidelines are a safe harbor, and that they sentence within the guidelines to avoid time-consuming appeals; another factor identified is the public release by the Commission of judge-specific sentencing information.

Over the past 35 years, the sentencing guidelines have been modified 14 times in order to incorporate legislation enacted by the General Assembly, to respond to feedback received from practitioners and the public, and to adjust recommendations based on analysis of sentences reported and associated research on effective practices. Since 2010, responding to mandates from the General Assembly, the Commission has added eight sentencing enhancements to the guidelines to increase sentence recommendation and to serve as alternatives to mandatory minimum sentences. The Commission is currently holding public hearings on four additional enhancements enacted during the 2015-2016 Session. The Commission is also receiving public comment on a proposed sentence risk assessment instrument, intended to identify high and low risk cases for which the Commission recommends additional information be provided to the Court. And, as part of a comprehensive assessment of the sentencing guidelines, the Commission has established three sub-committees to review the recommendations of a strategic planning work group and the Justice Reinvestment working group.

During this same 35 year period, the General Assembly enacted numerous mandatory minimum sentencing statutes, many of which gave the prosecutor discretion in the application of the mandatory. These mandatories required the prosecutor to give notice of the application of the mandatory after conviction but before sentencing, and required the Court to impose the mandatory if it determined by a preponderance of the evidence that the relevant sentencing factor was present. When a mandatory minimum sentence is applied, it supersedes the sentencing guidelines recommendation; if the mandatory is available but not applied, or if the guideline recommendation is longer than the mandatory minimum sentence, the guidelines must be considered by the Court. In the 2009 HR 12 Study of Mandatory Minimum Sentences, the Commission found that less than half of all mandatory-eligible offenses studied received a mandatory sentence, but that the use varied substantially depending on the nature of the offense. Mandatory sentences were imposed in 77% of eligible firearms cases, 43% of eligible drug cases, and 26% of eligible repeat violent offender cases.

Following the U.S. Supreme Court decision in *Alleyne v. United States* (570 US ___)(2013), most of the prosecutor discretion mandatories in Pennsylvania were invalidated. Legislation to reestablish these statutes include procedures by which the sentencing factors are treated as elements of the crime, requiring notice and proof beyond a reasonable doubt at trial. The Commission's analysis of one such bill, House Bill 741/PN 1262, found a substantial impact for reinstating drug trafficking and school zone mandatories, due to the decrease in admissions to DOC and the duration of sentences for mandatory-eligible drug offenders since the invalidation of these statutes. However, sentences for violent offenders remained relatively constant during this period, notwithstanding the invalidation of mandatory minimum sentencing statutes.



Advocates of mandatory minimum sentencing legislation appropriately identify sufficiency and certainty as important sentencing components. The sufficiency of the guideline recommendations are regularly reviewed, and adjustments continue to be made to address concerns and to promote uniformity and proportionality. Both the sentencing guidelines and the previous prosecutor discretion mandates include uncertainty. The uncertainty of the advisory guidelines relates to departures without substantive review of the reasons; the uncertainty of the mandates related to the lack of transparency in the exercise of discretion by the prosecutor.

In jurisdictions with presumptive sentencing guidelines, such as Minnesota and Washington, a court may impose a sentence outside the standard range of the guidelines if it finds "substantial and compelling" reasons, with the departure sentence subject to a *de novo* standard of review by the appellate court. This heightened review increases certainly at sentencing, while providing a formal and public mechanism for the consideration of exceptional circumstances. Senate Bill 63/PN 44 would create an exception to mandatory minimum sentences "...if the court has a compelling reason to believe that a substantial injustice would occur." Presumptive guidelines serve a similar purpose, even if limited to sentencing guidelines for mandatory-eligible offenses.

I hope this information is helpful as you consider the efficacy of mandatory minimum sentences, both as a tool of law enforcement and as a tool that impacts sentencing. As an agency of the General Assembly, the Commission on Sentencing is happy to provide any additional data and information requested by the Committee. However, I would be remiss if I did not mention that the Appropriation Bill passed by the House of Representatives (HB 218, PN 1236) eliminated all funding for the Commission. I am hopeful that this action will be reversed as budget negotiations move forward, so that the Commission can continue to provide guidelines and serve as a clearinghouse and information center on Pennsylvania's sentencing practices.

Thank you again for providing this opportunity to testify.