



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 proposed Offense Gravity Score (OGS) for minor offenses, the endless upper sentencing range for those with a Prior Record Score of four, and the method of calculating the Prior Record Score (PRS). We ask the Commission to consider the below testimony before voting to adopt the Proposed Sentencing Guidelines.

II. OFFENSE GRAVITY SCORE

PDAP supports having a range of sentences that call for restorative sanctions instead of probation or incarceration, but as constructed this category is so narrow as to be inaccessible. We propose the Commission widen access to Category A by lowering the OGS for more misdemeanor offenses.

THE MYTH OF CATEGORY A

As currently constructed, Category A is essentially theoretical because too few offenses have an OGS under four. Under the current guidelines, the term “restorative sanctions” is synonymous with probation. Currently, in nearly all cases of a low level or *de minimis* infraction of the law, judges impose probation, sometimes fairly lengthy. PDAP believes that a category of offenses where the intended and recommended sentences are community service hours and fines, as contemplated by Category A, is necessary and long overdue.

However, Category A lacks the number of offenses it needs to have be meaningful. Under the PSG, no crimes have an offense gravity score of one. There are a few designated with offense gravity scores of two and three but these offenses are rarely if ever charged. Unauthorized use of a water line without a permit, unauthorized sale of tickets, fortune telling, commemorative service demonstration activities are three examples of offenses designated with an offense gravity score of two and are offenses that are rarely, *if ever*, charged.

For example, 18 Pa.C.S. 5503(a)(2), relating to disorderly conduct for unreasonable noise, previously had an offense gravity score of one. That same offense is now designated with an offense gravity score of five. 18 Pa.C.S. 5507, relating to obstructing a highway, previously had an offense gravity score of one, is now also a five. For a person with no criminal record, these offenses were one of the few where a fine or community service was actually imposed as a sanction. Now, the recommended sanction starts at 12 months probation. This will have the unintended effect of increasing the already overused tool of probation for low level and minor offenses.

All misdemeanor three offenses should carry an OGS of two. At the very least, commonly charged low level misdemeanor offenses, like misdemeanor-three disorderly conduct, criminal mischief; harassment; misdemeanor retail theft; obstruction of the highway; and both possession of a small amount of marijuana and possession of drug paraphernalia should have an OGS of 1. This would make Category A meaningful, rather than illusory.

CONCERN ABOUT PEOPLE WITH LITTLE TO NO RECORD

The PSG leaves little room for rehabilitation for individuals with no prior record or a sole prior misdemeanor conviction if they are convicted of a higher level offense. First-time offenders convicted of a serious crime might have an undiagnosed mental health issue, addiction issues, or have endured extreme poverty. Those individuals need an opportunity for treatment and assistance. Instead the PSG consigns them to state prison, leaving little discretion to rehabilitate. Most level D offenses and all of Level E, F, and G center solely on incapacitation and deterrence. Instead, there should be more room to rehabilitate and to mitigate for defendants with a Prior Record Score (PRS) of zero or one, if convicted of level D, E, F, or G offenses. This should be made clear on the sentencing matrix chart itself, not just in guidelines text.

POSITIVE CHANGES TO THE OGS

PDAP supports the increase in the number of offense gravity scores. This increase 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. This will not only allow defense attorneys to be able to more accurately predict and advise clients of the potential outcomes, but it will also enable prosecutors to make more appropriate and acceptable plea offers.

The increase in the number of offense gravity scores will increase predictability and objectivity in sentencing while still allowing room for discretion to sentence the individual.

II. PRIOR RECORD SCORE

PDAP repeats its concerns that the way the PSG calculates Prior Record Score (PRS) will put more people in higher record score categories, overinflating sentences.

THE PROPOSED METHOD OF CALCULATING PRS WILL ARTIFICIALLY INFLATE THE SCORE

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.” Under the PSG, multiple offenses within the same case count against the PRS, which is a significant change from the current practice. Currently, if a defendant pleads guilty in the same case to a felony-one Burglary and felony-one Robbery, only one of these count toward the PRS. Under the new guidelines, both count, putting the defendant into the highest PRS category following one conviction. This is true for anyone 16 years of age or older. Under the PSG one conviction can immediately place them in the highest PRS category.

This is also a significant change for cases that are consolidated together for guilty pleas. Currently, if a defendant pleads guilty to offenses across cases consolidated for a guilty plea, only the most significant offense counts against the PRS, if the sentences run concurrently. The current practice incentivizes guilty pleas. Under the PSG, any equally significant offenses each count independently toward the PRS. This will discourage the consolidation of cases and violates Pennsylvania Supreme Court case law.

*Commonwealth v. Shiffler*¹ held that in order for someone to be sentenced to a higher sentence as a recidivist, that person must have first had a chance to reform under any recidivist statutes (other than those specifically outlined by the General Assembly, i.e. DUI recidivist statutes). Originally, Shiffler consolidated three Burglary(F1)(person present) cases in a guilty plea and received a concurrent sentence of 11 ½ - 23 months. Four years later, Shiffler was convicted of another burglary (F1)(person present), and the Commonwealth argued that he was subject to the “three strikes law”, because the prior burglaries he consolidated counted as the two predicate offenses that would subject him to a third strike. The Court relied on *Com. v. Dickerson*, 533 Pa. 294 (1993), saying, “(a)t the time of his concurrent sentencing for his three prior burglaries in 1997, appellant was not, in fact, sentenced as a second-time offender. Indeed, because he committed all of the prior burglaries before he was convicted or sentenced for any of them, he could not have been sentenced as a second-time offender in light of our holding in *Dickerson*, 621 A.2d at 992 (previous conviction must occur prior to commission of subsequent offense). The anomaly of appellant’s situation is thus: while he has not ever been – nor could he have been – sentenced as a second-strike offender, a reflexive application of subsection 9714(a)(2) would subject him to sentencing as a third-strike offender. The unreasonableness of that result is made more apparent when considering the disparity between the sentence appellant received upon his first sentencing contact with the criminal justice system – an aggregate term of 11 ½ - 23 months of imprisonment in a county facility – and that which the Superior Court panel majority deemed statutorily required upon this, his second sentencing contact with the system – a minimum term of 25 years of imprisonment. We do not believe that such a result was intended by the General Assembly in adopting the graduated scheme of recidivist sentencing which is reflected in Section 9714.” *Id.* at 493.

The approach of the current Sentencing Guidelines embraces the recidivist philosophy espoused in *Shiffler*. Under the current guidelines what matters is not the number of convictions an individual has; rather, the number of opportunities he had to learn his lesson from sentencing and reform. The

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

approach of the PSG to calculating the PRS forsakes this focus on the chance to learn from one's mistakes, contrary to *Shiffler*. That, of course, makes the PSG vulnerable to challenge in the courts.

The approach by the PSG to PRS also upends decades of plea bargaining. Relying on the current approach for decades, defendants have bargained for the benefit of a lower PRS by consolidating cases in guilty pleas. The PSG method of calculating PRS negates those agreements, creating impermissible *ex post facto* punishment by raising PRS beyond what was originally bargained for. This, too, will create appeals for every person who consolidated cases in a guilty plea in the past. It will also push many more people into a PRS of 3 or 4 which will fill Pennsylvania's prisons.

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. Additionally, only the single most serious offense imposed in a "single judicial proceeding" should count against the PRS. These changes would simplify the Guidelines and conform with *Shiffler* without upending decades of plea bargaining.

MAXIMUM SENTENCES FOR THOSE WITH A PRS OF FOUR

Over-inflated PRSs concern us, particularly given the way the PSG sets maximum guidelines sentences for anyone with a PRS of four. 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."²

HOW JUVENILE OFFENSES ARE COUNTED

We commend the Commission for raising the age of when juvenile adjudications count toward a PRS from 14 to 16. We reiterate our concern that the PSG counts all first-degree misdemeanor adjudications toward a PRS. In the current Sentencing Guidelines, only first-degree misdemeanor offenses as set forth in § 303.7(a)(4) count. Counting all first-degree misdemeanors runs opposite to the Commission's intended goal to "reduce the overall impact of the prior record score for less serious offenders, by lowering sentence recommendations linked to criminal history."³

III. LAPSING & DECAY

We applaud the addition of adult lapsing and decay, as well as the expansion of juvenile lapsing. We have concerns about the methodology the PSG employs, though, specifically that the process proposed is too narrow, overly complicated, and impermissibly places the burden of proof on the defense.

² TITLE 204 PA. CODE CH. 303a- Proposed 8th Edition Sentencing Guidelines, 1 Pa.B. 801., VOL. 53, NO. 1, JANUARY 7, 2023.

³ *Id.*

TOO NARROWLY DRAWN & TOO COMPLICATED

Lapsing and decay are not meaningful if they are so narrowly drawn that people cannot realistically access them. Setting the time frames for lapsing at 15 or 25 years is too limiting. Alternatively, we recommend that all misdemeanors- other than those that qualify as serious crimes- decay five years following the date of sentencing. Misdemeanor offenses carry statutory maximum sentences of at most five years. Sentences that lapse after five years, would lapse after the maximum sentence for the most serious misdemeanor offenses. Note, too, that many misdemeanor offenses carry either two years of probation or restorative sanctions under the PSG.

The PSG method for calculating lapsing and decay is also overly complicated. First it has a dichotomy regarding when lapsing begins, depending on whether a sentence carries probation or incarceration. This overly complex approach will make it difficult for line Defenders and Prosecutors to unravel which convictions lapse, as discerning when people are released on parole is not immediately apparent from records in the Common Pleas Court Management System (CPCMS).

Prosecutors consistently warned throughout the Sentencing Commissions' 2022 hearings that an overly complicated approach in the PSG would lead to confusion and require additional funding to hire more staff to prepare accurate records. We join with those concerns, and point to the 'if-then' provisions of lapsing and decay as a prime example of where the PSG complicate rather than simplify. Our concern about this unfunded mandate is particularly dire for Pennsylvania's Public Defenders. While the Commonwealth provides some funding for its prosecutors,⁴ it provides nothing to support its Public Defenders.⁵ Unfunded mandates created by the PSG hamper Public Defenders from providing effective assistance of counsel.

BURDEN OF PROOF

The PSG then lays the complexity of lapsing and decay at the feet of those least well-positioned to navigate it, by putting the burden of proof on the defense to prove an offense has lapsed. Lapsing should not be treated like an affirmative defense. Public Defenders do not have the access that prosecutors and police do to FBI databases or the Pennsylvania Justice Network (J-NET), which means they don't have access to information about when people are released on parole. Without such information, Defenders cannot meet any burden to prove whether convictions have lapsed.

Unless the PSG has the power to make government databases equally accessible to defense attorneys, a better approach would be that 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.

⁴ 16 P.S. 1401. Available at:

<https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1955&sessInd=0&smthLwInd=0&act=130&chpt=14>.

⁵ Sixth Amendment Center "Know Your State: Pennsylvania." Available at: <https://sixthamendment.org/know-your-state/pennsylvania/>.

LAPSING SHOULD NOT BE DISCRETIONARY

For lapsing and decay to be meaningful, judges should not have the power to ignore them. The PSG invites judges to ignore lapsed convictions in chapter 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.” We recommend this language be removed. Lapse and decay differ from expungement in that convictions that have lapsed and decayed are still visible to judges in court records. There is no reason to encourage judges to count lapsed convictions against defendants. Alternatively, the language should read that lapsing should count absent extraordinary circumstances.

III. AGGRAVATORS

The PSG improves on the 2022 draft sentencing guidelines by removing its long list of aggravators and mitigators, which preserves judicial discretion and gives the prosecution and defense space to argue the individual circumstances unique to every criminal case. Given that only the aggravators mandated by statute remain in the PSG and that there are no statutory mitigators, we recommend adding language to make clear that judges still may consider mitigation presented to them. This is particularly needed given the lengthy sentences for high OGS offenses for any offender with little to no prior record, and given that the high end of the standard sentencing range is the statutory maximum for any offender with a PRS of four with an OGS of nine or higher.

IV. FINES, RESTITUTION, COURT COSTS, & THE ABILITY TO PAY

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.

FINES

With respect to fines, the proposed guidelines provide:

(II) A fine, within the limits provided by law, or any amount equal to double the pecuniary gain derived from the offense by the person, or the use of community service as a non-monetary alternative, may be ordered as a restorative sanction without probation or confinement. The fines/community service guidelines, included with each guideline sentence recommendation, provide a range of recommended community service hours; the comparable fine is determined by multiplying the number of hours recommended by the person’s hourly wage, or by the current minimum wage.

This language omits 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). The

guidelines must reflect this requirement regarding the imposition of discretionary fines, to ensure that trial courts do not impose illegal sentences without considering the defendant's ability to pay.

RESTITUTION

With respect to restitution, the PSG provide:

(III) Restitution as a mandatory requirement. The court is required to order the person to compensate the victim for damage or injury sustained because of the offense.

Restitution as a restorative sanction may be ordered without probation or confinement.

This language appropriately addresses restitution imposed as part of the sentence under 18 Pa.C.S. § 1106. However, it 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). To ensure trial courts do not impose illegal sentences that include restitution without considering the defendant's ability to pay, the guidelines must reflect that requirement.

JUDGES HAVE THE POWER TO WAIVE COURT COSTS

Finally, with respect to court costs, the PSG provide:

(IV) Costs as a mandatory requirement. The court is required to order the person to pay costs. Costs as a restorative sanction may be ordered without probation or confinement.

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). See also *Commonwealth v. Mulkin*, 228 A.3d 913, 919 (Pa. Super. Ct. 2020) ("The trial court may also provide that a defendant shall not be liable for costs under Rule 706."). 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.

The guidelines must be consistent with these provisions, and it misstates existing law to require judges to order that defendants pay 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."

COSTS ARE NOT RESTORATIVE SANCTIONS

The guidelines also mischaracterize costs as a "restorative sanction" in this section. The definitions section defines "RS-restorative sanctions" as including "determination of guilt without further penalty, fine, community service, and restitution." Costs are not included in the definition, which is correct since it is not a restorative sanction for two reasons. First, costs are not a "sanction." The Supreme Court has repeatedly held that "[t]he imposition of costs in a criminal case is not part of the sentence, but rather is incident to the judgment." *Lopez*, 280 A.3d at 901 (quoting *Commonwealth v. Nicely*, 638 A.2d 213, 217 (Pa. 1994)). Moreover, costs are "not part of any penalty imposed even in those cases where there is a conviction" and "do not form a part of the penalty imposed by statutes providing for the punishment of criminal offenses." *Commonwealth v. Giaccio*, 202 A.2d 55, 58 (Pa. 1964). Second, costs are not rehabilitative or restorative. Instead, they "are a reimbursement to the government for the expenses associated with the criminal prosecution" and "are akin to collateral consequences." *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014). As a result, an order to pay costs does "not reasonably relate to the rehabilitation" of a defendant. *Commonwealth v. Hudson*, 231 A.3d 974, 980 (Pa. Super. Ct. 2020). In light of the status of court costs under Pennsylvania law, it would be erroneous to describe them as "restorative sanctions," as they are not.

V. TWO NOTES ABOUT DATA

Although per Sentencing Commission staff, the current approach for calculating sentencing ranges reduces the impact of the survey of three years of data reported to the Sentencing Commission, that three year study of data is still part of those calculations. We repeat, then, our concern that even this methodology artificially inflates the new sentencing ranges because it undercounts prior sentencing data from Philadelphia. The three-years of sentencing data comes from data reported to the Sentencing Commission, rather than data available through the Administrative Office of Pennsylvania Courts (AOPC). It includes no data from Philadelphia's Municipal Court, and during the three years surveyed, Philadelphia underreported its data to the Sentencing Commission.⁶ A more accurate and complete picture of sentencing data across those three years should come, instead via a data request from AOPC and should include data on sentences from Philadelphia's Municipal Court. Without it, the data is weak and the picture incomplete.

Additionally, we note that pursuant to 42 Pa C.S. §2153(a)15, "(p)rior to adoption of changes to guidelines for sentencing, resentencing and parole, risk assessment instrument and recommitment ranges following revocation, use a correctional population simulation model to determine: (i) Resources that are required under current guidelines, risk assessment instruments and ranges. (ii) Resources that

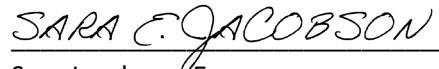
⁶ In 2020 Philadelphia's Court of Common Pleas reported only 39% of its sentences to the Commission. In 2019 it reported 46% of its sentences to the Commission. Data prior to 2019 is not available on the public website. Pennsylvania Commission on Sentencing, "2019 Reporting of Sentences to the Commission" and "2020 Reporting of Sentences to the Commission" available at: <https://pcs.la.psu.edu/research-data/jri-ii-reporting-certification-of-compliance/>.

would be required to carry out any propose.” Commission staff has indicated that data would be available sometime before the final hearing in March but likely very close in time to that final hearing. As of this writing, that data is not available. PDAP urges that the members of the Sentencing Commission closely review such data when it is available, to see whether, as we fear, far more people will fall into PRS categories of three and 4/REVOC under the PSG than equivalent categories under the current guidelines. If that is the case, far more resources will be required in terms of prison spending. If the report does not include projections for resources for prison spending and additional staffing for District Attorney and Public Defender offices due to the complexity of the changes in the PSG, then it is incomplete.

VI. CONCLUSION

Some aspects of the PSG are laudable, but the method proposed to calculate PRS risks filling Pennsylvania’s prisons and makes the PSG vulnerable to widespread legal challenge. Unless the issues with the PRS are addressed, the PSG will cause harm and may cost Pennsylvanians dearly, in years of lost life and in taxpayer funded overincarceration.

Respectfully submitted, February 16, 2023.



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