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THE PENNSYLVANIA COMMISSION ON SENTENCING

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS

Informational Hearing on Restitution and House Bill 1348

June 1, 2005

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Executive Director

Good morning Chairman Dally and members of the Subcommittee on Courts. Thank you providing this opportunity to appear before you today. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing.

With me today is Dr. R. Barry Ruback, a Professor of Sociology and of Crime, Law & Justice at The Pennsylvania State University. Through a research partnership project between the Commission and the University that began in 1998, Professor Ruback has conducted multi-method, multi-year studies that examine the imposition, payment, and effects of restitution in Pennsylvania. I have attached to my testimony copies of three *Research Bulletins* published by the Commission that summarize these studies. Professor Ruback is presently completing a study of victim compensation assessments and collections. I have asked him to join me today to address any questions members may have regarding restitution and collections generally, or his research specifically.

I will focus my brief comments this morning on the proposed amendments to 18 Pa.C.S. §1106 (relating to restitution for injuries to person or property) and §1109 (relating to costs).

Restitution & Economic Sanctions Generally

At the outset, it is important to identify and describe the five basic economic sanctions available to criminal courts in Pennsylvania: restitution, costs, fees, fines, and forfeiture.

Economic sanctions rest on a continuum, ranging from sanctions that most directly benefit the victim to those that most directly punish the offender. At the extremes of this continuum, the purposes of economic sanctions are fairly clear: restitution focuses almost exclusively on reparation to a specific victim (with little or no consideration of punishing the offender), while fines and forfeiture focus almost exclusively on punishing the offender (with little or no consideration of reparation to a victim). However, most economic sanctions are less pure in purpose and occupy the ‘middle ground,’ because they seek reparations for ‘society’ as a victim (and in particular the court system), and require offenders to pay substantial (and increasing) amounts in an effort to hold them accountable for their actions. These ‘middle ground’ economic sanctions include costs and fees.¹

¹ Ruback, R. Barry & Bergstrom, Mark H. (forthcoming). Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications. *Criminal Justice and Behavior*, p. 9

Most would agree that the victim of a crime should be compensated by the offender for all expenses related to the crime. This is consistent with the Commission's long-held position that the offender should be required to restore the victim to pre-offense status.² Most would also agree that law enforcement should be reimbursed by the offender for all expenses related to the crime. At issue are the means by which these goals are accomplished, and whether the proposed amendments effectively achieve these ends.

Proposed Amendments

House Bill 1348, the proposed amendment to 18 Pa.C.S. §1106 (Restitution for injuries to person or property), expands the definition of injuries to person or property to include those expenses that are a direct result of a crime. Adding compensation for 'collateral injuries' to that already provided for a victim's 'personal injuries' seems consistent with the purposes associated with restitution: a payment by the offender to the victim for financial losses.

I have attached to my testimony a copy of the Superior Court opinion in *Com. v. Deshong*, 850 A.2d 712, 2004 Pa. Super. 164, which raises several interesting points for the Subcommittee to consider when amending the restitution statute. Restitution may presently be ordered as a direct sentence, pursuant to Section 1106, or as an indirect sentence, pursuant to Section 9754, as a condition of probation. Different rules apply depending on which option is exercised by the sentencing court.

As a direct sentence, the court is required to impose an order for the full amount of the loss, regardless of the offender's ability to pay; the manner and amount of restitution must be determined at the time of sentencing; and the restitution order is limited to the loss that flows from the conduct for which the defendant is convicted. By expanding the definition in Section 1106 to specifically include collateral injuries, it would appear that a direct sentence of restitution to recover such losses would be possible.

As an indirect sentence (i.e., condition of probation), the court must consider the

² *Sentencing Guidelines Implementation Manual, 5th Edition*, p. 210

offender's ability to pay when determining the amount of restitution; the court is not required to specify the amount of restitution at the time of sentencing; and restitution may include indirect damages caused by the defendant. It would appear that an indirect sentence of restitution is presently available to the court to compensate victims for collateral injuries.

The benefit of amending Section 1106 to include collateral injuries is to permit the court to order the full amount of loss, regardless of the offender's ability to pay; the limitation is that the court will need to determine the amount of loss associated with these collateral injuries at the time of sentencing. Since collateral injuries include monies paid for professional services and other activities that may be utilized subsequent to sentencing, this could limit any direct restitution order. If the Subcommittee decides to move forward with the amendment as drafted, it is important that the direct restitution provision found in the Sentencing Code³ also be reviewed for consistency so as to avoid any unintended conflict.

The next issue is the proposed amendment to 18 Pa.C.S. §1109, which would permit law enforcement agencies to recover the costs associated with the investigation and prosecution of criminal cases. As noted in the three appellate court cases provided by the Subcommittee's Counsel,⁴ a Commonwealth agency does not qualify as a 'victim' for purposes of restitution. Rather than expanding the definition of 'victim' or modifying the restitution statutes, the draft legislation identifies certain law enforcement 'costs' related to the crime that may be recovered from the offender. This approach is consistent with the definition and purposes of fees and/or costs. "Fees are used to reimburse the state for the administrative expenses of operating the criminal justice system. Current distinctions in the labeling of fees (e.g., court costs, supervision fees, etc.) help to differentiate the purpose or use of the funding, but do not otherwise change the nature of these society-focused sanctions."⁵

³ 42 Pa.C.S. §9721(c). Mandatory restitution. In addition to the sentencing alternatives set forth in subsection (a) of this section the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury he sustained. For purposes of this subsection, the term "victim" shall be as defined in section 479.1 of the act of April 9, 1929 (P.L. 177. No. 175), known as The Administrative Code of 1929.

⁴ *Com. v. Boyd*, 835 A.2d 812, 2003 Pa. Super. 412; *Com. v. Figueroa*, 691 A.2d 487, 465 Pa. Super. 620; and *Com. v. Runion*, 662 A.2d 617, 541 Pa. 202.

⁵ Ruback, R. Barry & Bergstrom, Mark H. (forthcoming). Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications. *Criminal Justice and Behavior*, p. 14.

Although the opinions cited address three different Commonwealth agencies that were not considered “victims” for purposes of restitution, the proposed amendment appears only to address the first case (*Com. v. Boyd*) by focusing on law enforcement investigation and prosecution costs; the proposed amendment does not appear to address the two other Commonwealth agencies, the Department of Corrections and the Department of Public Welfare, both for the recovery of medical expenses associated with treatment of a victim of a crime. Unless the intent of the Subcommittee is to limit the proposed amendment to law enforcement investigation and prosecution expenses, a broader amendment might be considered.

As noted in *Boyd* as well as many other appellate court opinions, an alternate to the proposed amendment that would address all three agencies would be the expansion of the definition of the term “victim” in Section 1106 so as to include governmental agencies. This approach of using the restitution statute to recover these expenses would be akin to the ‘collateral injuries’ amendment, by providing a mechanism for reimbursement for what have been considered indirect costs.

If the intent of the Subcommittee is to address these governmental expenses as costs rather than restitution, consideration should be given to eliminating or substantially modifying subsection (b) of the proposed amendment. As presently drafted, assessment and collections of costs are treated in accordance with Section 1106, relating to a direct sentence of restitution. As noted previously, Pennsylvania appellate courts have consistently addressed issues of direct restitution quite differently from other economic sanctions, with direct restitution being based on the full amount of the loss while indirect restitution, costs, fees and fines are based on ability to pay. Perhaps an alternative would be to reference an appropriate statute(s) in the Sentencing Code, such as 42 Pa.C.S. §9728 (Collection of restitution, reparation, fees, costs, fines and penalties), 42 Pa.C.S. §9730 (Payment of court costs, restitution and fines); 42 Pa.C.S. §9730.1 (Collection of court costs, restitution and fines by private collection agency); or by amending the current provisions relating to fines (42 Pa.C.S. §9758 (Fines) and 42 Pa.C.S. §9772 (Failure to pay fines)) or adding a new provision to address collection of these costs.

Conclusion

As an agency of the General Assembly, the Commission on Sentencing continues to work with the Judiciary Committees and other state and local agencies to make criminal sentences more rational and consistent, and increasingly to hold offenders accountable to victims and the community through the use of restitution and other economic sanctions. I encourage members of the Subcommittee to call of the Commission to provide whatever assistance may be useful as you continue to develop these timely amendments.

Thank you.