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Testimony for the Pennsylvania Commission on Sentencing

We appreciate this opportunity to speak and the care with which you consider our concerns. The ACLU of Pennsylvania urges the Pennsylvania Commission on Sentencing to reject the current proposed sentencing guidelines amendment and revise the sentencing matrix to reconfigure the way prior record is calculated. We also suggest the Commission postpone the vote on this proposed amendment until December 2020 when there has been a sufficient amount of time to review public comment and make the necessary appropriate changes.

Pennsylvania is in the midst of a mass incarceration crisis and this Commission bears responsibility. The Commission had the opportunity to revamp the Sentencing Guideline Matrix in such a way based on data and evidence to reduce unnecessary incarceration by reconfiguring the prior record score to allow for lapsing. By keeping the prior record score the same and increasing sentencing enhancements and offense gravity scores, the Commission chose instead business as usual. Passage of this amendment, means that Pennsylvanians will be subject to even lengthier prison terms.

Pennsylvania has the highest adult incarceration per capita rate in the Northeast.¹ This crisis takes a terrible toll on individuals, families, and our communities. We incarcerate at a rate of 725 people per 100,000, higher than the national average of 698 per 100,000. Black Pennsylvanians are 8.9 times more likely and Latinos 3.3 times more likely to be incarcerated than white Pennsylvanians.² We urge the Commission members to turn their attention to the necessary decarceral work that must be done.

¹ American Civil Liberties Union, *Blueprint for Smart Justice: Pennsylvania*, 2018 available at: <https://50stateblueprint.aclu.org/states/pennsylvania/>.

² THE SENTENCING PROJECT: "[STATE-BY-STATE DATA](#)".

The Commission failed to change the way in which the prior record score is calculated, blatantly ignoring substantial evidence presented to the commission by former Commission member, Professor Rachel Lopez and her students from their [Pennsylvania Prior Record Reform Project](#). That evidence demonstrated that the prior record score should take lapsing into account in order to limit the negative effects of stale criminal history on future sentences. There is a wealth of data demonstrating that recidivism declines with age. Ignoring this extensive evidence the Commission instead chose to continue the Commonwealth's bloated sentencing and mass incarceration system.

In addition, in the proposed Sentencing Guideline Matrix, the Commission kept the recommended periods of county confinement alongside the probation recommendations, this gives little incentive for courts to give limited probation terms in lieu of county incarceration. By leaving the recommendations for county confinement in place alongside suggested probation terms, while this does encourage courts to limit probation terms it does nothing to *discourage* unnecessary incarceration for low-level offenses.

We ask that the Commission implement clear limits on probation terms as there is an overwhelming amount of evidence that supports limited probation terms. A recent study published by Columbia University found that probation and parole are leading drivers of mass incarceration and reiterated the need to cap probation terms to one or two years, which is the necessary time to achieve the rehabilitative and accountability purposes of community supervision.³ Lengthy probation terms not only stretch our strained-supervision resources but they serve as unnecessary trip-wires sending people back to our jails and prisons for technical revocations. The Commission while on the one hand recognizes that shorter probation sentences are evidence-based, on the other hand recommends a cap of 10 years, far too long for a person to be kept on probation. We commend the Commission for proposing a limit of 5 years for certain aggregated sentences of probation as a restorative sanction. However, this only impacts certain low level offenses. By continuing to disregard the rigorous data and evidence in terms of probation supervision, the Sentencing Commission contributes to Pennsylvania's mass incarceration crisis.

Additionally, the Commission continues to create sentencing enhancements, with or without, a mandate. These enhancements arbitrarily increase sentence length. Prosecutors are already equipped with sentencing options. Please see the ACLU-PA's, [More Law, Less Justice](#) report.

³ Kendra Bradner, Vincent Schiraldi, Natash Mejia, and Evangeline Lopoo, [More Work to Do: An Analysis of Probation and Parole in the United States, 2017-2018](#), Columbia University Justice Lab (August 2020) available at <https://justicelab.columbia.edu/sites/default/files/content/More%20Work%20to%20Do.pdf>

The section on fines leaves out something critically important. Courts must consider ability to pay when imposing a non-mandatory fine. This is both a statutory and constitutional requirement. The Pennsylvania Supreme Court ruled last year that 42 Pa.C.S. 9726 is an "unambiguous statutory command requiring record evidence of the defendant's ability to pay" prior to imposing a fine. This is cited in the list of "relevant statutes" in the sentencing guidelines. However, when referencing drug convictions, there are no mandatory fines. Those cases are subject to the ability to pay analysis.

Moreover, the table converting fines to hours of community service by simply multiplying them against Pennsylvania's minimum wage, \$7.25 is frankly cruel. 42 Pa.C.S 9730(b)(3) says that the amount of community service after a person cannot pay must be "just and practicable under the circumstances." Every piece of legislation our general assembly introduced dealing with this issue calculated community service hours at approximately \$20/hour. By calculating an hour of community service as worth only \$7.25 (less than half the hourly rate typically used in legislation related to community service) will lead to a person needing to work a vast number of hours, more than double the normal rate, in order to pay off their fines.

In summary, for all of these above reasons, we are asking the Commission to reject the current proposal and postpone the vote on these policies until December 2020 when there has been a sufficient amount of time to review public comment and make appropriate changes.

Sincerely,

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