



The Public Defender Association of Pennsylvania (PDAP) is a non-profit corporation whose membership includes hundreds of public defenders employed full or part-time across Pennsylvania's public defender offices. PDAP is dedicated to securing a fair justice system and ensuring high quality legal representation for people facing the loss of life, freedom, or family. Our mission is to provide tools, strategies, mutual support, training, and information to Public Defender Offices in Pennsylvania; to be the voice of public defense in Pennsylvania; and to promote best practices in the leadership, management, and administration of justice in Pennsylvania. PDAP thanks the Sentencing Commission for its work and appreciates the opportunity to provide feedback on the proposed revision to the Sentencing Guidelines.

I. INTRODUCTION

PDAP thanks the Commission for the time and effort it put into creating these Proposed Sentencing Guidelines (PSG) and for its efforts to solicit broad feedback. In many ways these PSG are a huge step forward. We offer below areas of support for the PSG and suggestions on ways to improve the overall approach as revisions proceed. Specifically, we offer comments on the Prior Record Score, Offense Gravity Score, and Lapsing Provisions, as well as an overarching concern about the data used to calculate misdemeanor offenses.

II. PRIOR RECORD SCORE

The stated intent of the PSG with respect to the Prior Record Score (PRS) is to reduce the impact of the PRS, since the offender has already been punished for those offenses, and to correct some of the disparate impact the prior convictions have had on racial and ethnic minorities. This is a laudable goal, and the newly proposed categories achieve some of it. However, there are several areas where ambiguities require clarification, and several areas where a disparate impact remains.

A. How to Count Multiple Offenses Sentenced at the Same Time in the PRS

After taking out all offenses that have lapsed, the new proposed Sentencing Guidelines instruct that the PRS category be determined by "identifying the most serious previous adjudication or conviction offense, and then determining the number of previous offenses with the same grade." It is not clear whether multiple convictions in the same case are to be counted separately or not. For example, if a defendant pleads guilty in

the same case to a felony-one Burglary and felony-one Criminal Conspiracy to Commit Burglary, it is unclear under the new guidelines whether one or both would count.

In a plea with multiple offenses across multiple cases, the PSG are unclear how the cases count toward the PRS. Under current Sentencing Guidelines, the distinction is based on whether those sentences were imposed concurrently or consecutively. PDAP recommends that the new guidelines clarify that if the sentences were imposed in the same judicial proceeding, multiple same-level offenses should only count one time, regardless of whether those sentences were run concurrent or consecutive to each other. If they are counted separately, it would change the prior record category of a first-time offender from medium to high with one case or one set of consolidated cases. We do not believe this is the intent of the PSG. As stated by the Pennsylvania Supreme Court, the point of a sentencing enhancement is to punish more severely those offenders who have persevered in criminal activity despite the theoretically beneficial aspects of penal discipline.¹ In other words, it makes sense to have prior convictions weighed more severely by counting them separately only if the offender engaged in further criminal offenses after having been sentenced, and not because the offenses occurred at the same or similar times prior to punishment. Lastly, a clarification that only the single most serious offense imposed in a “single judicial proceeding” would make the PRS easy to determine and simplify the Guidelines.

B. How to Define “Crime of Violence”

The term “crime of violence” should be defined. The Publication Comment language indicates that the prior record score category “high” is intended for the current categories of RFEL and REVOC. The current “REVOC” category is designated for offenders who not only have certain prior convictions but whose current offense carries an offense gravity score of 9 or higher, meaning it only applies to the most serious offenses. It appears that under the new proposed guidelines, the equivalent of offenses that have a current OGS of 9, will have an OGS of 19. Therefore, we recommend that the Guidelines define a “crime of violence” as having an offense gravity score of 19 or higher. Without such clarification, the determination of the prior record score remains unclear, and subject to misinterpretation.

C. Greater Specificity for Medium & High PRS Categories

The PSG category of “medium” is too broad. It encompasses a large group of offenders who currently have a PRS of anywhere from 1 to 5. This means that offenders with relatively less significant records (e.g. a single Possession with Intent to Deliver (PWID))-

¹ See *Commonwealth v. Shiffler*, 879 A.2d 185, 194 (Pa. 2005).

marijuana or a felony-three retail theft, or two first-degree misdemeanor theft cases) are grouped in the same category as offenders with 3 PWID cases involving large quantities of fentanyl or a single prior robbery, aggravated assault, or rape. In addition, any felony will put an offender in the “medium” category, even if that is a relatively low-level offense such as a felony-three retail theft of a \$3 bottle of soda or the passing of a forged check. The current grouping tends to benefit offenders with a relatively bad record and disadvantage those with a low current PRS but which includes a felony.

In addition, the new proposed guidelines places too many offenders in the “high” category. It will only take two second degree felony offenses to be placed in that category. Currently, two second degree felonies will not put an offender in the “RFEL” category, since they are 2-point offenses for PRS purposes, and it takes a total of 6 prior record points before moving into that category. For example under the current guidelines, a person who has two business burglaries will only have a PRS of 4, and does not go into the “RFEL” category, unless there are at least three such felony two level offenses.

A more balanced approach would have a single prior conviction of a third-degree felony or ungraded felony fall in the “low” category. In addition, all misdemeanor convictions, regardless of the number, should fall into the “low” category, rather than two first degree misdemeanor offenses placing an offender in the “medium” category. PDAP recommends that to place an offender in the “medium” category, either the number of first-degree misdemeanors is raised (e.g. 4 or 5 prior first-degree misdemeanors), or that a distinction is made to allow only “serious” first-degree misdemeanors, like the current one-point offenses, such as gun misdemeanors or those involving minors.

The “high” category, this should only apply to either two first-degree felony offenses, or three second degree felony offenses, in order to ensure that this category is for those who currently fall into the “RFEL” or “REVOC” categories.

D. How Juvenile Offenses are Counted

In the current Sentencing Guidelines, no third-degree misdemeanor and second-degree misdemeanor juvenile adjudications count toward an adult prior record score, and only a limited number of misdemeanor-one offenses as set forth in § 303.7(a)(4) do count. The PSG permit the counting of all misdemeanor-one juvenile adjudications, not just the ones set forth in the current guidelines. With this change, many offenders with a prior juvenile record will end up in a higher PRS category. For example, a current offender who has juvenile adjudications for two first-degree misdemeanor Theft by Unlawful Taking offenses under current guidelines have a PRS of 0, but under the new guidelines would fall in the “medium” category.

PDAP recommends that the new guidelines incorporate and use the same list of misdemeanor-one offenses that should be counted in the PRS as currently do. It appears that the Sentencing Committee recognized the issues with counting prior adjudications incurred as a juvenile, when the brain was not fully developed. This is reflected in the additional juvenile lapsing provision proposed in the new guidelines. The effect of counting all first-degree misdemeanors runs opposite to the Commission's intended goals of lessening the impact of prior adjudications and convictions.

III. OFFENSE GRAVITY SCORE (OGS)

PDAP supports the increase in the number of offense gravity score categories. We believe that by increasing the number of categories, each criminal offense can be assessed on a more individual basis. Different and unequal criminal offenses are no longer unfairly lumped together in the OGS.

The increased number of offense gravity score categories results in a smaller and more precise range of standard sentences. This will not only allow defense counsel to more accurately predict and advise their clients on the potential outcomes, it will also allow for prosecutors to make more accurate and mutually acceptable plea offers as early as the preliminary hearing. Not only will this promote uniformity in sentencing across the Commonwealth but also will promote predictability and objectivity in sentencing.

A. Reductions and Enhancements of an OGS that Create Uncertainty

PDAP has concerns that the proposed reductions and enhancements of the offense gravity scores will have the opposite effect on predictability. We recommend that the Sentencing Commission remove any OGS enhancements or reductions not currently required by law.² Creating other reductions or enhancements also create ambiguity and impede plea bargains.

For example, many of the proposed enhancements and reductions could change the standard range up to and even after a defendant's guilty plea. Cooperation, acceptance of responsibility, drug involvement, and even gang affiliation are all factors that can occur after a defendant's guilty plea and long after defense counsel has advised the client on the potential consequences of pleading guilty, accepting a negotiation, or proceeding to trial. Adding unnecessary ambiguity will have an adverse impact on the

² We caution that whether the Commission has the authority to legislate enhancements or reductions not already required by law is an issue that could lead to future litigation.

goals of uniformity, predictability, and objectivity. We encourage, instead, that these mitigating or aggravating factors remain left to the Judge's discretion.

If OGS reductions and enhancements are left in the PSG, courts need guidance to define the various levels of acceptance of responsibility, cooperation, drug and/or gang affiliation to avoid uneven interpretation. For example, does acceptance of responsibility mean waiving a preliminary hearing, pleading guilty at the first listing, or expressing remorse at sentencing? Who decides how much cooperation is substantial, the judge or the prosecutor? What level of gang or drug affiliation does an individual need to have to trigger the enhancement? What level of proof is required to show gang affiliation? Is this an additional element of the offense? Absent clear guidance, the PSG will not only create increased uncertainty in calculating the guidelines, but also to increased litigation before and after a Judge imposes sentence.

i. Preserving Judicial Discretion

In addition, to the uncertainty in what is sufficient for an increase or a decrease, the varying levels of a person's remorse, acceptance of responsibility, cooperation, drug and/or gang affiliation cannot be adequately accounted for with these adjustments. For example, a person can cooperate by confessing and waiving their preliminary hearing to qualify for a downgrade of one offense gravity score. Another person can cooperate on a more substantial level by providing information to authorities, which is helpful to their investigation to qualify for a two-level downgrade in their offense gravity score. A third person could wear a wire, obtain valuable information which leads to the arrest of multiple individuals. Under the proposed guidelines, this individual would presumably only qualify for the same two-level downward departure. Additionally, since their cooperation was already contemplated by the guidelines, a District Attorney could argue that their extraordinary efforts should not be a basis to depart from the guidelines into the mitigated range.

The prevailing theory that sentencing should be tailored to the individual coupled with the overriding desire for objectivity and predictability, requires that these factors be assessed on an individual basis by a judge. It is the sentencing judge who is in the unique position to assess the weight of the evidence that is presented in these areas and then exercise discretion to sentence in the mitigated, standard, or aggravated ranges of the guidelines or even to depart completely from these ranges.

Lastly, despite the benefit of smaller standard range sentences, we believe that the smaller mitigated and aggravated ranges will unfairly limit a judge's discretion. Under the current guidelines, where the standard range calls for incarceration, the bottom of the mitigated range many times allows for a sentence of probation. This is curtailed under the proposed guidelines due to the smaller mitigated ranges. Where mitigation is

present, this would limit a judge's discretion to impose probation because it would require them to depart completely from the guidelines.

ii. OGS Reductions and Enhancements Should be Equivalent

Under the current Sentencing Guidelines, enhancement increase an OGS by one point, and reductions reduce an OGS by one. The PSG includes enhancements by two points, while the maximum reduction possible remains one point. If OGS reductions and enhancements remain in the PSG, there should be equal opportunity to reduce the OGS as there is to enhance it. One solution would be to make all reductions and enhancements worth one point. Another would be to add more OGS reductions,³ like a reduction for someone suffering substance use disorder or from a mental health diagnosis at the time of the offense.

B. Increasing Access to Level A Restorative Sanctions

We applaud the Commission for creating a category which recommends restorative sanctions other than probation, such as community service or fines as the sole sanction. By default, under the current guidelines the phrase restorative sanctions have become synonymous with probation. To reduce the overuse of probation while still imposing sanctions for criminal behavior, the new restorative sanctions category is essential. However, Level A, as proposed, lacks the teeth to have a real effect. There are no crimes designated with an offense gravity score of one in the PSG. There are a handful of offenses designated as either a two or a three, but these offenses are very rarely charged. PDAP recommends that should qualify for Level A restorative sanctions rather than probation.

C. Clarify Probation with Restrictive Conditions

PDAP supports the Commission's proposal to include an option for probation with restrictive conditions in lieu of incarceration. This will be a valuable option for a Judge to consider for individuals who may need a stricter supervision than standard probation but not incarceration.

However, it is unclear what the Commission intends "probation with restrictive conditions" to mean. Is this term being used interchangeably with home confinement?

³ PDAP adopts and supports the reductions proposed by the Defender Association of Philadelphia in their testimony to the Commission, attached as APPENDIX A.

Is it intended to be synonymous with restrictive probation? Or is it intended to have a broader application? Perhaps, a judge could impose probation with weekly or monthly goals that should be reported back to the Judge. Perhaps it could mean probation with an electronic monitor, so the individual could be more closely monitored even if not wholly confined to their home, or even a probation with a curfew and check in each evening.

Any of these options could fit into the term of probation with restrictive conditions. This vast array of options would certainly support the goal of individualized sentencing which sentences the person rather than the crime. We further believe that this interpretation is consistent with §2154(a), which dictates that the Commission shall recommend confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and the community and rehabilitative needs of the offender.

PDAP requests the Commission issue further guidance on what probation with restrictive conditions entails. Judges should be permitted to fashion creative sentences in lieu of incarceration and not be confined to choose only between prison and home confinement.

D. Increase in Offense Gravity Score for Subsequent Offenses

PDAP opposes the proposed increase in offense gravity scores for subsequent offenses. Under the proposed guidelines, individuals charged with a second or subsequent offense for simple possession and possession with intent to deliver are penalized with a higher offense gravity score. However, there is no provision in the proposed guidelines that would discount their prior record score calculation in this situation. This would result in the double counting of their prior offense.

In the case of simple possession, an individual charged with a subsequent offense is currently penalized by an increase in the statutory maximum sentence. Under the proposed guidelines, their prior offense would be included in the calculation of their prior record score, they would face an increased statutory maximum, *and* would be penalized by an increase in the offense gravity score. This would amount to an illegal egregious triple penalty for an addiction-based crime.

Like adding enhancements not contained in the current criminal code, creating enhancements for subsequent offenses could be considered overreach, particularly given that the General Assembly decided that some existing offenses, like retail thefts and driving under the influence offenses, increase in offense gradation for subsequent offenses. This, too, could lead to more appeals.

E. Offense Gravity Score for DUI offenses

PDAP opposes the proposed offense gravity score designations for driving under the influence charges because they result in increased incarceration for DUI offenders.

The proposed guidelines inexplicably punish second offense DUIs just as severely as third offenses. The offense gravity score for a second offense should be lowered and consistent with the current guidelines.

Additionally, in certain situations, the PSG recommend standard range sentences of incarceration in excess of the mandatory minimums. For example, a first offense DUI in the highest tier (over .16 or drugs) calls for a mandatory minimum sentence of 72 hours incarceration. Under the proposed guidelines, the standard range calls for one to three months of incarceration.

Mandatory minimum sentences for driving under the influence have statutorily prescribed. The Sentencing Commission should not legislate above the mandatory minimum sentences set by the General Assembly. Accordingly, the bottom of the standard range of the sentencing guidelines should begin at the mandatory minimum.

IV. LAPSING

A. Juvenile Lapsing

PDAP supports the additional lapsing opportunities in the proposed Guidelines. The PSG are better since there is true lapsing for all juvenile offenses and they add the lapsing of adult offenses. For juvenile adjudications, the guidelines would retain not considering any adjudications for offenses that occurred prior to the individual turning 14 years old and any misdemeanor two or three adjudications. However, all adjudications for misdemeanor one offenses are to be used to calculate the PRS not just those misdemeanor one adjudications listed in 303.7(a)(4). The proposed guidelines do create a lapsing provision that at the age of 21, for all offenses with the gradation of misdemeanor one, ungraded felonies, or felony three offenses. At the age of 25, all non-violent felony-one and felony-two offenses lapse, and any violent offenses can lapse if the individual has remained crime free for 10 years since their last adjudication or conviction. PDAP supports lapsing of juvenile offenses at age 21 or age 25.

While most of these proposals are very positive, defender clients from the age of 18 through 20 would now have all adjudications for Terroristic Threats, any Theft by Unlawful Taking graded as a misdemeanor one, recidivist Prostitution, and Criminal Mischief graded as a misdemeanor-one used in the calculation of their PRS, whereas under the current guidelines they do not. Theft, prostitution, and criminal mischief are

crimes often associated with addiction and mental health issues; the issues that are best addressed using restorative sanctions such as treatment and community service. Unfortunately, under the proposed guidelines, young adults aged 18 through 20 with 2 or more adjudications for these crimes would be in the Medium category for PRS and would be unlikely to qualify for restorative sanctions under the proposed Basic Sentencing Matrix. PDAP proposes that only those misdemeanor-one adjudications previously enumerated in 303.7(a)(4)⁴ be used to calculate the PRS prior to any lapsing.

The juvenile lapsing provisions state that offenses are removed from consideration in the “at 21 years of age” and “at 25 years of age”. It is unclear whether this applies to the age of the offender at the time the new offenses were committed, or their age at the time of imposition of the new sentence. PDAP recommends that the guidelines clarify this to be the age of the offender at the time of the sentencing, rather than the age at the time of the commission of the crime. This approach would comply with the stated intent of the new guidelines that the main focus should be on factors related to the offender and the offense. This approach also focuses on future risk and not the prior criminal record.

B. Adult Lapsing

PDAP supports lapsing of adult convictions but recommends that some adult convictions lapse more quickly. Convictions for misdemeanors should lapse after five years, and conviction for felony three and ungraded felonies should lapse after ten years. The reason for this change is because the maximum sentence of the highest grade of misdemeanor is five years. Many individuals who are convicted solely of misdemeanor offenses are indigent and/or have addiction issues. Studies reflect that about 85% of individuals relapse within the first year.⁵ Allowing for lapsing in five years for misdemeanors would recognize the hard work and achievement of remaining drug free for five years and would allow courts to use restorative sanctions for those individuals who have relapsed after years of sobriety. Treatment is more effective than a jail sentence and is more cost effective for taxpayers.

Periods of incarceration should not toll the time in the lapsing provisions. Lapsing is not the same as expunging. Any convictions that lapse for purposes of calculating an individual’s PRS still remain on the individual’s criminal record and have the potential to be used as an aggravator or mitigator in any sentence fashioned by the court. Additionally, any individual who has served a lengthy sentence for a crime of violence

⁴ These crimes include: Possessing Instruments of Crime; Prohibited Offensive Weapons; Use or Possession of Electric or Electronic Incapacitation Device; Possession of Weapon on School Property; Possession of Firearm or Other Dangerous Weapon in Court Facility; and Violations of the Pennsylvania Uniform Firearms Act. 204 Pa. Code 303.7(a)(4)

⁵ Brandon, TH, et. al., *Relapse and relapse prevention*, Annu. Rev. Clin. Psychol. 2007; vol. 3:257-84.

and then incurs a new arrest when released is statistically unlikely to be arrested for any crime of violence. The Justice Policy Journal study “Recidivism Among Older Adults: Correlates of Prison Re-entry,” authored by Sarah Rakes, Stephanie Grace Prost, and Stephen J. Tripodi, analyzed data from 6,522 prisoners aged 45 and older that were released from custody, and concluded that 66% of individuals aged 45 - 54 were not returned to prison, with even higher rates of non-recidivists in people aged 55 - 64 (73.3%) and people aged 65 and older (88.2%). Of those older adults who did recidivate, “nearly 81% of imprisoned older adults were incarcerated for non-violent offences.”⁶ The United States Sentencing Commission’s 2017 report on The Effects of Aging on Recidivism Among Federal Offenders analyzed a group of 25,431 federal offenders who were released from prison or put on probation; “for offenders 60 years old or older at the time of release, almost one quarter (23.7%) who recidivated had a public order offense as their most serious new charge.” The report analyzed data from state offenders as well and concluded, “like federal prisoners, older state prisoners were less likely to recidivate than younger state prisoners.”

V. OVERARCHING CONCERNS ABOUT DATA

The approach taken to reach the new OGS artificially inflates sentences by undercounting sentencing data. At prior Sentencing Commission hearings on the PSG, Commission staff explained that to calculate the new OGS ranges, the Commission determined the median sentences for any given offense across the past three years. They explained that this median sentence set the low end of the new, narrower OGS sentencing range for each offense, to accurately reflect the sentences that are currently given.

Staff went on to explain that Philadelphia’s Municipal Court reports little, if any, of its data to the Sentencing Commission. Data from the Sentencing Commission website shows that in 2019 Philadelphia only reported 46% of its sentences to the Commission, and in 2020 reported 39% of its sentences.⁷ Not including this data in the calculation of OGS ranges for misdemeanor offenses, skews the data. Such data is available through the Commonwealth of Pennsylvania Common Pleas Case Management System, and it should be included. At a minimum, every misdemeanor OGS range should be recalculated to include that data.

Additionally, making the current median sentence the bottom of the OGS standard sentencing range, inflates the sentences. If the Commission’s goal was to accurately

⁶ See *Id.*

⁷ Pennsylvania Commission on Sentencing, “2019 Reporting of Sentences to the Commission” and “2020 Reporting of Sentences to the Commission” available at: <https://pcs.la.psu.edu/research-data/jri-ii-reporting-certification-of-compliance/>.

reflect the current practices, the median past sentences, as calculated, should serve as the middle of the new OGS sentencing range for each offense.

VI. CONCLUSION

The revision of the Guidelines is clearly a massive undertaking, and PDAP thanks the Commission for its thoughtful, transparent approach, and for the opportunity to provide feedback. We thank the Commission for its efforts to ensure that sentencing in Pennsylvania's criminal courts is equitable and just by balancing the needs of the community while offering rehabilitation to the individual.⁸



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⁸ Respectfully submitted, March 8, 2022.