



TESTIMONY SUBMITTED BY
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THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
TO THE
PENNSYLVANIA COMMISSION ON SENTENCING
PUBLIC HEARING ON WORKING DRAFT OF SENTENCING GUIDELINES PROPOSALS
MARCH 9, 2022

We appreciate this opportunity to speak and the attention with which you consider our concerns. The working draft of the proposal states that “the rebuilding of the guidelines serves as a vehicle to reform and improve Pennsylvania’s criminal justice system...while giving renewed focus to concerns about racial justice and the over-reliance on incarceration and long periods of community supervision.” The working draft sentencing guidelines proposals fall short of this goal. We urge the Sentencing Commission to use this important opportunity and meaningfully address the mass incarceration crisis in Pennsylvania.

We recognize the positive changes the commission has made in the working draft proposal including: the recalculation of prior record score, including lapsing provisions for adult convictions; mitigating sentencing factor adjustments; and the one point reduction in offense gravity score assignment for all inchoate offenses.

We support the use of mitigating sentencing factor adjustments, however, the list of mitigating factors need to be vastly expanded and broadened. Additionally, the aggravating sentencing factor adjustments should be eliminated from the working draft proposal. There are plenty of opportunities available already to increase a person’s sentence. The commission’s primary responsibility is to ensure fair and uniform sentencing across the Commonwealth, not find new ways to incarcerate people.

The recalculation of prior record score is an improvement. The recalculation will decrease the impact of a person’s prior record for individuals with lengthy and more serious prior records. But because of the recalculation, it is also likely that harsher penalties will be applied to people with less serious, but more frequent contact with the criminal legal system. This particularly affects individuals with mental health and/or substance use issues. We also recommend that the commission use the “decay” form of lapsing rather than “gap” for less serious crimes (felony 3 or less). Decay refers to policies that establish a timeframe for when prior convictions are no longer considered at sentencing, regardless of criminal behavior. Gap policies require an individual to be crime-free during a lookback period in order for previous crimes to be excluded from consideration of the prior record score.¹ We encourage the Commission to define “crime-free” as including time spent in detention, incarceration, or juvenile placement.

¹ Drexel University Thomas R. Kline School of Law Community Lawyering Clinic, The Pennsylvania Prior Record Reform Project: Limiting the Negative Effects of Stale Criminal History on Future Sentences (February 2019).

The proposed sentencing matrix includes narrower ranges and an expansion of the offense gravity scores. We are concerned that this will limit opportunities for mitigated sentences. Additionally, the commission increased the lower end of the sentencing range for many of the sentence recommendations. The aggravating and mitigating ranges on the proposed matrix (plus/minus on the right side of the matrix) are also smaller, making it more difficult for judges to reduce sentences and also issue less or non-carceral sentences.

The ACLU-PA urges the commission to prioritize decarceration and has several recommendations to further this goal:

We recommend that the commission incorporate the recommendations from their [recently published report](#) into the proposed sentencing guidelines. Some² of the recommendations include: evaluating people for substance use and mental health issues prior to sentencing and then crafting appropriate sentences that meet the needs for those issues; improving access to evidence-based treatment at time of sentencing; and consider expanding the sentencing levels and offenses for which alternatives to incarceration are available.

We urge the commission to remove the school zone enhancement from the sentencing guidelines. Unlike the domestic violence and gang enhancements, the Commission received no statutory authority to create a school zone enhancement. While our laws do still have a school zone mandatory minimum sentencing provision on the books, 18 Pa.C.S. § 6317, in 2015, the Pennsylvania Supreme Court, in *Commonwealth v. Hopkins*, 117 A.3d 247 (Pa. 2015) found this provision unconstitutional. The Commission, with this enhancement, is attempting to reinstate a mandatory minimum without legislative approval.

The proposed guidelines should also include a notation for all enhancements (not just trafficking, arson, and sexual abuse of children) that: the OGS enhancement does not apply if the OGS offense listing assignment already includes that same enhancement factor.

The commission added restorative sanctions to the proposed sentencing matrix that do not include probation. However, there are very few offenses assigned a low offense gravity score of one, two, or three. The offenses (such as, tampering with Kosher food or burning a flag) in those categories do not reflect the type of behavior that is typically found in the criminal legal system. We urge the commission to expand the non-confinement sentence recommendations on the matrix and apply lower offense gravity scores (1, 2 or 3) to more offenses.

Any reforms to the criminal legal system must take into account the racial impact of those changes. The commission should take racial disparities seriously and should conduct a racial impact study before implementing any new changes to the sentencing guidelines.

In summary, for all the reasons above, we are asking the Commission to prioritize decarceration foremost in the sentencing guidelines and focus on the rehabilitative needs of people involved in the criminal legal system.

² PA Commission on Sentencing, *The Role of Substance Use in Probation Outcomes* (September 2020).