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Thomas R. Caltagirone, Majority Chairman,
Jeffrey E. Piccola, Minority Chairman,
House Judiciary Committee
Members of the House Judiciary Committee
Members of the Pennsylvania House of Representatives
House Post Office Box 104
Main Capitol Building
Harrisburg, PA 17120-0028

Re: Sentencing Reform Act of 1991
House Bill No. 239

Dear Representatives Caltagirone and Piccola, Members of the House Judiciary Committee and Members of the General Assembly:

I am appearing before you on behalf of the Defender Association of Philadelphia and the Public Defender Association of Pennsylvania. Obviously, House Bill 239 represents a significant step and a substantial change in direction of Pennsylvania sentencing practice. The Bill is intended to address a number of perceived problems both with sentencing practices and with the institutions which control the disposition of sentenced offenders in Pennsylvania. Before addressing specific aspects of the legislation, we believe it appropriate to consider some of the fundamental issues underlying Pennsylvania's current crisis in corrections.

THE CRISIS IN CORRECTIONS

No one can deny the unhappy fact that some individuals in this and every other society violate some of the fundamental principles -- the law -- on which society is based and on which it relies for the stability and safety of its citizens. Many of these individuals can be and are punished by the imposition of sanctions which do not require incarceration. Restitution, fines, education, and supervision are some of the non-penal sanctions which not only adequately serve to

curb antisocial conduct, but also present a humane and cost-effective alternative to imprisonment. It is further acknowledged that there are a number of individuals who, by virtue of the antisocial acts which they have committed or by virtue of their repetition of such acts, for punitive reasons and/or the protection of society, must be insulated from our free society by penal incarceration. It is the identification of these individuals and the determination of how long they should remain in custody that presents the three branches of government with the difficult problems to which House Bill 239 is addressed.

EDUCATION, HEALTH, ETC. vs. PRISONS - CHOICES MUST BE MADE

This decision of who should be imprisoned and for how long cannot be made in the abstract. Weighing in it are considerations requiring humane treatment of even alienated members of society, and -- an issue that is particularly pressing at this time -- questions concerning attribution of resources and making choices about how we will expend the limited funds available to the government. The value of building, maintaining and staffing prisons must be balanced against the value of educating our children, treating our sick and caring for our elderly. Given the relatively fixed amount of money available to the state (and to local governmental units as well), it is axiomatic that a million dollars, or a hundred million, spent on keeping people in jail means that much less for some other worthwhile governmental responsibility. Furthermore, in addition to the direct costs of maintaining individuals in prison are the indirect, but nonetheless, incidental costs: increased welfare payments, lost tax revenues, etc. Finally, there are intangible costs: homelessness, broken families, children raised without adequate parental supervisor, etc.

The last 10 years has seen a radical expansion in the number of individuals incarcerated in federal, state and local institutions. While the United States may lag in providing medical care to all of its citizens and while we may not build the best automobiles, we have achieved the dubious distinction of being "number one" in the rate at which we incarcerate our citizens, passing both South Africa and the Soviet Union in this category some time in the late 1980's. This increase in the imprisonment of our citizens and precipitous rise in the dollar cost of incarceration has led this legislature to seek some reasonable method for reducing, in a rational and humane way, the population of Pennsylvania's prisons. Although there are additional claimed, and real, benefits flowing from House Bill 239, it is fundamentally designed to reduce prison populations through two separate mechanisms. First, the Bill will substantially eliminate the parole decision and thus cause

the release of individuals at the expiration of their minimum sentences. Second, the Bill will effectively reduce these minimum terms by allowing prisoners to earn, by compliance with their job responsibilities and by participation in worthwhile programs, slight reductions in their minimum terms. Before discussing these aspects House Bill 239, we would like to make a few observations concerning other mechanisms for rationally and humanely reducing incarceration rates which are not directly addressed by House Bill 239.

THE IMPACT OF MANDATORY SENTENCING STATUTES

Beginning in 1982, Pennsylvania has adopted a series of mandatory sentence statutes which restrict a judge's discretion and require, under certain circumstances, the imposition of mandatory prison sentences. Those statutes were enacted in response to a perception of increasing crime rates, public outcry relating to both general and specific conduct, and the belief, not generally accurate, that many Pennsylvania judges were "soft" on crime; that it was common judicial practice to allow serious offenders to avoid responsibility for their conduct by the imposition of unreasonably lenient sentences. As is the case with many reactions, the result had serious, unwarranted and costly consequences. A large number of individuals were required by these mandatory sentence provisions to serve very substantial prison terms in the absence of any likelihood that their criminal conduct would be repeated or when, in reality, they posed no significant threat to society. Older citizens with no prior criminal history were subjected to mandatory 5-10 year prison terms as a result of isolated incidents, unlikely to recur, in which they used firearms. Students taking public transportation home from school were subject to substantial mandatory sentences for offenses committed on that public transportation. Young people, yielding to the temptation of easy money, received mandatory sentences for peripheral involvement in drug distributing under statutes designed not to ensnare them, but rather those who played a major role in such trafficking.

A "MODEST PROPOSAL" ON MANDATORY SENTENCING

We understand both the reasons for the adoption of the various mandatory sentence provisions and the legislature's sincere belief that such provisions were necessary and appropriate to deal with perceived problems. At the same time we earnestly suggest that a significant step, not simply to reduce the overall prison population but to do so in a rational fashion so that more dangerous individuals would be left remaining in custody and those significantly less dangerous would be given the appropriate opportunity for either an earlier release or for alternative punishment,

would be to adopt a simple piece of legislation excepting from any mandatory sentence provision, any individuals who had not previously pleaded guilty to or been convicted of a felony. Such legislation would not bar substantial prison sentences, but rather would allow trial judges discretion to impose an appropriate sentence - more severe than the mandatory sentence, if warranted - after receiving information about the offender and the offense. Indeed, the crux of the problem in attempting to reduce levels of incarceration is not simply releasing people from jail in a random fashion, but rather in releasing those individuals who are least in need of incarceration and who pose the least threat, while retaining in custody those posing a significant threat to the personal safety and welfare of Pennsylvania citizens.

H.B. 239 : ABOLITION OF THE PAROLE DECISION AND TIME-CREDIT

The two principal provisions of House Bill 239 abolish the parole decision and substitute for the control mechanism inherent in that decision a system of rewarding inmates for socially responsible conduct while in custody by reducing their terms of incarceration. Thus the Bill substitutes the reward (positive reinforcement) of a reduced term of imprisonment for the previous threat (negative reinforcement) by the Parole Board that an individual who misbehaved while in custody would not be released at his minimum. While it is unquestioned that the abolition of the parole decision will result in a substantial diminution of prison population, it is not so clear that the "work-related" and "earned time" provisions of the legislation will work as a mechanism for controlling inmate conduct and for rewarding those inmates who display an appropriate attitude towards accepting their incarceration and attempting to improve themselves. For this reason, although we do support both the substitution of determinate sentence for the pre-existing parole system and the concept of awarding time credit, we would urge a slight modification of the portions of House Bill 239 relating to "work-related" and "earned time" (Sections 901 and 902).

MAKING TIME CREDIT PROVISIONS MORE REALISTIC

The fundamental problem with these two time credit provisions is that they offer credit for performance of work assignments and participation in programs, but there is a significant shortfall in the availability of both work assignments and programs. Given this situation, the proposed credit system, rather than effectively establishing a system of rewards, is likely to become a source of dissatisfaction for inmates who are willing to carry out work assignments and participate in programs but who are unable to obtain such assignments or enroll in such programs. It is not difficult

to imagine the frustration and anger that will result when such an inmate realizes that, although he is willing and able to participate, he will be required to remain in custody longer than his cellmate simply because there was no job or program available for him. To remedy this problem we would urge the amendment of House Bill 239 to provide for three days of credit per month for "good conduct", with that term broadly defined to include compliance with all institutional rules and regulations and performance of any assigned tasks or duties. With such a general definition, inmates would be encouraged to obey the rules and perform either regularly assigned or specifically requested tasks, and would be rewarded by credit for such compliance/performance. The reasons for broadening the definition and increasing the relative importance of this aspect of time credit are two-fold. First, it recognizes both the relative scarcity of available programs and alleviates the unfairness inherent in discriminating between inmates because of the unavailability of work assignments. Second, it recognizes the importance of good conduct as a control mechanism, and greatly enhances the effectiveness of that mechanism.

We would also suggest the program aspect of time credits should be diminished slightly by reducing the amount of time credit from 4 to 3 days per month and, again, that the language of Section 902 be changed to give the Department of Corrections and the institution broader discretion in defining what kind of programs and participation would entitle an inmate to credit. Hopefully with this "relaxed" language, participation in therapeutic inmate groups and other worthwhile, but perhaps not formal, programs would both benefit the inmates and provide a reasonable basis for those active participants to reduce their time in custody. These two changes would leave the maximum earned time/work related credit at six days[1], one more than the five days presently allowed by House Bill 239, and the same as the six days suggested by Senator Fisher in the original earned time bill he sponsored in the Senate three years ago.

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[1] Curiously, calucation of the benefit to an inmate of either a 5 or 6 day per month credit presents a more complex problem than would first appear. The obvious answer for 6 days of credit per month would be to assume that the inmate would get an approximate 20% reduction in his sentence and that on a 10 year sentence he would get out 720 days early. In fact the reduction in sentence would amount to 16.48% or 602 days. For 5 days per month of credit. The figures are 14.12% or 515 days.

EXCLUSION OF MANDATORY SENTENCES FROM WORK/PROGRAM CREDIT

Section 901 excludes from participation in the work/program credit provisions all individuals serving mandatory sentences or uncommuted life sentences. We strongly urge that the House reconsidered this provision, at least as it relates to various mandatory sentences. The requirement that mandatory sentences be imposed often requires the imposition of substantial prison term on individuals who could otherwise be safely treated less harshly. Excluding these individuals from the work/program credit significantly undercuts the values such programs have as control mechanisms, enhances the unfairness of mandatory sentencing generally, provides a disincentive for those on whom such sentences are imposed to participate in what might otherwise be valuable programs, and simply alienates those individuals. With increasing percentages of the prison population serving mandatory sentences, particularly young men serving sentences for low level participation in the narcotics traffic, and the abolition of the parole decision, it becomes increasingly important to provide some mechanism for controlling the conduct of these individuals and encouraging their participation in rehabilitative programs. The only practical mechanism available after the abolition of the parole decision is the allowance of time credit for good conduct, performance of work assignments and participation in institutional programs.

It is important to remember that mandatory minimum sentences are just that: minimums. Judges are free to impose prison sentence substantially more severe than those required by the various mandatory sentencing acts, and frequently do so. Even if it can be ascertained which individuals have received mandatory sentences, depriving them of the possibility of earning a slight reduction in their sentences simply serves no legitimate purpose and may require the maintenance in custody of individuals who could be safely supervised on the street and could be leading productive lives, paying taxes and supporting their families. For this reason we urge that Section 901 be modified by deleting at least the words "and mandatory minimum sentences" from lines 9 - 10, page 22.

TIME CREDIT FOR PAROLE VIOLATORS

Section 902(f) provides that parolees returned to prison for violation shall not be entitled to work/program credit "during service of any new sentence imposed". This provision could be construed as barring time credit for inmates serving "backtime", or might be construed to bar earned credit on sentences imposed for unrelated offense. While we do not necessarily agree that denying earned time credit on backtime being served is a good idea, this construction is not too

bothersome to us. On the other hand refusing to allow an individual to earn credit on any new, unrelated sentence imposed after a parole violation further undermines the intent and purpose of the entire time-credit package, which is to provide both an incentive to the inmates and a control mechanism for prison guards and officials. It should be enough to simply deny earned time credit on parole setbacks ordered by the Parole Board. Extending that punishment beyond the inmates backtime is simply counter productive.

EFFECTIVE DATE AND APPLICABILITY

There are number of other provisions of House Bill 239 which give rise to questions and objections. Section 1504 provides that the Act will take effect in 60 days, but itself is silent on the question whether the bill will apply to individuals previously sentenced or will only apply to those individuals sentenced after the effective date. Section 503, however, provides that the "automatic" parole at the expiration of the minimum term shall apply only to sentences "imposed after the effective date of this act...." Although House Bill 239 has at is core the abolition of parole decision and the streamlining of the Parole Board and the Department of Corrections into a single unit with a common purpose, the above quoted language of Section 505 will require the maintenance of a fully function Parole Board exercising the parole function, as well as the revamped organization under the Department of Corrections. The "old" Parole Board and its functions will have to be maintained for many decades because there are literally hundreds of inmates have who already received sentences with minimum terms not expiring until the year 2010 or later. Not only is this two-tiered system inefficient but its existence will undercut the efforts being made in House Bill 239 to provide incentive and rewards for an inmates good conduct. If enacted as written House Bill 239 will create two classes of inmates: the pre-act inmates who must seek release from the Parole Board and will be subject to delays in their paroles because of Board inaction; and the a second group, sentenced after House Bill 239 becomes law, who will be released automatically after serving their minimum sentences unless the Department of Corrections petitions to have them held in custody. It is a basic fact of human nature that people will endure almost any kind of treatment unless they can look across the street, in the next office, or in the next cell and see someone else being treated differently (which invariably translates "better"). We strongly urge that Section 503 be amended to delete "after the effective date of this act", at page 11 line 22. Such an amendment will also render the Act internally consistent, as Section 901 providing for earned time and work related time credit

clearly does apply to all sentences whether imposed prior to or after the effective date of the Act.

INCREASING THE ALLOWABLE MINIMUM TERM

Section 503 also contains an express provision which effectively doubles the potential sentence that any defendant could receive in Pennsylvania, repealing the existing statue which provides that the minimum term cannot exceed half the maximum term, and substituting in its stead a provision that the minimum cannot exceed the maximum term. We do understand the concern that, in the absence of the Parole Board power to withhold release because of the seriousness of the offense, judges should be able to sentence defendants to a longer minimum term. What the members of the House may not realized is that the maximum sentences already authorized by law far exceed the terms necessary to punish virtually any criminal defendants. The most serious offenses which would require the longest sentence invariably occur in groups. That is, the defendants are generally guilty of multiple crimes and each crime involves multiple offenses carrying separate and substantial penalties. By way of example: a hypothetical armed defendant who entered homes, robbed the occupants and threatened or beat them, under present law would be subject to a 10-20 year sentence for burglary, a separate and consecutive 10-20 year sentence for each individual robbed and a separate sentence of up to 10-20 years for each individual on whom an aggravated assault was committed. In addition, separate sentences could be imposed for possession of an instrument of crime or prohibited offensive weapon, terroristic threats, violation of the uniform firearms act, etc. Thus a single burglary/robbery/assault case might give a judge a potential minimum term of 60 to 70 years to work with. And if there were multiple crimes (different residences and different victims) the number would rise geometrically. While sentences exceeding the defendant's life-span may provide some emotional catharsis for a sentencing judge and/or a victim, and may even help to get a judge favorable publicity and reelection, they do not represent either a rational or an humane approach to the sentencing process. Judges who might tend to impose 50, 70 or 100 year minimum sentences should not be encouraged to double those prison terms by this legislature or anyone. We are hopeful, and confident, that if this provision is included in the final version of this bill it would be rendered superfluous by the overwhelming majority of serious and reasonable judges who understand, and care about, the implications of the sentences they impose. We simply do not want to encourage the few judges who regard their role in sentencing as providing divine and eternal retribution. Again, we would urge this House to delete the first sentence in Section 503, and the repealers relating to 42 Pa.C.S.

Section 9755(b), 9756(b), 9756(c), 9757 and the Act of June 22, 1931, (P.L. 864, No.280).

THE EX POST FACTO PROBLEM

In addition to this objection to Section 503, we should also point out that this provision as it now stands constitutes ex post facto legislation which is prohibited by both the Pennsylvania and the U.S. Constitution. The first sentence of Section 503 allows the imposition of a greater sentence where the sentencing occurs after the effective date of the act. This means that an individual who committed, let us say, a burglary of an occupied residence prior to the enactment of this bill would be subject to a 10-20 year sentence. If his sentencing was delayed until after the effective date of this Act, that potential prison sentence would be effectively doubled - he could received a 20 to 20 year sentence. Such an increase in the authorized sentence after the defendant had committed the offense is constitutionally prohibited.

DENIAL OF PAROLE

Section 505 provides a safety-valve alternative to the parole decision, the Department of Corrections may petition to bar an inmate's release at the expiration of his minimum term. Section 505(b) both discusses the kind of evidence that may be considered and appears to lump together hearings on non-parole and on parole revocations ("in determining that a parole violation took place, or upon a petition filed...."). To the extent that it applies to parole revocation hearings, this Section conflicts with a large body of state and federal law, much of it with constitutional underpinnings, mandating certain procedural rights at parole revocation proceedings. These include limited confrontation rights, a right to adequate notice, to counsel, etc. See e.g. Morrisey v. Brewer, 408 U.S. 471, (1972); Gagnon v. Scarpelli, 411 U.S. 778, (1973); Commonwealth v. Davis, _____, Pa._____, _____ A.2d _____(February 6, 1991)(hearsay evidence that defendant pulled a knife on his father and was doing badly in school is held impermissible to establish probation violation).

On possible solution to this problem would be to delete the reference to parole violation in Section 505(b) by excising the language "that a parole violation took place, or upon" from line 14 - 15, page 13. This would removed the problem with violation hearing but would still leave a problem concerning a petition to deny parole, which analytically lies somewhere between a parole hearing at which time inmates rights are very limited, and a revocation hearing at which the inmate is afforded substantial rights (see above). We

would urge the House to revamp Section 505(b) to require the Parole Board to allow some confrontation and provide counsel in those relatively rare situations where the Department of Corrections is attempting to extend the inmate's minimum term.

Section 505, in one subsection sets forth the grounds for denying an individual release upon petition by the Department and a hearing, and in a second section captioned "evidence" provides that members of the Parole Board may act on the basis of hearsay evidence and reports.
The House is strongly urge to suggest that the prison terms not be extended solely on the basis of hearsay evidence concerning an inmate's suitability for release. As noted earlier, this extension of the minimum sentence falls somewhere between a parole decision and revocation decision. These two issues carry widely diverse procedural requirements and it is not clear how the law will ultimately treat this new creature. It is suggested that significant problems may be avoided by providing for timely notice to the inmate ("the Department shall file a petition within two months of the projected parole date, a hearing shall be held at least one months prior to projected parole date and a decision rendered at least one week prior to that date"), some elementary confrontation rights ("if requested, absent good cause for denying such a request, the inmate shall be permitted to confront and cross-examine individuals offering evidence against him"), and counsel at such a hearing. We are hopeful that "no parole hearings" will be relatively rare and that providing for counsel at such hearings will not pose a serious problem.

Finally, we would note that the only observed variation between House Bill 239 and Senate Bill 341 occurs in Section 505(a). The Senate version in one respect seems to give the Department and Board more discretion. However, Section 505(a)(2) of the Senate Bill allows an extension of the minimum term (no-parole) based on a single serious violation of the rules, regardless of when that violation occurred, extenuating circumstances, or the relative seriousness of the violation. We believe that the provision of House Bill 239 makes more sense.

NOTICE TO VICTIM

We are skeptical of the value of encouraging victim involvement in the parole decision. While Victim Impact Statements are certainly an appropriate part of the sentencing process, their value, years later and after the inmate has served his minimum term under the observation of prison officials, seems minimal. The interests of a victim in participating in such a process would seem to relate more

to the victim's innate psychological make-up than it would to his or her wanting to help the Department to arrive at a rational parole decision. Furthermore, such responses notifying victims many years after the incident, seems likely to dredge up bad memories best forgotten and psychologically, do the victim more harm than good.

If the legislature is insistent on keeping the victim notification program in House Bill 239 it is suggested, at the least, that Section 506 be restructure with the initial section outlining enrollment in the victim program, a subsequent Section providing for the victims statement of concerns, and the final section dealing with procedure.

PAROLE VIOLATIONS

Section 508 is entitled "convicted violators" but deals with both convicted and technical parole violators. It is suggested that the title of Section 508 be changed to "Parole Violators" and Section A be headed "convicted violators". This would tie in comfortably with Section B which is denoted "technical violators".

APPEAL PROVISIONS

Section 509 allows a parolee to petition for review following the imposition of sanctions under Section 508. Section 509 focuses exclusively on the appropriateness of the sanctions imposed, essentially tracking the Sentencing Guidelines appeal provisions of 42 Pa.C.S. Section 9781(c). While this provisions satisfactorily deals with the issue of sanctions, it overlooks the clear right that parolees have to appeal, with counsel, procedural issues relating to their parole revocations (e.g. right to counsel, notice, confrontation, timeliness, due process, etc.). We assume that Section 509 is non-exclusive and that the drafters realize that the rights and procedures outlined are in addition to the others mentioned above.

DRUG SCREENING

Section 704 provides for drug screening of inmates prior to parole and for testing of parolees. Section 704(a)(1) prohibits the release of an inmate unless he has passed a drug test "within one week prior to the date of release". It is strongly urged, for a number of reasons, that this provisions be modified to require a negative test within <u>two months</u> of the inmates release. First, one week is so short a time frame that any disruption at the laboratory or in record keeping could result in an unfair denial of release to a drug free inmate. In addition, narrowing the time frame to one week before the inmate's projected release date would make it

easier for that inmate to time his cessation of drug use to obtain a negative result. Widening the time frame and giving the Department discretion in the scheduling of the test will tend to randomize the testing process somewhat, both making it a more reliable determinate of good conduct and an increased deterrent to drug use.

Section 704(b) deals with random screening of parolees and sets forth standards determining who should be screened. It is urged that these specific requirements be deleted and in their stead the Department be given discretion in determining who should be tested and how often. This seems to be the approached taken from the first sentence of Section 704(b)(2), but the specific requirements of the preceding paragraph seem to undercut the later vested discretion.

Section 704(b)(2) also makes the parolee taking the test responsible for its costs. We do not know exactly how much the test will costs and how frequently they would be ordered, but, given the generally impoverished state of new parolees, who would generally be subject to the most intensive screening, it is suggested that requiring payment from them may be akin to squeezing blood from a stone. If the legislature is so incline the bill could be amended to give the Department discretion to levy costs against the parolee where he has sufficient income and/or resources to pay.

We thank the Members of the Judiciary Committee and the General Assembly for their interest, concern and forbearance in reading this somewhat lengthy statement. We have tried to express our views as thoroughly and candidly as possible, consistent with our belief that while some individuals require incarceration, the institutionalization of Pennsylvania citizens should be a last, rather than a first, resort.

Very truly yours,

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