



Monitor

Judicial Appointments Announced

Chief Justice Stephen Zappala made his first appointments to the Commission in April, selecting **President Judge Michael T. Conahan** of Luzerne County to replace Judge Gary Caruso of Westmoreland County and reappointing



Judge Renee Cardwell Hughes

Judge Renee Cardwell Hughes of Philadelphia for a third term. Judge Hughes was first appointed to the Commission in May 1998, and re-appointed in 2000. She has served on the Commission's Data & Field Services Committee and is currently Chair of the Policy Committee. Judge Hughes was appointed to the bench in 1995 by Governor Tom Ridge and was elected to a full ten-year term beginning in January 1996. Prior to becoming a member of the Judiciary, she was in private practice and specialized in the representation of small businesses and religious institutions.

Judge Conahan was elected to the Court of Common Pleas in November 1993.

He previously served as a district justice from 1977-1993. Judge Conahan received his B.S. degree from Villanova University and his J.D. degree from Temple University School of Law.



In a separate appointment, Chief Justice Zappala recently named **Judge Jeffrey A. Manning** of Allegheny County to serve the one-year balance of Judge Robert Dauer's term. Judge Dauer passed away on April 2, 2002. Judge Manning was appointed to the Common Pleas Court in April 1988, elected to a ten-year term in November 1989, and retained for a second term in 1999.

Commission Begins Policy Review

Earlier this year, the Commission solicited comments regarding modifications to the Sentencing Guidelines (5th Edition), and in particular two prior record score policies: juvenile adjudications and totally concurrent sentences. These policies were specifically targeted based on feedback from practitioners that missing or incomplete juvenile and criminal records result in an inconsistent calculation of prior record scores.

The comments received by the Commission strongly discour-

aged any change in guidelines that would exclude consideration of juvenile adjudications. While the Commission seems disposed to retaining the use of juvenile adjudications in the prior record score calculation, the Commission's Policy Committee will continue to study Juvenile Court procedures and records in an effort to improve the quality and consistency of prior record score calculations.

The Commission also received suggestions regarding

other aspects of the Sentencing Guidelines, particularly offense gravity score (OGS) assignments, and questions regarding the impact of 1997 Guidelines in terms of state/county correctional population and the utilization of intermediate punishment.

The Commission will be meeting with state and county policymakers to further discuss these sentencing issues before deciding if guidelines changes are necessary.

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Scheduled Training Sessions

- Wednesday, Aug. 21 (State College)*
- 5th Edition Guidelines (6 CLE)
- Wednesday, Oct. 16 (State College)*
- 5th Edition Guidelines (6 CLE)
- Wednesday, Nov. 20 (Harrisburg)*
- In-Depth Look at Sentencing (3 CLE)
- Wednesday, Dec. 4 (Harrisburg)*
- 5th Edition Guidelines (6 CLE)

For more information, contact Carrie Peters [(814) 863-2797, ext. 2 or carriep@psu.edu].

Commission Research Projects

Restrictive Intermediate Punishment Evaluation Project

This study, jointly conducted by PSU Professors John Kramer and Jeffery Ulmer, addresses two major research questions. First, have the anticipated shifts in sentencing to RIP occurred? Second, are RIP sentences involving drug treatment effective in reducing crime?

The proposed research has major policy implications. First, findings from the study will inform the Commission about the extent to which the guideline recommendations for RIP are being followed and whether there is variation among counties. The research will also indicate whether RIP has had the intended impact of decreasing jail populations and whether adjustments to the guidelines may be necessary. Second, the proposed research will contribute to our understanding concerning the impact that sentences involving drug treatment have on crime reduction. This is important to assist the Legislature in its deliberations on funding allocations to substance abuse programs that are used in lieu of incarceration.

Preliminary findings suggest that the shift in sentencing for certain targeted offenses from incarceration to RIP has occurred under the 1997 sentencing guidelines. The initial findings from the drug treatment component indicate

that, while overall 57% of the offenders sentenced to these RIP programs were re-arrested, those who completed the program were less likely to be re-arrested than those who did not complete the program [44% vs. 80 %].

Boot Camp Evaluation Project

The Commission is required by statute to conduct an annual evaluation of the state motivational boot camp. In addition to recidivism studies, recent efforts have focused on obtaining other outcome information through offender surveys. It is hoped that the survey findings will also provide insights regarding recent changes both at the boot camp (e.g., *Thinking for Change* programming) and following release (e.g., residential aftercare requirement).

The Boot Camp Evaluation Survey is administered to offenders at three points in time: 1) upon admission to the Boot Camp, 2) upon graduation from the Boot Camp, and 3) six months after graduation when the offender is on parole. The second survey is given to offenders at two stages: at admission and on parole.

The Commission will be using the JNET notification feature to improve the quality and ease of future boot camp recidivism research. The Commission will publish a regularly updated list of all boot camp graduates,

and be notified immediately via JNET when any person on the list is arrested.

Restitution Project

This multi-year, multi-method project on restitution, directed by PSU Professor Barry Ruback, examined the imposition of restitution orders, the payment of restitution, and effect of restitution payment on lowering recidivism. Primary funding for the project came from the National Institute of Justice, with additional funding from the Pennsylvania Commission on Crime and Delinquency. A final report was submitted to the National Institute of Justice in March 2002. A previous edition of the Commission's Research Bulletin presented the findings from the first phase of the project, which addressed: 1) the impact of the 1995 mandatory restitution law on restitution orders, and 2) factors related to the imposition of restitution before and after the implementation of the mandatory law. The fall issue of the Monitor will include a special two volume edition of the Research Bulletin, which will report on the findings from two subsequent phases of the project: 1) an in-depth, county level, analysis of restitution payment and recidivism, and 2) a survey of judges, district attorneys, and Chief Probation Officers on Restitution in Pennsylvania.

SGS Web... Now available to all JNET counties

SGS Web is a web-based version of the Commission's Sentencing Guideline Software. It is hosted through JNET, the Commonwealth's secure Justice Network. **SGS Web** allows timely calculation of the sentencing guideline recommendations and secure on-line reporting of sentences. **SGS Web** guideline 'forms' may be initiated by any JNET user designated by the Court; forms can be added to, viewed, or completed at any stage of the sentencing process.

SGS Web improves the pre-sentence process by: 1) enabling county staff to

enter information on an offender only once, even if that offender returns to the system in subsequent judicial proceedings; 2) allowing staff to consult the Sentencing Commission database to see if that offender has sentences reported from other counties; 3) enhancing the ability of county staff to inform judges about the applicable guideline ranges, applicable mandatory statutes and maximum sentencing provisions; and 4) removing the need to mail forms to the Commission... as soon as the sentence is submitted, it becomes a part of the Commission's database, which counties may access.



SGS Web is now available to all JNET counties! Commission staff is available to provide on-site demonstrations, and to assist counties in developing local procedures and assigning user roles. For more information, visit the 'Information Technology & Software' tab on our web site (<http://pcs.la.psu.edu>) or contact Carol Zeiss ((814) 863-0731 or caz3@psu.edu).

Recent Commission Activities & Decisions

The Commission's second quarterly meeting of 2002 was held on May 14-15, 2002 in Harrisburg. A dinner and work session was held Tuesday evening at the Crowne Plaza, with the Legislative Breakfast and Quarterly Meeting held Wednesday morning in the Capitol.

WORK SESSION

During the Tuesday evening work session, members and invited guests discussed the Policy Committee prior record score recommendations and the written comments received to date. The House Judiciary Committee vigorously opposed any effort to weaken the prior record score use of juvenile adjudications, and noted that any proposal to exclude juvenile adjudications would directly violate the Commission's statutory mandate. The Juvenile Court Judges Commission recommended that no change be made to the policy. Much of the subsequent discussion focused on the problems related to obtaining complete, accurate and consistent juvenile and criminal records, and potential remedies.

LEGISLATIVE BREAKFAST

The Commission hosted its second annual Legislative Breakfast, providing an opportunity for staff and members of the General Assembly to learn about the activities and services available through the Commission.

QUARTERLY MEETING

Budget & Management

The Commission approved a modified FY01/02 operating budget and tentative FY02/03 operating budget; service purchase contracts for operations and for legal and IT services; solicitation of bids for a financial audit; and the preparation and submission of the following DCSI continuation grants: SGS Web and RIP Sentencing & Recidivism Evaluation. The Commission also approved continuation of the MOU with PSU without modification for FY02/03.

Data & Field Services

Judge verification reports for 2000 sentencing data will be mailed in May. Efforts are underway to develop an interface between the SGS Web application and the AOPC District Justice disposition database, allow-

ing SGS Web users to access AOPC case information by simply providing the OTN. Research

Staff provided an update on the three research projects underway (Boot Camp Evaluation, RIP/D&A Treatment, and Restitution). A Boot Camp Research Meeting was held in March with representatives of the DOC and PBPP, and an RIP Evaluation Advisory Committee is scheduled for June. The Commission gave approval for continuation of the RIP/D&A Evaluation as the research project for PSU contracted faculty for FY02/03.

Policy

The Commission referred comments received regarding prior record score and other policy recommendations to the Policy Committee for further study. The Committee will meet with staff in State College in June and in Harrisburg in July.

The next Commission Meeting, which includes the annual strategic planning session, will be on August 13-14, 2002 in State College in Harrisburg.

Key Sentencing-Related Decisions (April—July 2002)

Brief summaries of these and other cases are now found at the "Sentencing Guidelines & Information" tab on the Commission's web site:

<http://pcs.la.psu.edu>

Credit

McCoy v. PBPP (793 A.2d 1004)

Harold v. PBPP (797 A.2d 393)

Sentencing Issues

Com. v. Travaglia (792 A.2d 1261) (priors)

Com. v. Sharp (792 A.2d 1266) (prior DUI)

Com. v. McCalman (795 A.2d 412) ▶▶

Com. v. Klien (795 A.2d 424) (merger)

Com. v. Druce (796 A.2d 321) (recusal)

Com. v. Lenhoff (796 A.2d 338) (error)

Com. v. Menhart (796 A.2d 990) (relief)

Com. v. Payne (797 A.2d 1000) (consec.)

We conclude appellant should be given credit for the eighteen (18) days spent under house arrest. While this case has been on appeal, the Pennsylvania Supreme Court decided the case of *Com. v. Chiappini*, 566 Pa. 507, 782 A.2d 490 (2001), and held that a home confinement/electronic monitoring program constitutes time spent in 'custody' for purposes of 42 Pa.C.S.A. §9760, Credit for time served.

***Com. v. McCalman*, 795 A.2d 412, 418**

Sentencing Guidelines Q&A...

Topic... Deadly Weapon Enhancement

Does the deadly weapon enhancement apply to an accomplice?

Yes. In *Com. v. Pennington* (751 A.2d 212) the Superior Court held that the deadly weapon enhancement could be applied though the weapon was never on the defendant's person, where the weapon was within his immediate physical control, and where defendant and accomplices had knowledge of the existence of the weapon and had ready access to it during the crime.

Is notice required for the application of the deadly weapon enhancement?

No. The deadly weapon enhancement is not a mandatory sentencing provision therefore notice is not required. The deadly weapon enhancement is a means of modifying the guideline sentence ranges and must be applied if the court determines that the offender possessed or used a deadly weapon during the commission of the current conviction offense. The court then has discretion in sentencing within the enhanced ranges or imposing a sentence outside the guidelines. (5th Edition Guideline Manual, §303.10 (a), pp. 189-199)

Does the current (5th Edition Guidelines) deadly weapon enhancement differ from that in previous guidelines?

Yes, in two ways. First, the court is now required to determine if the deadly weapon is 'possessed' or 'used', while previous guidelines only required the court to determine if the weapon was 'possessed'. Second, the deadly enhancement is now applied to every offense for which the offender possessed or used a deadly weapon, while previous guidelines only applied the deadly weapon enhancement to the most serious offense of a transaction. The only circumstance in which the deadly weapon enhancement is not applied following a court determination is when possession or use of a deadly weapon is an element of the offense. In such cases, the enhancement is applied to other offenses in the proceeding.

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MONITOR (SUMMER 2002)

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The Pennsylvania Commission on Sentencing is an agency of the General Assembly located on the University Park campus of the Pennsylvania State University. The Commission was created in 1978 for the primary purpose of creating a consistent and rational statewide sentencing policy to promote fairer and more uniform sentencing practices.

The *Monitor* is a quarterly publication of the Commission. All inquiries should be directed to the Commission at the address or numbers listed above.

RECENT LEGISLATION (April-July 2002) INSERT

***Harris v. United States* (No. 00-10666) (United States Supreme Court, Decided June 24, 2002)**

The Constitution permits legislatures to make the distinction between elements and sentencing factors, but it imposes some limitations as well. For if it did not, legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor. The Court described one limitation in this respect two Terms ago in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum," whether the statute calls it an element or a sentencing factor, "must be submitted to a jury, and proved beyond a reasonable doubt." Fourteen years before, in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court had declined to adopt a more restrictive constitutional rule. *McMillan* sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm. The principal question before us is whether *McMillan* stands after *Apprendi*.

Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion — and rely upon judicial expertise — by requiring defendants to serve minimum terms after judges make certain factual findings. It is critical not to abandon that understanding at this late date. Legislatures and their constituents have relied upon *McMillan* to exercise control over sentencing through dozens of statutes like the one the Court approved in that case. Congress and the States have conditioned mandatory minimum sentences upon judicial findings that, as here, a firearm was possessed, brandished, or discharged...; or among other examples, that the victim was over 60 years of age, 42 Pa. Cons. Stat. §9717(a) (1998); that the defendant possessed a certain quantity of drugs...; that the victim was related to the defendant...; and that the defendant was a repeat offender... We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them.

Reaffirming *McMillan* and employing the approach outlined in that case, we conclude that the federal provision at issue, 18 U.S.C. §924(c)(1)(A)(ii), is constitutional. Basing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments... That factor need not be alleged, submitted to the jury, or proved beyond a reasonable doubt.

Legislation from 2002 Session of General Assembly (April-July)

<u>TITLE/SECTION</u>	<u>OFFENSE</u>	<u>OLD</u>	<u>NEW</u>	<u>1997 OGS</u>	<u>2001-2002 SESSION</u>	<u>EFFECTIVE DATE</u>
18/2706 (d)	Terroristic threats - diverted from activities	new	F3	[Omnibus] 5	Act 2002-82 (SB1109/PN2105)	August 27, 2002
18/2715 (b)(1) (b)(2) (b)(3)	(Bomb threat) Threat to use weapons of mass destruction - reports or threatens - diverted from activities - during state of emergency	M1 new new	M1 F3 F2	[Omnibus] 3 [Omnibus] 5 [Omnibus] 7	Act 2002-82 (SB1109/PN2105)	August 27, 2002
18/2716 (a) (a) (b)(1) (b)(1) (b)(2) (b)(3)	Weapons of mass destruction - possession/first offense - possession/subsequent - use/cause illness, injury - use/results in death - damage/disrupt water, food - evacuation	new new new new new new	F2 F1 F1 LIFE F1 F1	[Omnibus] 7 [Omnibus] 8 [Omnibus] 8 N/A [Omnibus] 8 [Omnibus] 8	Act 2002-82 (SB1109/PN2105)	August 27, 2002
18/3929.2 (a)	Possession of retail theft instr. - detection shielding device	new	M1	[Omnibus] 3	Act 2002-33 (HB2129/PN2841)	June 17, 2002
18/4120 (c)(1)(I) (c)(1)(II) (c)(1)(III) (c)(1)(IV) (c)(2)(I) (c)(2)(II) (c)(2)(III) (c)(2)(IV)	Identity theft - total value < \$2,000 - total value \$2,000 or more - criminal conspiracy, any amt. - third/subsequent offense - victim/< \$2,000 - victim/\$2,000 or more - victim/criminal conspiracy - victim/third, subsequent	new new new new new new new new	M1 F3 F3 F3 F3 F2 F2 F2	[Omnibus] 3 [Omnibus] 5 [Omnibus] 5 [Omnibus] 5 [Omnibus] 5 [Omnibus] 7 [Omnibus] 7 [Omnibus] 7	Act 2002-62 (HB1546/PN3866)	August 19, 2002
18/4905 (b) (b)	False alarms to agencies of public safety - causes a false alarm - during state of emergency	M1 new	M1 F3	3 [Omnibus] 5	Act 2002-82 (SB1109/PN2105)	August 27, 2002
18/4905 (a) (a) (b) (b)	False reports to law enforcement authorities - falsely incriminating another - during state of emergency - fictitious reports - during state of emergency	M2 new M3 new	M2 M1 M3 M2	2 [Omnibus] 3 1 [Omnibus] 2	Act 2002-82 (SB1109/PN2105)	August 27, 2002
18/5123 (c.1) (c.2)	Contraband - telecom. devices to inmates - possession by inmates	new new	M1 M1	[Omnibus] 3 [Omnibus] 3	Act 2002-84 (SB820/PN1798)	August 27, 2002
18/5516 (b)	Facsimile (bombs) weapons of mass destruction - possess, manufacture, etc.	M2	F3	[Omnibus] 5	Act 2002-82 (SB1109/PN2105)	August 27, 2002
42/4722	DNA data base, Mandatory cost	n/a	n/a	Mandatory cost (\$250)	Act 2002-57 (SB1089/PN2082)	June 19, 2002
42/4732 (a) (b)	DNA data base, Prohibition on disclosure - disclose to unauthorized - obtain without authorization	new new	M1 M1	[Omnibus] 3 [Omnibus] 3	Act 2002-57 (SB1089/PN2082)	June 19, 2002