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THE PENNSYLVANIA COMMISSION ON SENTENCING

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS

Informational Public Meeting on House Resolution 12

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Good morning Chairman Walko and members of the House Judiciary Subcommittee on Courts. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. Thank you for providing this opportunity to comment on House Resolution 12 (Attachment 1), which directs the Commission to conduct a study on the use and impact of mandatory minimum sentences.

Mandatory Minimum Sentences and Sentencing Guidelines

In 1982, the Pennsylvania General Assembly passed mandatory minimum sentencing statutes for certain violent offenders... repeat offenders, those who visibly possess a firearm while committing an offense or while on public transportation... and for offenders convicted of “driving under the influence.” In 1988 additional mandatory statutes were enacted for drug delivery offenders, with the length of the minimum sentence dependent upon the type and quantity of drug involved. During the 1995 Special Session on Crime, the General Assembly passed Pennsylvania’s version of Three Strikes, which increased the mandatory sentences for repeat violent offenders. And last year, the General Assembly enacted legislation that increased existing mandatory sentences for offenses against children and enacted Pennsylvania’s version of Jessica’s Law. A comprehensive list of mandatory minimum sentencing statutes enacted prior to 2006 is attached (Attachment 2). While a number of mandatory sentencing statutes apply automatically upon conviction of an offense, most of the mandatory provisions require prosecutorial notice prior to sentencing, and if the prosecutor does not give notice to sentence under the mandatory, the judge is not bound to impose the mandatory minimum sentence.

In addition to mandatory sentencing statutes, Pennsylvania also adopted, in 1982, a set of presumptive sentencing guidelines that were promulgated by the Commission and intended to reduce sentencing disparity and increase sentence severity. In 1994, and again in 1997 and 2005, the sentencing guidelines were amended to provide harsher penalties for violent offenders, consistent with legislation enacted by the General Assembly, while at the same time encouraging the use of alternative programs, such as county and state intermediate punishment and state motivational boot camp, for less serious offenders. While the guidelines can never supersede the

mandatory minimum sentence required by statute, the guidelines do provide an alternative to a mandatory minimum sentence when prosecutorial notice is not given.

House Resolution 613 of 2004

On March 31, 2004, the House of Representatives unanimously adopted House Resolution 613 (P.N. 3480) (Attachment 3), which empowered the House Judiciary Committee to direct and oversee a study conducted by the Pennsylvania Commission on Sentencing on the use and impact of mandatory minimum sentences. Specifically, the resolution authorized the House Judiciary Committee to utilize, as deemed appropriate by the chairman,...

“...the experience, knowledge and services of the Pennsylvania Commission on Sentencing to study the use and impact of mandatory minimum sentences on the criminal justice system in this Commonwealth;... that the Judiciary Committee, with regard to all matters related to this study, provide direction and oversight to the Pennsylvania Commission on Sentencing as it assists the committee with this undertaking;... (and) that the Pennsylvania Commission on Sentencing report to the House of Representatives through the Judiciary Committee on its activities, findings and recommendations.”

In order to effectively address the use and impact of mandatory sentencing in the Commonwealth, the Commission concluded that a comprehensive study must begin with a review of charging decisions, track through the trial and sentencing phases, and consider recidivism and other measures of effectiveness. The cooperation of the courts and the district attorneys is critical to this type of study.

Unfortunately, the study period was limited to the remainder of the 2004 Legislative session, and a comprehensive study of such a complex issue could not be completed in the remaining eight months, and certainly not statewide. As a result, the Commission's efforts were directed toward the *identification of issues* related to the use and impact of mandatory minimum sentences in Pennsylvania, by testing methods for gathering and analyzing relevant data, and by suggesting future research activities.

Activities completed as of the end of the 2003/2004 Session include the following:

- Review of legislative history and floor debates preceding passage of identified mandatory minimum sentencing statutes to determine purposes of legislation.
- A comprehensive review of the research literature involving mandatory minimum sentencing to inform data collection efforts and provide a framework within which to interpret future study results.
- Pilot testing of data collection instrument/procedures and detailed examination of court records of mandatory eligible cases based on conviction offenses in five counties (Allegheny, Lancaster, Montgomery, Philadelphia, and Cumberland).
- In-depth interviews with district attorneys, public defenders, and judges in five counties (Allegheny, Lancaster, Montgomery, Philadelphia, and Cumberland) in order to obtain an overview of how and under what circumstances mandatory minimum sentences are imposed.
- Development of a preliminary recidivism study, based on sentences imposed in 1996, to test the impact of specific deterrence relating to the mandatory sentencing provisions.
- Analyses of the Pennsylvania Commission on Sentencing 1996 data to determine the frequency in the imposition of certain mandatory sentences based on conviction offenses.
- Development and mailing of a statewide survey of district attorneys and public defenders to obtain descriptive and evaluative information on the use and processing of mandatory sentencing statutes across the state.

The Commission suggested the following ‘next steps’ to build on the preliminary efforts:

- Statewide data collection effort to track all mandatory eligible cases from charging through to trial and sentencing, and analysis to determine impact of court determinations and plea negotiations on the application of mandatory sentencing provisions.
- In-depth interviews with district attorneys, public defenders, and judges in additional Pennsylvania counties to obtain information on how and under what circumstances mandatory minimum sentences are imposed, and to further investigate issues such as: the frequency and outcomes of Carroll Hearings relating to the applicability of drug mandatorics; and transfer of cases to federal court.
- Analysis of Pennsylvania Commission on Sentencing 2004 (and subsequent) data to determine the frequency in the imposition of mandatory sentences based on the conviction offenses.
- Completion of recidivism study to measure the impact of mandatory sentencing provisions on specific deterrence.

- To the degree possible, measure the impact of mandatory sentencing provisions on general deterrence, incapacitation, and retribution, through studies of time served, crime rates, and other outcomes.

House Resolution 12 of 2007

The Commission welcomes this opportunity to return to a study of the use and impact of mandatory minimum sentences. While the issues addressed and objectives identified in HR 12 are almost identical to HR 613, there are two substantial differences.

First, HR 12 would direct the Commission, rather than the Judiciary Committee, to study the use and impact of mandatory minimum sentences. This difference is important. While the Commission is an agency of the General Assembly, and the Judiciary Committee has oversight of the Commission, a study of mandatory minimum sentences should follow the same protocol used by the Commission to promulgate guidelines or evaluate the effectiveness of programs. By its composition, the Commission is intended to be insulated from the political process, but informed by all key constituencies. The research conducted by the Commission, and the findings that flow from that research, is and should be data-driven.

The study proposed in to HR 12 is also consistent with the duties and responsibilities of the Commission. The primary purpose of the Commission is to create a consistent and rational statewide sentencing policy and to promote fairer and more uniform sentencing practices in the Commonwealth of Pennsylvania. In addition to promulgating sentencing guidelines, the Commission is empowered to: establish a research and development program; serve as a clearinghouse of information on Commonwealth sentencing practices; serve in a consulting capacity to state courts; collect and disseminate information regarding the sentences actually imposed and the effectiveness of sentences; and make recommendations to the General Assembly concerning modification or enactment of sentencing and correctional statutes to carry out an effective, humane and rational sentencing policy; and to systematically monitor compliance with the guidelines and with mandatory sentencing laws (42 Pa.C.S.A.§2153).

Through a *Memorandum of Understanding* with The Pennsylvania State University, the Commission has established a research partnership with the Sociology Department and its

Crime, Law & Justice Program. Through this partnership, the Commission works with faculty and students (graduate and undergraduate) to study a number of topics, including: evaluation of the state motivational boot camp and the state intermediate punishment program; the effectiveness of restrictive intermediate punishment sentences involving substance abuse treatment; and the imposition and collection of restitution and victim compensation assessments. In recent years, the Commission has also been collaborating with a number of Pennsylvania law schools on research and educational projects, including work on HR 613.

The second difference between HR 12 and the previous HR 613 is the duration of the project. As noted previously, HR 613 was limited to eight months, of which two months were lost to start-up requirements (e.g., selecting faculty and students, purchasing equipment, establishing a budget through the Chief Clerk's Office, etc.). HR 12, which directs the Commission to report its findings no later than two years following adoption of the resolution, provides a more realistic time-frame for such an ambitious project. In order to keep the House apprised of its progress, the Commission could establish a project work plan, and identify a number of benchmarks as part of that work plan; interim reports could be submitted to the Judiciary Committee on a regular basis (e.g., every six months), and/or the Commission could brief the Judiciary Committee or the Courts Subcommittee through Information Meetings.

Where HR 12 is nearly identical to HR 613 is that it identifies three important issues related to mandatory minimum sentences: discretion, purposes of sentencing, and criminal justice resources.

Webster defines discretion as “the power or right to decide or act according to one's own judgment.” In Pennsylvania's criminal justice system, discretion is distributed among a number of agencies and individuals, and changes in the distribution of that discretion have hydraulic effects throughout the system. Prior to the 1980's, at least as related to sentencing, it could be said that most discretion resided with judges. The establishment of the Sentencing Commission and sentencing guidelines was an effort by the General Assembly to limit that discretion, as noted in this statement by then-Representative Anthony Scirica:

We are amending a Senate bill, and this amendment changes the way we sentence criminals in Pennsylvania. The purpose of the amendment is to make criminal sentences more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict the unfettered discretion we give to sentencing judges. *Pennsylvania House Journal*, 3130 (September 21, 1978).

In the case of sentencing guidelines, some discretion was shifted from judges to the Commission, although judges could depart from the guidelines by articulating aggravating or mitigating reasons. Mandatory minimum sentencing statutes have further shifted sentencing discretion away from judges, to the legislature (particularly for no notice mandatories) and the prosecution (particularly for notice mandatories). These same statutes may impact other aspects of the criminal justice system, particularly charging decisions and plea negotiations. For mandatories as with guidelines, an issue to consider is the impact of this shifting of discretion.

Regarding purposes of sentences, a number of rationales have been articulated for mandatory minimum sentencing statutes. A review of the Legislative Journals of the Senate of Pennsylvania and the House of Representatives includes references to deterrence and incapacitation and retribution as means of advancing public safety.

Comments during floor debate on the drug trafficking mandatories:

... in order to deal with this we have to try to provide some deterrents. This bill is more about deterrents than punishment because it establishes if you do sell to a minor or if you are a big-time dealer -- ...(these are) the kind of people we all want to get off the street and be imprisoned without a chance for probation. (Senator Greenleaf, *Legislative Journal, Senate*, 2/23/1988, p. 1784)

I probably will vote for this today, not because I specifically believe this is going to be the answer to a problem, but because maybe by voting for this and maybe by implementing this into law we will have a better data base at a future time to go back and see what works and what does not work. (Senator Fumo, *Legislative Journal, Senate*, 2/23/1988, p. 1785)

We are going to have to do something to make a young man, a fourteen-year-old, a fifteen-year-old, a sixteen-year-old or an eighteen-year-old figure that it is not important for him to go and sell drugs to make \$300 a night because he can have a decent job and look up and be somebody. (Senator Jones, *Legislative Journal, Senate*, 2/23/1988, p. 1787)

It is time to get some of these drug dealers off the roads. (Senator Bell, Legislative Journal, Senate, 3/21/1988, p. 1937)

Comments during floor debate on the 'Three Strikes' mandatory:

... there is a very small number of violent criminals who are committing the vast majority of the violent crimes in Pennsylvania and in this nation. This legislation would address that problem. ...

We must get them off the street so that they can no longer victimize and commit violent crimes against our citizens. (Senator Greenleaf, Legislative Journal, Senate, 9/18/1995, SS1, p. 253-254)

The whole structure of this bill is aimed at incarcerating those, incapacitating those who are in their peak crime years, and who are likely to commit crimes of violence, who if they are on the street are likely to victimize us. (Senator Heckler, Legislative Journal, Senate, 9/19/1995, SS1, p. 255)

It (this bill) is one that I believe sends a very strong and clear signal to violent criminals, adult criminals who are repeat offenders, that if you continue to violate Pennsylvania's law, you run the risk of going to jail for a long time. (Senator Fisher, Legislative Journal, Senate, 9/19/1995, SS1, p. 262)

And until we are willing to seriously and successfully take the measures that prevent or reduce crime by attacking its causes, then we must, at least, remove the incorrigible, dangerous, violent criminal until he no longer poses a threat to the lives and livelihoods of responsible law-abiding citizens. (Senator O'Pake, Legislative Journal, Senate, 9/19/1995, SS1, p. 263)

... what it (the bill) does is carves out 10 very specific areas of violent criminal behavior, and we say to the people of Pennsylvania that if individuals are going to commit these violent offenses repeatedly, that they are going to be subject to mandatory minimums which will lock them up well into their sixties, perhaps into their seventies, and very likely for the rest of their lives. (Representative Piccola, Legislative Journal, House, 10/3/1995, SS1, p. 402)

As noted in the Commission's report on HR 613, if these are in fact the purposes underlying the mandatory minimum sentencing provisions in Pennsylvania, then any study of the impact of such sentences should be measured against these standards: are mandatory sentencing provisions deterring criminal behavior? are mandatory sentencing provisions incapacitating targeted offenders? and/or are mandatory sentencing provisions appropriately punishing targeted offenders? HR 12 addresses these issues by focusing attention to "what circumstances and for what types of crimes the sentences are most effective as well as the appropriate length of sentence."

In order to determine the effectiveness of mandatory sentencing statutes, it is important to measure outcomes against stated goals. If the stated goal is general deterrence, a reduction in crime rates may be a measure of success. If the stated goal is specific deterrence, a reduction in recidivism may be a measure of success. However, it is more difficult to measure outcomes linked to goals, particularly in terms of the duration of a sentence, for retribution and incapacitation. If the purpose is retribution, how much incarceration is enough to hold one accountable? If the purpose is incapacitation, under what circumstances would release from incarceration be appropriate? While recidivism may be used to measure outcomes, the length of sentences in these areas is driven more by factors such as proportionality and heightened concerns for public safety. As a result, the role of these other factors must be considered as part of a study of the use and impact and effectiveness of mandatory sentencing statutes.

The third issue raised in HR 12 is criminal justice resources: are sentences imposed pursuant to mandatory minimum statutes cost effective? The resolution addresses the increased number of state sentences and the increased sentence length brought about by mandatory minimum sentences, the impact of mandatory provisions on other aspects of the criminal justice system, and the affect these provisions may have on eligibility for rehabilitation programs and parole. The issue of cost-effectiveness is closely related to the earlier discussion of purposes, but focuses more on the efficient use of correctional resources.

In recent years, at a time when Pennsylvania's population has remained stable and its crime rates have been falling, the populations in state prisons and county jails have increased substantially. Due to the deployment of a web-based sentencing application (SGS Web), the Commission is well positioned to analyze sentences imposed during the past three years (2004-2006) to better determine the use and impact of mandatory minimum sentences and the distribution of sentences when no mandatory applied. (Attachment 4, Preliminary Sentencing Data).

A number of sentencing programs have been established in recent years to provide alternatives to incarceration, including alternatives to mandatory sentencing provisions for DUI and drug-related offenders. The Pennsylvania District Attorneys Association has provided critical support

to advance the enactment of these programs, and to provide state funding for comprehensive drug and alcohol treatment for offenders. The Commission's ongoing evaluation of these programs, as well as current sentencing data, can be used to study the present utilization of these programs, and to review the eligibility requirements and processes for admission to these programs.

Conclusion

As an agency of the General Assembly, the Commission views as an important responsibility its duty to "...make recommendations to the General Assembly concerning modification or enactment of sentencing and correctional statutes... to carry out an effective, humane and rational sentencing policy." (42 Pa.C.S. §2153(a)(12)). The Commission welcomes the opportunity to study the use and impact of mandatory minimum sentences in Pennsylvania as described in HR 12, assuming adequate funding is provided.

Thank you again for this opportunity to testify before the Subcommittee on Courts.