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TESTIMONY BEFORE THE PENNSYLVANIA SENTENCING COMMISSION ON PRELIMINARY SENTENCE RISK ASSESSMENT INSTRUMENT

As the President of the Pennsylvania Association of Criminal Defense Lawyers ("PACDL"), I would like to thank the Commission for the opportunity to present testimony today concerning the Preliminary Sentence Risk Assessment Instrument. PACDL is the only statewide organization that represents the interest of both private and public defender members of the criminal defense bar in the Commonwealth of Pennsylvania. Important to the issues before the Commission, PACDL's stated purposes include achieving justice and dignity of defendants and the criminal justice system itself, and protecting those individual rights guaranteed by the Pennsylvania and United States Constitutions. Founded in 1988, PACDL consists of over 900 members.

In addition to my capacity as President of PACDL, I am honored to present this testimony on behalf the Defenders Association of Philadelphia. Charles A. Cunningham, Acting Defender, was unable to appear today but has authorized me to present this testimony on the Association's behalf. The Defender Association of Philadelphia was established in 1933 and represents indigent individuals charged with crimes. The Defender Association represented approximately 42,000 individuals in 2014.

Together, we jointly provide the following comments to the Preliminary Sentence Risk Assessment Instrument. Generally, we have significant concerns about the use of risk assessment as proposed by the Commission in determining the length of an individual's sentence for the reasons set forth below. However, we do believe that certain risk assessment data, with a strong needs assessment and responsivity capacity, can be of significant use concerning reentry programs upon the conclusion of an individual's sentence and in determining the eligibility in alternative sentencing. Both can reduce our prison population.

Similar concerns were raised by U.S. Department of Justice in its July 29, 2014 letter to the U.S. Sentencing Commission concerning the use of risk assessment tools at sentencing. First, the Justice Department raised concerns about using "static historical offender data such as education level, employment history, family circumstances and demographic information" because the use of the same "rather than the crime committed and surrounding circumstances - is a dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools." The use of this data "raises constitutional questions because of the use of group based

characteristics and suspect classifications in the analytics." Equally important, the Justice Department noted the "utilizing such tools for determining prison sentences to be served will have a disparate and adverse impact on offenders from poor communities already struggling with many social ills" thereby undermining the touchstone of our legal system of equal justice under the law. Finally, the Justice Department reiterated that: "Criminal accountability should be primarily about prior bad acts proven by the government before a court of law and not some future bad behavior predicted to occur by a risk assessment instrument." See, U.S. Department of Justice Letter to U.S. Sentencing Commission, dated July 29, 2014, p. 5-8 (available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/DOJ.pdf). These same concerns are present with the Preliminary Sentence Risk Assessment Instrument proposed by the Commission.

Considering the overall inherent problems with any risk assessment instrument as discussed above, the Preliminary Sentence Risk Assessment Instrument for which the Commission is seeking public comment improperly exhibits racial and gender bias and improperly utilizes mere arrests rather than convictions. Each of these factors will be examined separately.

RACE BIAS

The Risk Assessment Instrument provides demerit points to an individual from Allegheny County (OGS1 and OGS3) or from an urban county (OGS2 and OGS5). There are significant minority populations in Allegheny and Philadelphia Counties (urban counties). According to the United States Census Bureau, Philadelphia has the largest minority population in Pennsylvania. Its population is 44.2% African-American (as opposed to Pennsylvania's percentage of 11.5%), 2.4% biracial (Pennsylvania's percentage is 1.8%) and 13.3% Hispanic or Latino (as opposed to the state's 6.3%). Allegheny's numbers are: 13.3% Black or African-American, 1.9% biracial and 1.8% Hispanic or Latino. See http://quickfacts.census.gov/qfd/states/42/42101.html (last accessed on May 31, 2015).

It would be unconstitutional for the Risk Assessment Instrument to directly utilize race as a factor in determining an appropriate sentence. It is similarly improper to utilize "county" or "urban", which has the effect of being a proxy for race, as a factor in determining an appropriate sentence. The United States Supreme Court has held that it would be unconstitutional for a litigant to utilize race as a factor in peremptorily excusing a juror. Batson v. Kentucky, 476 U.S. 79, 95, 106 S.Ct. 1712, 1722, 90 L.Ed.2d 69 (1986). That would similarly be true here.

GENDER BIAS

The Risk Assessment Instrument also attaches demerit points if you are a male (OGS2-14). As it would be unconstitutional to attach a different set of rights to one's gender, it would be unconstitutional to attach demerit points simply because of one's gender.

For example, the United States Supreme Court has held that it would be unconstitutional for a state to have a different minimum age for men and women to purchase of alcohol. Craig v. Boren, 429 U.S. 190, 198-199, 97 S.Ct. 451, 457-458, 50 L.Ed.2d 397 (1976). There the Supreme Court struck down a state law that permitted women 18 or older to purchase beer but required that men be 21 or older. In the context of jury selection, the Supreme Court held that it would be unconstitutional for a litigant to consider gender in peremptorily excusing a juror. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Gender based discrimination is no more constitutionally permitted than race based discrimination.

MERE ARRESTS

The Risk Assessment Instrument assigns anywhere from 1 to 4 demerit points depending on the number of times a person was arrested. The Instrument does not require that any of those arrests result in a conviction in order to qualify for demerit points.

Pennsylvania law is clear that mere arrests cannot be utilized in order to impeach a character witness. Commonwealth v. Scott, 496 Pa. 188, 436 A.2d 607 (1981); Commonwealth v. Morgan, 559 Pa. 248, 739 A.2d 1033 (1999). This because there has no been a judicial determination of the legitimacy for an arrest until there is a conviction.

Pa.R.E. 405 (a)(2) is similarly explicit: "In a criminal case, on cross-examination of a character witness, inquiry into allegations of other criminal conduct by the defendant, not resulting in conviction, is not permissible."

Here the Risk Assessment Instrument improperly ignores the well-established principle that mere arrests cannot be utilized as they are as consistent with innocence as with guilt. Pennsylvania case law and the Pennsylvania Rules of Evidence make clear that mere arrests should not be utilized in assessing Risk.

ANY RISK ASSESSMENT INSTRUMENT MUST CONTAIN A NEEDS ASSESSMENT AND RESPONSIVITY CAPACITY

Pennsylvania should not employ a risk assessment alone without a needs assessment and responsivity capacity. Act 2010-95 recognized the place of a needs assessment and responsivity capacity in any risk assessment tool when it provided:

> **(d) Alternative sentencing.**--Subject to the eligibility requirements of each program, the risk assessment instrument may be an aide to help determine appropriate candidates for alternative sentencing, including the recidivism risk reduction incentive, State and county intermediate punishment programs and State motivational boot camps.

42 Pa.C.S.A. § 2154.7(d). Further, a properly developed tool should be used only for the purposes for which they have been validated – to identify appropriate modes of community supervision. The development and use of a risk assessment tool at sentencing with only an eye towards prison and not also considering a needs assessment responsivity capacity, is deeply problematic.

Individuals have a right to individualized sentencing. It is axiomatic that no instrument or scientific tool can truly predict human behavior. Rather, studies only measure risk in the aggregate and cannot precisely predict behavior as applied to each individual. Based on the current state of the science, "identifying causal risk factors for recidivism is a work in progress that, as yet, cannot support definitive conclusions."[1] The foundation of risk assessment tools in actuarial science belies an individualized approach to sentencing. "Actuarial assessments speak to level of risk and may inform decisions regarding risk classification and allocation of resources. However, their utility in guiding the development and implementation of individualized risk reduction and rehabilitation plans is limited due to their focus largely on historical or unchangeable factors that cannot be addressed in treatment… [W]ith invariant item content comes the potential exclusion of case specific factors that do not systematically increase (or decrease) recidivism risk across the population but are relevant to a particular offender's level of risk."[2] The best risk assessment tool is wrong approximately 40% of the time. Even when combined with discretion from a properly trained individual, these practices can still be wrong up to 30% of the time.[3]

The approach of the research undertaken by the Commission is flawed. It is attempting to use validated science in a fashion for which it was not intended. Further, the research lacks objectivity as it sets out to create a tool with a narrowly pre-determined scope. The legislation suggests that a risk assessment tool "be used as an aide in evaluating the relative risk that an offender will reoffend and be a threat to public safety."[4] This approach, however, limits the scope of the outcomes before the study begins, compromising the integrity of any subsequent science. Put another way, there is no objective research to indicate that risk and needs responsivity tools, even when properly applied, can be used effectively in determining sentence length. As such, attempting to develop a tool that does this in an "evidence-based" fashion is circular in its logic and doomed in its conclusions.

According to the science, there are four different types of risk factors: fixed marker; variable marker; variable risk factor; causal risk factor.[5] These distinctions are critical to the understanding of the science and to ensure that consistent and accurate language is used. The term needs, when used to contrast the general term "risk", actually refer to a marker of risk – the

[1] Monahan, John and Jennifer L. Skeem. *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning.* Sentencing Reporter, Vol. 26, No. 3, Critical Issues in the Use of Risk Assessments,
[2] Desmarais, Sarah L. & Jay P. Singh. *Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States.* Council for State Governments. March 2013, p.6.
[3] Id.
[4] 42 Pa.C.S.§2154.7
[5] Monahan, supra note 1.

casual risk factors (also called dynamic risk factors).[6] Responsivity refers to the need for corrections/treatment options to adapt to the individual's needs.

Making determinations of risk and needs for sentencing, without the means to address those needs is futile and counterproductive. Pennsylvania must ensure it has adequate programs and resources for providing the services needed to match needs. The Pennsylvania Board of Probation and Parole is already working to employ evidence-based practices through the use of scientifically based Risk Needs Responsivity ("RNR") tools. This is appropriate as community based supervision is the outcome for which RNR tools have been validated. Their use as a sentencing tool *for incarceration* alone is not scientifically valid. Certainly, determinations of risk without the assessment of factors that are changeable through intervention create a no-win situation. It truncates the use of the instrument, and ignores the fact that there are behaviors and factors that *can be changed* in order to reduce recidivism and provide smart, effective, and fair sanctions. Yet not offering programs that best address these factors punishes individuals for specific traits or behaviors while refusing to do anything about them. This is neither cost-effective nor good public policy.

As the research states, the "RNR model has influenced development of offender risk assessment instruments and *offender rehabilitation programs*. In so doing, we provide a summary of the evidence that demonstrates how the criminal behaviors of offenders can be predicted in a reliable, practical and useful manner. We also provide evidence *of how rehabilitation programs can produce significant reductions in recidivism when these programs are in adherence with the RNR model*."[7] (emphasis added) Note that this study is linked to on the Pennsylvania Board of Probation and Parole's website.

Studies indicate that "supervision agencies can be transformed to achieve public safety goals through focusing on offender change strategies. Providing officers with new behavioral skills to work with offenders and creating an empowering environment can yield positive outcomes. Criminal justice policy should focus on reengineering community supervision to prevent additional penetration into the justice system, to reduce churning, and to reduce incarceration."[8]

Even the National Center for State Courts guide to using risk and need responsivity at sentencing, the product of a literature review and an expert national working group, makes clear that application of these tools to sentencing is outside the scope of science. "The use of RNA information at sentencing is somewhat more complex than for other criminal justice decisions because the sentencing decision has multiple purposes—punishment, incapacitation,

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[6] Id.
[7] Bonta, James & D.A. Andrews. *Risk-need-responsivity model for offender assessment and rehabilitation*, Public Safety Canada, 2010.
[8] Taxman, Faye. No Illusions: Offender and Organizational Change in Maryland's Proactive Community Supervision Efforts. Criminology & Public Policy, 7: 275–302. 2008.

rehabilitation, specific deterrence, general deterrence, and restitution—only some of which are related to recidivism reduction."[9] For this reason, the National Center for State Court's guide specifically states that risk-needs assessments for the purposes of "offender classification" or "incarceration" are outside the scope of their guide.

In sum, the use of solely a risk assessment tool is improper. An attempt to utilize an actuarial tool of any sort must adhere to evidence-based best practices, requiring risk-needs and responsivity and be targeted at community supervision. Any other use produces numbers which are of no significance, rendering any developed tool to be improper, inadmissible, and unconstitutional.

CONCLUSION

The basic foundation of our criminal justice system is individualized sentencing. When a defendant appears for sentencing, the court considers the evidence presented and applicable law and determines the sentence which is most appropriate for the specific defendant who committed the specific crime. The Preliminary Sentence Risk Assessment Instrument proposes a new form of evidence for the court to consider. This evidence is a prediction of the future, which improperly exhibits racial and gender bias and improperly utilizes mere arrests rather than convictions. This prediction of the future does not consider the impact of a needs assessment and responsivity capacity which in most cases would have a direct impact upon the likelihood in which a defendant recidivates. Stated differently, the Preliminary Sentence Risk Assessment Instrument changes the rules depending upon where you live, your gender, and your contact with law enforcement. There is no compelling reason to treat a defendant who commits the same crime differently based upon these circumstances, i.e., to fail to treat him/her equally under the law. We strongly recommend that the Commission reconsider the use of these factors and include the necessary needs assessment and responsivity capacity to any Sentence Risk Assessment Instrument proposed in the future.

I would like to again thank the Commission for providing this opportunity to PACDL and the Defender Association of Philadelphia to testify concerning the Preliminary Sentence Risk Assessment Instrument.

Respectfully Submitted.

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[9] National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing*: *Guidance for Courts from a National Working Group.* (2011). Available at www.ncsc.org/~/media/Microsites/Files/CSI/RNA Guide Final.ashx