Senate Judiciary Committee
Public Hearing on Probation Reform
Tuesday, June 25, 2019

The Honorable Janine Edwards – President Judge, Wayne County
The Honorable Michael Barrasse – President Judge, Lackawanna County
The Honorable Wade Kagarise – Judge, Blair County
The Honorable Charles Ehrlich – Judge, Philadelphia County

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Sentencing Commission promulgate guidelines for administrative probation violations

- The legislation lacks a definition of administrative violation. The term should be defined in the legislation or, if enacted, by the commission in the course of promulgating the guidelines.
- The guidelines adopted by the commission are made mandatory later in the bill. This is a change from current practice which allows judges to deviate, but requires a written statement explaining the reasons for the deviation. Judges should retain the ability to deviate so long as the reasons are established on the record.
- Capping imprisonment at 30 days for administrative probation violations does not take into account the number of prior administrative violations and does not allow for flexibility to deal with issues on a case-by-case basis. *E.g.*, a sexual predator who violates a condition that he/she not set foot in a playground. While this does not constitute a commission of a new crime – presumably what the legislation considers an administrative violation – a judge should not be constrained to the 30-day cap when dealing with the violator.

Prohibition on split sentencing

- Prohibiting courts from sentencing individuals to a term of probation consecutive to a term of imprisonment or another sentence of probation could lead to the unintended consequence of longer confinement terms by tying the hands of judges. *E.g.*, a judge wishing to impose a county jail sentence of 11 ½ to 23 months followed by two years of probation may, under the legislation, feel compelled to sentence the offender to total confinement.
- Longer confinement will trigger state sentences when the maximum reaches 24 months.

- Convictions of, or pleas to, higher grades of offenses could have impacts beyond incarceration, including precluding an individual's eligibility for Clean Slate of criminal history records given the exceptions/prohibitions in the Clean Slate law for higher graded offenses.
- Consecutive probation can be necessary to ensure compliance with problem-solving court requirements or other statutory obligations. *E.g.*, in a basic first-time DUI case, general impairment is charged. Upon conviction, the offense requires a six-month minimum term of probation with the flexibility for additional supervision through consecutive probation if necessary. This is an important option as six months does not always allow sufficient time for the payment of fines and costs and compliance with all drug and alcohol treatment requirements under law.
- Rigid prohibitions also fail to account for multiple crimes or the number of victims involved in the case. *E.g.*, a contractor with prior fraud convictions was sentenced to several years of probation, which was violated several times for failure to timely pay victim restitution. Probation was extended until restitution was paid in full. In this case, shortly after the extended probation ended, the contractor falsified an application for a state contractor's license and insurance, both of which were secured. Over the course of several years, 19 new victims were defrauded of $200,000. Each of the charges carried a maximum of 5 years and payment of restitution. The sentence included several consecutive prison sentences and multiple probation terms that were consecutive to both the prison and probation terms – it was the only way a sentence could be fashioned to adequately punish the defendant and also provide sufficient time under supervision to ensure payment of restitution.

Caps on probation based on grade

- The enactment of rigid caps based solely on the grade of the offense fails to consider past actions of the defendant. Judicial discretion should be maintained to fashion an appropriate sentence and probation timeframes should not be based simply on the grade of the offense.

Limits on total confinement upon revocation based on commission of another crime

- Limiting penalties to six months (misdemeanor) fails to account for prior violations or what triggered the original sentence.
- It is not always the type of violation at issue, but rather the violator's history. *E.g.*, a child sexual abuse offender who is on probation is convicted of a misdemeanor indecent assault or found to be in contact with the previous victim. Judges must retain flexibility to deal with these situations accordingly.

Generalized policies prohibiting split sentences, capping probation based on grade and limiting total confinement for violations based on new crimes must be balanced against public safety interests. Judicial flexibility should be retained in order to appropriately deal with sexual and violent offenders and make sure mental health defendants are supervised in a manner that suits them best and limits incarceration.

Earned-time credit, merit time and early termination

- These are constructive public policies to pursue and could be the means to achieving the prime sponsors' ultimate goal of reducing "the amount of time and resources devoted to probationers who have completed sentences for past crimes while allowing them to fully reintegrate back into society."
- Timeframes, however, must allow for appropriate treatment or other court-ordered steps. *E.g.*, 18 months might not be sufficient to complete obligations under a problem-solving court or other diversionary program.
- Some jurists believe that consideration should be given to tailor early termination provisions in percentages, *i.e.*, one half of the supervision term, one fourth, etc. Percentages allow counsel and courts to individualize sentences and reduce the risk that the process gets sidestepped with harsher results occurring.
- It would be beneficial to give courts an "out" in individual cases. *E.g.*, probation will be reduced unless the court finds x, y or z (policy decisions that would have to be crafted). If the legislature is reluctant to give courts the out, it could instead enumerate in the statute factors that must be met or consider the use of presumptions. This would also provide offenders with an appeal mechanism.
- In conjunction with reform, the question of a defendant waiver should be addressed if early termination provisions are enacted. *E.g.*, if the commonwealth and defendant agree to a five-year period of supervision as part of a plea agreement and the defendant waives early termination. Is this agreement enforceable by the court? A legislative pronouncement of the answer would help eliminate confusion.
- Several counties already employ some type of early termination programs. *E.g.*, in Dauphin County if there are no violations, fees and costs are paid and conditions are completed, individuals are released from supervision at the half-way point.
- The House version includes exceptions for probation resulting from crimes requiring registration under Megan's Law.
- The House legislation also includes educational earned-time credit, provisions that merit discussion and debate as this process moves forward.

Resentencing of offenders incarcerated due to revocation of probation

- **<u>The panel makes no representations of constitutionality</u>**, but a state Supreme Court case, *Commonwealth* v. *Sutley*, 474 Pa. 256 (1977) held that "judicial judgments and decrees entered pursuant to [substantive law adopted by the legislature] may not be affected by subsequent legislative changes after those judgments and decrees have become final." Ultimately the legislature must determine whether the addition of the § 9771.2 would run afoul of this precedent.
- Potential constitutional issues aside, if a process is established for resentencing, the petition procedure - including identification codes assigned by the AOPC - is superfluous to the statue and is better suited to a rule of procedure.