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The Public Defender Association of Pennsylvania (PDAP) is a non-profit association whose membership includes hundreds of Public Defenders. PDAP is dedicated to securing a fair justice system and to 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 its efforts to solicit broad feedback across this process. Some issues we raised in our prior testimony were addressed with these revisions, but concerns remain with the data collection process, the proposed Offense Gravity Score (OGS) for minor offenses, and the method of calculating the Prior Record Score. We ask the Commission to consider the below testimony before considering the Proposed Sentencing Guidelines final.

**II. DATA/OVERARCHING**

* **WHAT WE LIKE:**  In our analysis of the new sentencing ranges, some clients do better under the new Proposed Sentencing Guidelines (PSG) than they do under the current guidelines. People charged with serious offenses and people who become a 4/Rfel do not. The ranges are also more narrow, which should help curtail judges who prefer to sentence at the upper edge of the standard range.

**III. OFFENSE GRAVITY SCORE**

* **WHAT WE LIKE:** The increase in the number of offense gravity scores allows for criminal offenses to be assessed on a more individualized basis. Different crimes with different levels of seriousness are no longer unfairly lumped together, which allows for smaller, and more proportional, increases between the categories. The increase in number of categories also allows for the recommended sentences to be more precise and targeted, increasing predictability and objectivity in sentencing.
  + **We also like:**  The creation of categories of offenses where the intended and recommended sentences are community service hours and fines, which the PSG calls Category A offenses, but…
* **WHAT WE DON’T:** The proposed OGS categories in Category A, are essentially theoretical because so few offenses are given OGS scores of 1, 2, 3, or even 4. This creates a mythical category of restorative sanctions without probation that is in practice unobtainable. As I looked across the matrix, my tallies of numbers of offenses with these OGS scores is OGS of 1 = 0 offenses; OGS 2 = (about) 154; OGS 3 = 2; OGS 4 = 16. That may sound like a lot of OGS of 2, but most of them are random things that are never charged. Think unauthorized use of a water line without a permit, unauthorized sale of tickets, fortune telling, commemorative service demonstration activities etc. Commonly charged low level misdemeanor 3 offenses- Disorderly Conduct, Criminal Mischief, and many low level thefts have an OGS of 5, putting them in Category B.

Additionally, people with a PRS of 0 or 1 under the PSG who are arrested for anything over an OGS of 14, even with full mitigation, still get a state sentence. Given that first-time offenders convicted of a serious crime might have an undiagnosed mental health issue, addiction issues, or have endured extreme poverty, more mitigation should be available.

* **CHANGE WE SUGGEST:** We urge that all M3s be given an OGS of 2, or alternatively that commonly charged low level misdemeanor offenses, like M3 disorderly conduct; harassment; criminal mischief; misdemeanor retail theft; and both possession of a small amount of marijuana and possession of drug paraphernalia should have all have an OGS of 1. This would make Category A meaningful, and not illusory.
  + We also recommend that people with a PRS of 0 or 1 should have more mitigation open to them.

**IV. PRIOR RECORD SCORE**

* **WHAT WE LIKE**: We discuss it in greater detail below, but the creation of adult lapsing and raising the age when juvenile adjudication from age 14 to age 16 are all positive changes, albeit with methodology/implementation concerns (see more below).
* **WHAT WE DON’T**: This is perhaps the biggest problem with the PSG. We have repeatedly asserted that the way the PSG calculates Prior Record Score (PRS) will put more people in higher record score categories, overinflating sentences. After eliminating lapsed offenses, the PSG calculates PRS by “identifying the most serious previous adjudication or conviction offense, and then determining the number of previous offenses with the same grade.” Multiple offenses within the same case count, potentially putting the defendant into the highest PRS category for just one conviction. Additionally, under the PSG, even if cases are consolidated in a plea and resolved with a concurrent sentence, each offense counts against the PRS. This disincentivizes pleas, incentivizes prosecutors to force clients to plead to multiple F1s (or multiple of whatever the highest level offense charged is) to inflate the PRS, and it calls into question the benefit of the bargain of countless past pleas. It also violates the principles of *Commonwealth v. Shiffler*.[[1]](#footnote-1) *Shiffler*  held that judges should only sentence offenders more severely if they continued to commit crimes after the theoretical benefits of penal discipline. The approach of the PSG to calculating the PRS forsakes this focus on the chance to learn from one’s mistakes, embracing instead a focus on the number of offenses pled to. It will also push many more people into a PRS of 3, the second most serious category, which will inflate prison sentences.

Additionally, the maximum sentences for people with a PRS of 4/RFEL are too high- Under the PSG, once an individual has a PRS of 4, any crime with an OGS of nine or higher carries a guideline range up to the Statutory Limit (SL). This runs contrary to the PSG’s stated goal of “lowering sentence recommendations linked to criminal history,” and of providing “more targeted recommendations and more uniform and proportional increases between categories.”

* **CHANGE WE SUGGEST:** PDAP recommends that the new guidelines add language that if sentences were imposed in the same judicial proceeding, multiple same-level offenses should only count once. Consistent with Supreme Court precedent,[[2]](#footnote-2) prior convictions should weigh more severely and count separately only if the offender engaged in criminal conduct after serving a sentence. Additionally, only the single most serious offense imposed in a “single judicial proceeding” should count against the PRS. These changes would simplify the Guidelines without upending years of plea bargaining.

HOW JUVENILE OFFENSES ARE COUNTED

* **WHAT WE LIKE:** Raising the age for whether juvenile adjudications can count for a PRS calculation from 14 to 16.
* **WHAT WE DON’T:** Under the PSG, all first-degree misdemeanor adjudications count against the PRS. In the current Sentencing Guidelines, only first-degree misdemeanor offenses as set forth in § 303.7(a)(4) count, which is how things should stay.

**V. LAPSING & DECAY**

* **WHAT WE LIKE:** We applaud the addition of adult lapsing and decay, as well as the expansion of juvenile lapsing.
* **WHAT WE DON’T:** 1) TOO NARROW- Lapsing and decay are not meaningful if they are so narrowly drawn that few people can access them. The PSG sets the time frames for lapsing at 15 or 25 years following either the time of sentencing for non-confinement sentences or time of release to the community for confinement. Alternatively, we recommend that all misdemeanors- other than those that qualify as serious crimes- decay five years following the date of sentencing, the maximum for an M1 offense.
* 2) TOO COMPLICATED- The PSG method for calculating lapsing and decay is also overly complicated. It differs on when lapsing begins, depending on whether a sentence carries probation or incarceration. It further complicates lapsing calculations by having lapsing toll upon direct violations of probation or parole but not toll for technical violations. While better than a solely draconian approach, this overly complex approach will make it difficult for line Defenders to unravel which convictions.
* 3) THEY TREAT IT LIKE AN AFFIRMATIVE DEFENSE- The problem of complexity is exacerbated because the PSG places the burden of proof, by a preponderance, on the Defense. Problematic in part because Defenders have less access to data on criminal convictions than prosecutors do. A better approach would assign the defense a burden of production, which the prosecution could then rebut.
* 4) LAPSING SHOULD NOT BE DISCRETIONARY- Judges should not have the power to ignore that an offense has lapsed. The PSG invites judges that in §303a4(e)(1), which provides, “(t)he Court may consider at the time of sentencing prior adjudications or convictions not counted in the calculation of the PRS, ***including lapsed offenses***, and other factors deemed appropriate by the court” (emphasis added).
* **CHANGE WE SUGGEST:** Once a defense attorney raises a claim that an offense has lapsed or decayed, the burden should be on the prosecution to show the offense has not lapsed or decayed. Additionally, prosecutors should be required to provide information about when an offender was released on parole as part of their discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and Pa R.Crim.P. 573 and estopped from challenging assertions of lapsing or decay if they have not provided such information.

Additionally, we recommend language about lapsed offenses be removed from this provision. Alternatively, language should read that lapsing should count absent extraordinary circumstances.

IV. AGGRAVATORS

* **WHAT WE LIKE:** The 2022 version had a LONG list of complicated aggravators and far fewer mitigators. The PSG removed those and only kept in the aggravators mandated by statute.
* **WHAT WE DON’T:** Which means there’s nothing about mitigation. We recommend they add language to make clear that judges can & should still consider mitigating evidence presented to them- especially for those with a PRS of 0 or 1 charged with an F1 or F2.

V. FINES, RESTITUTION, COURT COSTS, & THE ABILITY TO PAY[[3]](#footnote-3)

As they relate to fines, costs, and restitution, the Commission has set forth proposed guidelines that are either incomplete or inconsistent with controlling law regarding a defendant’s ability to pay.

* **WHAT WE DON’T LIKE** (and moreover contradicts existing law):
  + FINES- The PSG omit the statutory requirement in 42 Pa.C.S. § 9726(c) and (d) that discretionary fines can only be imposed after the sentencing court considers the defendant’s ability to pay that fine. As the Supreme Court explained, under that statute, “a sentence is illegal when the record is silent as to the defendant's ability to pay the fine imposed.” *Commonwealth v. Ford*, 217 A.3d 824, 828-29 (Pa. 2019). In determining an affordable amount, a sentencing court “shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.” 42 Pa.C.S. § 9726(d).
  + RESTITUTION- The language of the PSG does not address restitution imposed as a condition of probation, as that form of restitution must be “in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime.” 42 Pa.C.S. § 9763(b)(10). Accordingly, if a court imposes a sentence of probation that includes a requirement to pay restitution, that restitution must be based on the defendant’s ability to pay while on probation. As the Superior Court has explained, “Pennsylvania courts have consistently held that a determination of a defendant's ability to pay is an integral requirement of imposing restitution as a condition of probation.” *Commonwealth v. Whatley*, 221 A.3d 651, 654 (Pa. Super. Ct. 2019) (citing cases).
  + COURT COSTS- The PSG makes costs mandatory. This contradicts both the relevant statutes as well as recent decisions from the Superior and Supreme courts. While 42 Pa.C.S. § 9721(c.1) ordinarily requires the imposition of costs, it also provides that such a requirement does “not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs).” Similarly, 42 Pa.C.S. § 9728(b.2) states that a defendant “shall” be liable for costs “as provided in section 9721(c.1), unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs).” These provisions vest sentencing courts with the authority to reduce or waive costs. As the Superior Court has held, courts have the “discretion to conduct such a hearing at sentencing” to reduce or waive costs. *Commonwealth v. Lopez*, 248 A.3d 589, 595 (Pa. Super. Ct. 2021) (en banc). The Supreme Court affirmed this ruling that permits the reduction or waiver of costs at sentencing, as “its opinion should not be construed to strip the trial court of the discretion to conduct an ability-to-pay hearing at sentencing.” *Commonwealth v. Lopez*, 280 A.3d 887, 893 (Pa. 2022). The result is that at sentencing, although courts are not *required* to consider a defendant’s ability to pay, they nevertheless have the *option* to waive court costs. Instead, consistent with Rule 706(C) and those binding opinions, an accurate statement would be that the sentencing court “is required to order the person to pay costs unless the court, in its discretion, reduces or waives those costs after considering the burden upon the defendant by reason of the defendant’s financial means.”

1. *Commonwealth v. Shiffler*, 879 A.2d 185 (Pa. 2005). [↑](#footnote-ref-1)
2. *Id.* [↑](#footnote-ref-2)
3. Shout out to Andrew Christy of the ACLU of PA, an expert on PA fines & costs caselaw, who drafted a section on this for PDAP. The above is a trimmed version of what Andrew wrote. [↑](#footnote-ref-3)