

COMMONWEALTH OF PENNSYLVANIA

Phone 814.863.2797  
Fax 814.863.2129  
<http://pcs.la.psu.edu>



P. O. Box 1200  
State College, PA  
16804-1200

THE PENNSYLVANIA COMMISSION ON SENTENCING

**TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE**

**Informational Hearing on Sex Offender Management  
& Pennsylvania Sentencing Structure**

**January 31, 2006**

**Mark H. Bergstrom  
Executive Director**

Purpose of Commission

Among the powers and duties of the Commission are the following:

- Serving as a clearinghouse and information center for the collection, preparation and dissemination of information on Commonwealth sentencing practices.
- Assisting and serving in a consulting capacity to State courts, departments and agencies in the development, maintenance and coordination of sound sentencing practices.
- Make recommendations to the General Assembly concerning modification or enactment of sentencing and correctional statutes which the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.  
(42 Pa.C.S. §2153(a) (7)(i), (7)(ii), and (12))

Two key concepts that drive a *rational sentencing policy*, and are embedded in constitutional principles guaranteeing equal protection (14<sup>th</sup> Amendment) and prohibiting cruel and unusual punishment (8<sup>th</sup> Amendment) are uniformity and proportionality.

### Purposes of Sentencing

The sentencing guidelines establish a system with a primary focus on retribution (punishment, accountability), but which allow for other sentencing purposes, including rehabilitation, deterrence, and incapacitation. Retribution, or just deserts, is punishment imposed to hold the offender accountable for the crime committed. By using the seriousness of the current offense (offense gravity score) and the offender's criminal history (prior record score) to scale the type and length of punishment, the Commission provides a benchmark for sentencing which is proportional and consistent. But recognizing both the need and the statutory requirement for individualized sentencing, courts are encouraged to consider the other purposes identified.

### Structures of Sentencing

Sentencing structures generally fall into two categories: determinate and indeterminate.

In a *determinate* sentencing system, the court imposes a flat sentence (a specific amount of time), and the offender is incarcerated for a period no longer than the stated sentence. Most indeterminate sentencing systems include provisions that allow an inmate to earn an earlier release based on good behavior and/or program participation (e.g., good-time, earned-time, gain-time). As a result, an offender sentenced under a determinate sentencing system to a mandatory minimum sentence of 10 years is often eligible for release prior to completing the stated sentence (e.g., based on a common 5 days credit per month, an inmate would be released in 8.3 years). The federal VOI/TIS initiative sought to constrain this practice by requiring that violent offender serve 85% of the stated sentence.

In an *indeterminate* sentencing system, such as that employed in Pennsylvania for state sentences, the court imposes a minimum and a maximum sentence, with the minimum no more than one-half the maximum sentence (e.g., 10-20 years, 10-40 years). The offender is incarcerated for a period no shorter than the stated minimum sentence, and no longer than the stated maximum sentence. Indeterminate sentencing systems include a second step in the process: a parole review, primarily based on risk to public safety, to determine if and/or when an offender is released from incarceration to community supervision.

Paroling authority from a maximum sentence of confinement of two years or greater, a state sentence, is vested in the Pennsylvania Board of Probation and Parole (61 P.S. §331.17). There is no right to parole, and a state offender may not be paroled until the minimum sentence has been served; no good-time, no earned-time, no gain-time. The minimum term imposed by the court

only serves as administrative notice to the parole board of the earliest date at which a state offender may be considered for parole. As a result, it would not be unusual for an offender sentenced under Pennsylvania's indeterminate system to a mandatory minimum sentence of 10 years, therefore at a minimum a 10-20 year sentence, to serve substantially more than 10 years, and if released, to be under community supervision for the outstanding balance of the maximum sentence.

### *Offense-Related Considerations*

The statutory maximum, generally linked to the grade of the offense, defines the longest total period of incarceration and/or supervision that may be imposed based upon conviction of an offense. In designating the grade and/or defining the statutory maximum, a criminal statute limits the longest penalty that may be imposed in the worst-case scenario for the conviction offense. Except for prior convictions, any element used to determine the grade or statutory maximum of an offense must be proven beyond a reasonable doubt at trial.

The sentencing guidelines, sentencing recommendations that the courts are required by law to consider, address only the minimum sentence. The sentencing guidelines provide courts with a range of recommendations that are intended to apply to the most typical case. If the court determines that the guideline recommendations are inappropriate based on the facts of the case, the court may give a longer sentence (i.e., departure above) or a shorter sentence (i.e., departure below) as long as the court provides a reason on the record for such a sentence and reports that reason to the Commission. Generally, since the sentencing guidelines apply to the minimum sentence, and the court is free to impose any maximum sentence up to the statutory maximum, factors considered under the sentencing guidelines may be determined by the Court at sentencing under a preponderance of the evidence standard.

Mandatory minimum sentences are legislative sentencing provisions which establish the shortest sentence that an offender may receive upon conviction for a certain offense. The court has no authority to impose a sentence shorter than one required by a mandatory provision. As with sentencing guidelines, to the degree that a mandatory provision applies only to the minimum sentence, and the court is free to impose any maximum sentence up to the statutory maximum, factors considered for the mandatory minimum sentence may be determined by the Court at sentencing under a preponderance of the evidence standard.

Pennsylvania statutes contain two types of mandatory minimum sentencing provisions. The first type requires the prosecutor to give reasonable notice to the defendant, prior to sentencing, of the intent to proceed under a mandatory minimum sentencing statute. If the prosecutor does not give notice, the mandatory provision does not apply. The most notable mandatory provisions for which notice is required are those related to drug trafficking (18 Pa. C.S. §7508) and two/three strikes (42 Pa. C.S. §9714). The second type of mandatory provision, applies automatically upon conviction for an offense identified in the mandatory statute. No notice is required by the prosecutor. The most notable mandatory provisions for which no notice is required are those relating to DUI (75 Pa. C.S. §3802) and homicide by vehicle while DUI (18 Pa. C.S. §3735).

With few exceptions, most notably the penalties for first and second degree murder, the mandatory sentence specified by statute is a mandatory minimum sentence. The actual sentence imposed may be longer than the mandatory minimum sentence as long as the mandatory minimum does not exceed the longest minimum sentence authorized by other statute. When a mandatory minimum sentence is imposed, a maximum sentence must also be imposed.