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**THE PENNSYLVANIA COMMISSION ON SENTENCING**

**TESTIMONY BEFORE THE  
UNITED STATES SENTENCING COMMISSION**

**The Impact of *U.S. v. Booker* on Federal Sentencing**

**PUBLIC HEARING  
February 16, 2005**

**Mark H. Bergstrom  
Executive Director**

**TESTIMONY OF MARK H. BERGSTROM, EXECUTIVE DIRECTOR  
THE PENNSYLVANIA COMMISSION ON SENTENCING  
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*Introduction*

Good morning Mr. Chairman and members of the United States Sentencing Commission. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. Thank you for providing this opportunity to comment as you assess the impact of the United States Supreme Court decision in *U.S. v. Booker* on federal sentencing. I hope that some of the experiences with sentencing guidelines in Pennsylvania during the past 25 years may be of assistance in this effort.

Sentencing guidelines are inherently linked to the sentencing structures and practices of the jurisdiction in which they are developed. For this reason, I doubt that Pennsylvania's sentencing guidelines would be effective if transplanted to the District of Columbia or North Carolina or to the federal courts. So my purpose here today is not to recommend adoption of any specific aspect of Pennsylvania's guidelines for incorporation into the federal system, but rather to highlight some characteristics of structured sentencing that have proven effective and useful in Pennsylvania.

*Sentencing Structure*

Pennsylvania has both sentencing guidelines and discretionary parole release authority. When imposing an incarceration sentence, Courts are required to impose both a minimum and a maximum sentence, with the minimum sentence guided by the sentencing guidelines and any applicable mandatory minimum sentence, and the maximum at least double the minimum sentence but no longer than the statutory maximum. The minimum sentence serves as administrative notice of the earliest date a person is eligible for parole. There is no good time or earned time for state offenders in Pennsylvania; therefore, an inmate must serve the entire

minimum sentence before being eligible for parole. And since there is no right to parole, Pennsylvania's appellate courts have long held that the maximum sentence imposed by the court is the 'actual' sentence.<sup>1</sup> A defendant may not serve more than the maximum sentence, either in prison alone, or through a combination of prison and parole.

Pennsylvania's sentencing structure has arguably survived *Apprendi* challenges because the grading of the offense, which dictates the statutory maximum, is based upon proof beyond a reasonable doubt of the elements of the crime. The Court may not impose a maximum sentence longer than the statutory maximum based on the grading of the offense. Pennsylvania's sentencing guidelines have arguably survived *Blakely* challenges because they provide recommendations only relating to the minimum sentence, and provide no recommendations regarding the maximum sentence. If your inquiry includes review of federal sentencing structure beyond sentencing guidelines, I commend to you a forthcoming article in the *Emory Law Review* by Professor Steven Chanenson, a Professor of Law at the Villanova University School of Law and a member of the Pennsylvania Commission on Sentencing.<sup>2</sup>

### *Sentencing Guidelines in Pennsylvania*

Pennsylvania's first sentencing guidelines were adopted in 1982. They "...were promulgated in order to structure the trial court's exercise of its sentencing power and to address disparate sentencing. Legislative history also indicates that the Guidelines were enacted 'to make criminal sentences more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict unfettered discretion given to sentencing judges.'"<sup>3</sup>

Pennsylvania's sentencing guidelines structure both the dispositional and durational decisions of the sentencing court. Since the guidelines address sentencing for misdemeanors and felonies, the dispositional recommendations consider the full continuum of options,<sup>4</sup> including probation,

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<sup>1</sup> *Rogers v. Pennsylvania Board of Probation and Parole*, 555 Pa. 285, 724 A.2d 319 (1999). Also see: *McGill v. Pennsylvania Department of Health*, 758 A.2d 268 (Pa. Cmwlth., 2000).

<sup>2</sup> Chanenson, Steven L. "The Next Era of Sentencing Reform." *Emory Law Review*, Vol. 53, 2005

<sup>3</sup> *Com. v. Mouzan*, 571 Pa. 419, 812 A.2d 617, 620 n.2 (2002)

<sup>4</sup> See Sentencing Alternatives, 42 Pa.C.S. §9721.

county intermediate punishments, county incarceration,<sup>5</sup> state intermediate punishments and state incarceration, including the State Motivational Boot Camp. Since the early 1990's the guidelines have provided trade-off's between the use of incarceration and community-based intermediate punishment options, with great emphasis on the use of clinically prescribed drug and alcohol treatment in lieu of or in addition to incarceration.

Pennsylvania's sentencing guidelines have often been characterized as 'advisory' due to a history of relatively weak and procedural appellate review, particularly related to review of durational departures from the guidelines. However, in recent years, the Pennsylvania Superior Court has exhibited an 'increase in the reach of appellate review of sentencing discretion.'<sup>6</sup> Since this Commission has expressed an interest in receiving comments regarding state appellate review and presumptiveness of state guidelines, it may be helpful to relate some of the comments from a recent Pennsylvania Superior Court opinion that addresses this change in appellate review of the Pennsylvania sentencing guidelines. In *Com. v. Walls*, the Court stated:

... Thus, it would be helpful at this point to dispel a misconception in the law. It is perceived by many... that the extension of discretion to the sentencing court has resulted in a situation where the sentencing court is free to impose any sentence within the limits allowed by law, as long as it states its reasons for doing so upon the record. The corollary to this premise suggests that as long as the court states its reasons for departing from the guidelines on the record, the Superior Court is duty bound to affirm, regardless of whether or not reasons stated are viewed as reasonable or as justifying the departure. This is simply not so.<sup>7</sup>

The Court went on to discuss its role "... to review sentences in a more detached manner" so to "ensure not only a fair and impartial sentence under the circumstances, but also to protect against grossly disparate treatment of like offenders throughout the Commonwealth."<sup>8</sup> The Court relied

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<sup>5</sup> In Pennsylvania, an offender with a maximum sentence of less than five years may be ordered to serve an incarceration sentence in a county facility. 42 Pa.C.S. §9762.

<sup>6</sup> *Com. v. Walls*, 846 A.2d 152, 156 (Pa.Super., 2004)

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 157.

on the statutory provisions related to appellate review of the guidelines which defines when a sentence is unreasonable:

In determining whether a sentence is unreasonable, the appellate court shall have regard for:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the opportunity of the sentencing court to observe the defendant, including any pre-sentence investigation;
- (3) the findings upon which the sentence was based; and
- (4) the guidelines promulgated by the Commission.<sup>9</sup>

The Court suggested that the sentencing guidelines accomplish the goals of consistency and rationality in sentencing by providing a norm for comparison: "... the standard range of punishment, for the panoply of crimes found in the crimes code and by providing a scale of progressively greater punishment as the gravity of the offense increases. By logical extension, the provision of a 'norm' requires an assumption of the type of conduct that typically satisfies the elements of the crime and correlates the norm to that conduct."<sup>10</sup> The Court went on to explain:

The provision of a "norm" also strongly implies that deviation from the norm should be correlated with facts about the crime that also deviate from the norm for the offense, or facts relating to the offender's character or criminal history that deviates from the norm and must be regarded as not within the guidelines contemplation. Given this predicate, simply indicating that an offense is a serious, heinous or grave offense misplaces the proper focus. The focus should not be upon the seriousness, heinousness or egregiousness of the offense generally speaking, but, rather, upon how the present case deviates from what might be regarded as a "typical" or "normal" case of the offense under consideration....

If the sentencing court, under the guise of exercising its discretion, imposes a sentence that deviates significantly from the guideline recommendations without a demonstration

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<sup>9</sup> 42 Pa.C.S. §9781(d)

<sup>10</sup> *Com. v. Walls*, 846 A.2d 152, 158 (Pa.Super., 2004)

that the case under consideration is compellingly different from the "typical" case of the same offense, or without pointing to other sentencing factors that are germane to the case before the court, including the character of the defendant or the defendant's criminal history, then the court is not, in reality, merely exercising its sentencing discretion. Rather, the court is, in effect, rejecting the assessment of the Sentencing Commission as to what constitutes just punishment for a typical commission of the crime in question. The cases of *Gause* and *Eby* indicate that the sentencing court is not free to reject the assessment of just punishment contained in the sentencing guidelines and interpose its own sense of just punishment.<sup>11</sup> Of course, the rationale for this position should be obvious, if a sentencing court were able to easily sentence outside of the guideline ranges, the goals of treating like offenders in like fashion would be frustrated and we would be, *de facto*, in a sentencing environment that existed prior to the passage of the guidelines.<sup>12</sup>

### Conclusion

Regardless of the level of appellate review, the sentencing guidelines in Pennsylvania have been effective in shifting dispositional choices and changing durational decisions.<sup>13</sup> This may be because, in practice, the guidelines in Pennsylvania are accepted as a common starting point for sentencing. Judges with adequate reasons for departure are able to depart, but in the vast majority of cases the guidelines appear reasonable to all parties.

Thank you again for providing this opportunity to testify.

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<sup>11</sup> Portion of footnote contained at this point in *Com. v. Walls*: In *Gause* we stated, "[b]y wholly ignoring the guideline ranges the sentencing court has, in effect, interjected its own sense of just punishment for our legislature's." [Gause, 659 A.2d at 1018](#). In *Eby*, we stated "[t]he court here not only failed to articulate sufficient reasons for its deviation from the guidelines, but also impermissibly relied upon its singular disagreement with those guidelines." [Eby, 784 A.2d at 209](#). By implication, a myriad of cases where we have found the sentence imposed excessively lenient, stand for the same proposition.

<sup>12</sup> *Com. v. Walls*, 846 A.2d 152, 158, 159 (Pa.Super., 2004)

<sup>13</sup> See: Kramer, John H. and Lubitz, Robin L. "Pennsylvania's Sentencing Reform: The Impact of Commission-Established Guidelines." *Crime & Delinquency*, Vol. 31, No. 4, pp. 481-500. Also see: Kempinen, Cynthia A. "Impact of the 1994 and 1997 Revisions to Pennsylvania's Sentencing Guidelines." *Pennsylvania Commission on Sentencing Research Bulletin*, Vol. 3, No. 2 (November 2003).