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COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

In re: Mandatory Sentencing

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Stenographic record of hearing held in
Room 140, Main Capitol, Harrisburg,
Pennsylvania

Thursday, September 10, 1992, 10:10 a.m.

HON. JEFFREY A. PICCOLA, ACTING CHAIRMAN

MEMBERS OF COMMITTEE

Hon. Robert D. Reber, Jr.
Hon. James R. Heckler

Also Present:

Mary Woolley, Esquire, Republican Counsel
Galena Milahov, Research Analyst
Katherine Em Manucci, Secretary

Reported by:
Emily R. Clark, RPR

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1 ACTING CHAIRMAN PICCOLA: We'll call this
2 meeting to order. The Chairman, Tom Caltagirone, has been
3 unexpectedly called away today. He asked me to sit in in his
4 place and chair this hearing, which will be on the issue of
5 mandatory sentencing and its effects in Pennsylvania.

6 Our first witness is the Commissioner of the
7 Department of Corrections, the Honorable Joseph D. Lehman.

8 Commissioner Lehman, welcome. We understand
9 you have a court commitment and that you want to testify
10 immediately and leave, so we welcome you and ask you to
11 begin.

12 MR. LEHMAN: Good morning, Mr. Chairman. I
13 appreciate your courtesy.

14 Reviewing the effects of mandatory sentencing I
15 think is a very timely issue, not only, frankly, for
16 Pennsylvania, but for the country.

17 Essentially, what we are dealing with is a
18 phenomenon that arose during the early to mid 1980s as an
19 outgrowth of a nationwide war on crime and a war on drugs.
20 The proliferation of mandatory sentences, frankly, was an
21 experience that most states went through as a result of this
22 phenomenon.

23 I think what we need to do now is to step back
24 and ask ourselves in a very objective, in a very reasonable
25 way, what are the advantages and disadvantages of mandatory

1 sentences?

2 I've taken the opportunity to appear before you
3 today, Mr. Chairman, to essentially encourage you to take on
4 this task, as awesome as it is. I recognize that this is a
5 very difficult and thorny policy issue. But, I think, it's a
6 very important one that's related to our notion of fairness
7 and justice in this country. Additionally, because of the
8 price tag associated with the sentencing policies, frankly,
9 which end up sentencing more and more offenders to prison, you
10 and those members of the legislature are left with some very
11 tough budget decisions that we have to make as a result of
12 this policy. In other words, the policies that we enact in
13 this General Assembly in effect are driving and defining the
14 resource needs of the prison system.

15 Today I would simply offer you some suggestions
16 of how we might approach this review. Put simply, in
17 reviewing the viability of mandatory sentences as an
18 appropriate public policy, I think there are several questions
19 that we should examine.

20 The first question I think is a basic and most
21 important question that should be asked and deals with the
22 efficacy of the issue of mandatory sentencing as a policy, and
23 that is whether or not mandatory sentencing has had a
24 demonstrable effect on crime. I think that's a basic issue
25 that we need to sit down and ask rationally and reasonably.

1 A second area is, a mandatory sentence is a
2 legal requirement to impose a sentence of imprisonment based
3 on a single criterion, that single criterion being the offense
4 for which the offender is charged and subsequently pleads
5 guilty to or is found guilty of. A question that we need to
6 ask is whether or not a single criterion is, in and of itself,
7 a sound basis for predicting the risk that individuals
8 represent to the public. I think we need to look at that
9 issue.

10 The third area is mandatory sentences by their
11 very nature in terms of a policy, restrict judicial discretion
12 in favor of prosecutorial discretion. I recognize that many
13 prosecutors would say that it provides a critical, a needed
14 leverage for them in terms of plea bargaining, and in terms of
15 their work load, in their considerable work load, I think
16 that's valid concern that they have. A question that I think
17 should be raised, though, is whether or not there is perhaps
18 another way of, a better way to assist prosecutors in
19 achieving their ends without utilizing mandatory sentences as
20 they are currently constructed.

21 An equally important question has to do with
22 the cost of today's policies. Certainly an issue I referred
23 to earlier. What is mandatory sentencing costing the
24 taxpayers of the Commonwealth? Certainly a question I think
25 this General Assembly has to deal with on a yearly basis.

1 From a historical perspective I think we have a
2 partial picture and I would like to just share some facts in
3 relation to that.

4 In the past 10 years, the Department of
5 Corrections' budget has nearly tripled, from approximately
6 \$127 million in fiscal year '81 and '82, to \$460 or \$461
7 million in fiscal year '91 and '92. Actually, a growth in the
8 general fund budget of 263 percent over that period of time.
9 The Department of Corrections' fiscal year '92-'93 budget,
10 that is, this year, is for \$500 million. That does not take
11 into account the significant cost of operating seven new
12 prisons that are scheduled to come on line by 1995.

13 We, as a Commonwealth, have made significant
14 commitments to the issue of incarceration to public safety in
15 terms of prisons. We've committed ourselves at \$1.3 billion
16 in construction to support the biggest and most expansive
17 prison construction program in the history of the
18 Commonwealth. That commitment represents a commitment to
19 build 10,000 cells. That involves seven new prisons. Each
20 one of those seven new prisons is going to cost the
21 Commonwealth and its taxpayers approximately \$800 million in
22 terms of design, construction, debt service and operation over
23 a 20-year period. That is a significant investment in terms
24 of ensuring the public safety and certainly one that's been
25 needed.

1 But even when we get done with this massive
2 construction program, the fact is that in 1995, looking at
3 today's projections, we are going to still be overcrowded.
4 We're going to be 15 to 20 percent over capacity. That
5 projection assumes that the General Assembly is not going to
6 enact any additional mandatory sentences, isn't going to
7 create any enhanced penalties over what exist today. So no
8 matter how you look at it, we have a significant fiscal
9 issue.

10 Looking at today's costs as I've just shared
11 with you, I believe it's evident that we can't stop there. We
12 need to ask the question of what the future costs of mandatory
13 sentencing are going to be to the Commonwealth and its
14 taxpayers. The question needs to be asked not only in terms
15 of the real cost of prison construction and operation in the
16 future, and that is a legitimate question; the question also
17 needs to look at the lost opportunity costs associated with
18 the impact of mandatory sentences. You have to clear it with
19 the resource constraints of the Commonwealth's revenue and
20 budget so it represents real choices that legislators have to
21 make between what they're going to give up in the future, in
22 order to, in fact, fund additional capacity within the prison
23 system. In other words, what are we going to give up in terms
24 of our ability to fund other services, such as health care,
25 education, child care, or, in fact, rebuilding our

1 infrastructure? Those are tough decisions that the General
2 Assembly will have to make in the future.

3 But the questions that I frame this morning,
4 Mr. Chairman, I think you can tell that I probably have some
5 opinions about the efficacy of mandatory sentences. I
6 intentionally have not gone into any detail in terms of
7 responding to those questions. I recognize the importance of
8 the policy. I recognize the difficulty that this issue is in
9 terms of dealing as a public policy, but the primary purpose
10 of me appearing before you this morning was, frankly, to
11 encourage you simply to take up the task of looking at this
12 very important issue.

13 The bottom line I believe is the efficacy of
14 mandatory sentencing needs to be decided and evaluated based
15 on cost and benefits, and we need to conduct a very reasonable
16 and rational discussion about those. To the extent possible I
17 think the policy needs to be framed based on facts about the
18 sentencing policy, not on what we believe or think it may be
19 doing. That means asking some very tough questions and
20 answering some very tough questions.

21 I'm certainly willing to sit down with any
22 member of the General Assembly and take an objective look at
23 whether or not it makes sense to continue these practices.

24 I thank you, Mr. Chairman, for the opportunity
25 to testify this morning, and I certainly would be happy to

1 respond to any questions that you may have.

2 ACTING CHAIRMAN PICCOLA: Thank you,
3 Commissioner. The questions that you pose are I think quite
4 important for those of us in the General Assembly. Some of
5 the numbers that you gave us, speaking as a fiscal
6 conservative, are staggering, and I think we will have to pose
7 those questions as we deal with the future policy making.

8 I would like to ask you whether or not a factor
9 in arriving at a mandatory sentence, in addition to the ones
10 that you have indicated here, might be simply punishment,
11 particularly the repeat violent offenders that we have imposed
12 mandatories on. Do you think that should be a factor,
13 society's desire for punishment as effected by the policy of
14 the General Assembly?

15 MR. LEHMAN: Absolutely. I think, frankly,
16 that punishment certainly is a purpose of sentencing and I
17 think it's one of the purposes that has to be taken into
18 consideration, particularly for those offenses that are so
19 serious that society says this demands a statement of
20 punishment that involves, for example, substantial periods of
21 incarceration. The question isn't whether punishment is
22 needed. The question is on what basis are you going to make
23 that judgment and who is going to exercise the discretion?

24 I guess the problem I have, and I think that
25 many prosecutors and judges will probably tell you, that

1 they've had cases in which there were mandatory sentences,
2 mandatory laws that mandated that an individual be sentenced
3 based on the crime, where the crime in and of itself was not
4 necessarily representative of the risk to that individual.
5 There were other factors that they could not take into
6 consideration. I guess the question to the General Assembly
7 is, is punishment is valid but who is going to make that
8 decision? And is it appropriate to make it based on a single
9 criterion.

10 ACTING CHAIRMAN PICCOLA: Counterbalancing the
11 punishment, you indicate that apparently the predicting of
12 risk should be a factor. How good are we at that?

13 MR. LEHMAN: Well, frankly, I don't think
14 anybody would say that we have any ability with any degree of
15 certitude to take an individual case and make absolute
16 predictions how somebody is going to behave in the future.
17 But I think what we do have and I think we need to recognize
18 it, we have a sentencing law in the Commonwealth and
19 sentencing guidelines that says that we, in fact, are going to
20 take into consideration variables that relate to prediction of
21 future behavior. We have sentencing guidelines which are
22 based on the offense severity and prior record.

23 Frankly, the most reliable from my perspective
24 in predicting future behavior is past behavior. The reality
25 is that sentencing guidelines take those past behaviors into

1 consideration, where mandatory sentencing does not and, in
2 fact, excludes it from consideration.

3 ACTING CHAIRMAN PICCOLA: You've raised my next
4 question, then. Do you think as an alternative to mandatory
5 sentencing we could somehow make the sentencing guidelines
6 system that we have in Pennsylvania, which is I think by most
7 accounts fairly unique in terms of other states, make it more,
8 make those guidelines more toward the mandatory as opposed to
9 less toward the guidelines area? In other words, we could
10 effect the public policy of the General Assembly through the
11 guidelines as opposed to mandatory sentencing and statutes?
12 Do you think that's possible?

13 MR. LEHMAN: Frankly, I think that there is a
14 way and I've indicated to Mike Eakin at the Prosecutor's
15 Association, to sit down and look at building in a process
16 that looks at other criteria than simply the charge, charging
17 offense, in looking at ways that other criteria could provide
18 the basis for going before the court in requiring an
19 incarcerated sentence. That's what mandatory sentences is;
20 it's only a mandate to the in/out decision relative to going
21 to prison.

22 And I think there are other ways to accomplish
23 that to, in fact, meet the prosecutorial needs relative to the
24 issue of having the leverage, and at the same time looking at
25 a broader range of criteria that, frankly, would serve the

1 public better.

2 **ACTING CHAIRMAN PICCOLA:** On your dollar
3 statistics on page 2 of your testimony, you indicate that the
4 Department of Corrections' budget has nearly tripled through
5 this or through last fiscal year, and the current budget is
6 for \$500 million, which takes it beyond tripling. How does
7 that compare with other states of similar size to
8 Pennsylvania, if you know?

9 **MR. LEHMAN:** I think probably fairly
10 comparable. If I were to look at -- we are the 10th largest
11 system in the country in terms of incarcerated inmates. And
12 that, by the way, doesn't count the county prisons, that only
13 counts the state. If you were to look and compare it, the
14 predominant cost of any prison system, of course, is your
15 staffing. It represents 70 to 80 percent of the operating
16 budget. The reality is that if you look at our
17 staff-to-inmate ratios, we are below the national average. I
18 would suspect in terms of the northeast that our cost, per
19 diem cost is less than most of the northeast states.

20 **ACTING CHAIRMAN PICCOLA:** The \$1.3 billion that
21 is presently committed to construct, I believe, it's the seven
22 new prisons that are not yet on line but either under
23 construction or planned?

24 **MR. LEHMAN:** That's correct.

25 **ACTING CHAIRMAN PICCOLA:** And they will provide

1 us with 10,000 cells that we do not have today?

2 MR. LEHMAN: The 10,000 cells actually
3 represents the seven new prisons plus some additions of blocks
4 and modular units at existing facilities.

5 ACTING CHAIRMAN PICCOLA: And what is our
6 capacity today?

7 MR. LEHMAN: 16,514. And we have about 24,580
8 inmates.

9 ACTING CHAIRMAN PICCOLA: And since the
10 enactment of mandatory minimums, how many cells did we add to
11 the system? I guess since about 1982 up till today. I mean,
12 how many are on, how many new ones were put on line in that
13 period of time?

14 MR. LEHMAN: I don't have that figure, Mr.
15 Chairman, but I can get it to you. My press secretary says
16 4,500, approximately.

17 ACTING CHAIRMAN PICCOLA: Thank you.

18 Staff have any questions?

19 (No audible response.)

20 ACTING CHAIRMAN PICCOLA: Thank you very much.

21 MR. LEHMAN: Once again, thank you, Mr.

22 Chairman.

23 ACTING CHAIRMAN PICCOLA: Our next witness is
24 the Honorable Maurice Cohill, Jr., U.S. District Court for the
25 Western District of Pennsylvania.

1 Judge Cohill, welcome.

2 JUDGE COHILL: Thank you, sir.

3 ACTING CHAIRMAN PICCOLA: Glad to have you here
4 this morning.

5 JUDGE COHILL: Thank you.

6 I am pleased to be asked to testify before this
7 committee, and I was asked by David Krantz to consider the
8 effect of sentencing guidelines and mandatory minimum
9 sentences and prison conditions in general. I was told that I
10 need not present a formal statement, although I could prepare
11 a short one if I desired. I've been trying a case in Erie for
12 the last three weeks and took today off, much to the relief of
13 the lawyers and the jury, in order to appear here.

14 My secretary is on vacation and I've made some
15 handwritten notes, which hardly amount to a formal statement
16 but I would like to use them for a few minutes and then so you
17 can see where I'm coming from, and then I'll be happy to
18 answer any questions, or engage in discussion.

19 By way of background, I've been a judge for the
20 last 27 years. I served in the Court of Common Pleas of
21 Allegheny County, particularly in the juvenile court for 11
22 years, and then I was appointed to the United States District
23 Court for the Western District of Pennsylvania in 1976 by
24 President Ford. I was chief judge of that court for seven
25 years, from July 2nd, 1985, to July 1st of this year, when I

1 had to step down because of a statutory requirement that no
2 federal judge can serve as chief judge for more than seven
3 years.

4 Since November 1st of 1987, the judges of the
5 United States District Courts, which are the federal trial
6 courts, the federal equivalent of the Courts of Common Pleas,
7 have been required to utilize guidelines in their sentencing
8 of convicted defendants. Congress had created a sentencing
9 commission consisting of some federal judges and others to
10 issue guidelines for sentences in an attempt to achieve some
11 uniformity in sentences, regardless of whether the judge might
12 be called an easy judge or a tough judge.

13 I think except perhaps for the judges who were
14 members of the sentencing commission, I've never met a federal
15 judge who felt that the guidelines improved anything. And I
16 hasten to add that the guidelines really make our job from an
17 emotional standpoint much easier. You can just say to some
18 weeping mother or spouse or child, well, you know, I'm sorry,
19 I can't do anything about the sentence, I'm bound by the
20 guidelines.

21 And I also would say that any state or federal
22 judge that I know will tell you that the toughest task that a
23 judge has to perform is sentencing someone. However, I think
24 guidelines are a cop-out. The taxpayers are paying the judges
25 pretty nice salaries to be judges, and most of the judges I

1 know are fairly intelligent, decent folks. I think they
2 should be allowed to have some discretion.

3 The guidelines themselves can become irrelevant
4 because of mandatory minimum sentences. I really appreciate
5 the difficult job the legislative branch has these days in the
6 field of criminal justice. The public is fed up with crime.
7 Who can be elected if they appear to be soft on crime? But if
8 the public would stop for minute and think, they would realize
9 that no decent person wants to be soft on crime. But there
10 can be, I think, a rational approach to the problem. The job
11 is to educate the public, and I suggest that the way to do
12 that is to tap another public nerve and that's the priority
13 given to the way their tax dollars are being spent.

14 You heard some very interesting figures from
15 Commissioner Lehman and I'm going to give you some more from
16 the federal standpoint. There's no question that the
17 guidelines, the mandatory minimums and the absence of parole,
18 at least at the federal level, contribute to prison
19 overcrowding. I don't know the latest figures on state costs,
20 other than what we heard Commissioner Lehman say, but
21 according to the Federal Bureau of Prisons, as of August 7th,
22 1991, the cost of keeping a person in prison is \$1,492 a
23 month, or call it \$1,500 a month, or \$18,000 a year. And, of
24 course, this doesn't reflect costs of \$20,000 to \$40,000 per
25 bed to construct new prisons.

1 I've seen one state, Minnesota, which estimated
2 their cost for keeping a prisoner at \$30,000 a year.

3 The federal cost of keeping a person in a
4 halfway house is \$991 a month, or call it \$1,000 a month, or
5 \$12,000 a year, or about two-thirds of the cost of prison.

6 Last, the federal cost of keeping a person on
7 probation or under supervision after they're released from
8 prison is \$115 per month, or \$1,380 per year.

9 It seems to me that except for those who are
10 violent people, every effort should be made to develop and
11 utilize alternatives to prison. I think if the public could
12 be shown the cost savings and effectiveness of alternate
13 programs, they would appreciate the efforts of the legislators
14 to avoid heavy expenditures for prisons.

15 Having said all that, I'd like to close with a
16 plea for my own county, and I wish I had known Commissioner
17 Lehman was going to be here. I've had the case of the
18 conditions of the Allegheny County jail since 1976 and I've
19 had the case of conditions at the state correctional
20 institution at Pittsburgh, better known as Western
21 Penitentiary -- of course, that's a state institution -- I've
22 had the case of the conditions there since 1989, I think it
23 was about 1989.

24 In 1990 the Pennsylvania legislature passed Act
25 71, making available \$185 million in state matching funds to

1 counties for new jail construction. This was an initiative of
2 the Allegheny County and Philadelphia delegations. The
3 Department of Corrections is to implement that Act. The
4 county, Allegheny County, is under my court order to complete
5 its new jail by December 1st, 1994. It requested the
6 Department of Corrections to review its grant application by
7 June 30th of 1992. To date, it has received no approval and
8 now construction, which already had begun, may be delayed.

9 I won't bore you by describing the conditions
10 which I found when I first visited the Allegheny County jail
11 in 1976 and when I first visited the penitentiary a couple of
12 years ago. I make it a point in cases like that of visiting
13 the scene that is the subject of the litigation because that's
14 the best way -- and these are non-jury cases, of course --
15 that's the best way I think a court can familiarize itself
16 with the problems which are being discussed. Even the
17 toughest of the tough on crime people would have been revolted
18 and appalled by the conditions that I found at both of these
19 institutions.

20 I realize this commission may have nothing
21 directly to do with the Department of Corrections, but if the
22 opportunity arises, I know that the Allegheny County
23 delegation and our county commissioners and certainly I
24 personally will appreciate anything that can be done to
25 expedite the review process of these applications for grants

1 by the counties, and have the review expedited by the
2 Department of Corrections.

3 So those are my thoughts, Mr. Chairman. I'll
4 be glad to try to answer any questions.

5 ACTING CHAIRMAN PICCOLA: Thank you, Judge.
6 We've been joined by Representative Bob Reber of Montgomery
7 County. Welcome.

8 REPRESENTATIVE REBER: Thank you, Mr.
9 Chairman.

10 ACTING CHAIRMAN PICCOLA: Judge, since you have
11 the two cases involving the Allegheny County jail as well as
12 Western Penitentiary, first with respect to the Allegheny
13 County jail, based upon whatever evidence you've derived in
14 that case thus far, what has contributed most to that
15 overcrowding situation, and paying particular attention to the
16 mandatory minimums, I guess particularly our drug mandatories
17 which probably impact on county jails more than the
18 mandatories for other offenses.

19 JUDGE COHILL: Right. Well, I think a lot of
20 it, of course, is the fact that the county jails have to take
21 state prisoners, people that have already been convicted of
22 crimes when the sentence is two years or less.

23 When I first got the jail case in 1976,
24 ironically enough, overcrowding was not a problem. The
25 explosion began across the United States, and Pennsylvania and

1 Allegheny County were no exceptions, in 1983. Between '76 and
2 '83 the problems only related to the conditions within the
3 jail, which were absolutely horrible.

4 But I, in the first opinion that I wrote about
5 the jail, I stated: "Fortunately, overcrowding is not a
6 problem at the Allegheny County jail." That all turned around
7 in 1983. And it's mostly, of course, drugs. 60 percent of
8 the prisoners in federal prisons are there on drug offenses,
9 and many others I'm sure don't show up in statistics. I mean,
10 for instance, a bank robber that robs a bank because he's a
11 drug addict. That doesn't show it's a drug crime, that's a
12 bank robbery. So I'm sure that 60 percent is an
13 understatement of the people in federal prisons for drug
14 offenses.

15 But it's mainly, I think, the fact that the
16 jail has to not only house detention prisoners, prisoners that
17 haven't had a trial yet, but those who are under state
18 sentences and the state insists that they be kept in the jail
19 because the state doesn't have room. And then there's a third
20 category of prisoner in jails and those are either federal or
21 state witnesses that have to come into Pittsburgh to testify
22 in some trial or other and they're kept there for two or three
23 days or whatever the case may be, waiting to testify in
24 someone else's trial.

25 But I think drugs are at the bottom of the

1 whole thing. But certainly on top of that when you add the
2 mandatory sentences, why, you've got a problem.

3 ACTING CHAIRMAN PICCOLA: What is the current
4 population and capacity of Allegheny County jail?

5 JUDGE COHILL: It was built for about 500, and
6 I put a cap on it. I finally let them, well, I finally let
7 them go up to 560, I think, and I have a prison monitor, a
8 woman that watches both the prison and the jail for me. She
9 inspects periodically to let me know how the cells are being
10 kept up and so forth.

11 Since the case began, the county built an
12 annex, a so-called jail annex, which houses some 475
13 prisoners. The new jail is going to hold 2,400 prisoners.
14 When the new jail is built, the old jail will be abandoned. I
15 don't know what the county intends to do with the annex. I
16 suppose if they're wise, they're going to hang on to the annex
17 because I think they may need that, too. But the 2,400, at
18 least on present projections, the 2,400 beds in the new jail
19 should be able to take care of things. But they have been,
20 they've just added additional beds in what had been our public
21 safety building down there so they now have three jail
22 facilities, a number of community-based institutions, and a
23 number of, or agencies I guess I should say, and they're also
24 renting space in outlying counties, in jails in outlying
25 counties.

1 ACTING CHAIRMAN PICCOLA: So they have 975
2 maximum number of people in the Allegheny County jail plus the
3 annex?

4 JUDGE COHILL: I would say that's about right.
5 I won't swear to that figure, but it's about right.

6 ACTING CHAIRMAN PICCOLA: Thank you.

7 Does anyone have any questions? Mary Woolley.

8 MS. WOOLLEY: Judge, it's not a question in
9 response to your concern and Allegheny County concerns, we've
10 had concerns from other counties, too, who have made
11 application for those grants. And the Department of
12 Corrections told me there's been an overwhelming response, an
13 unanticipated response in terms of the volume and it's causing
14 a re-allocation problem. I mean, the fact that they're going
15 to have to reallocate and not live up to the commitment that
16 was anticipated by Allegheny County and other counties, when
17 we originally passed litigation negotiations about the writing
18 of the law and the implementing regulations.

19 JUDGE COHILL: I just hope that the whole --
20 there is certainly a sense of urgency everywhere and I hope
21 that the Department senses that.

22 MS. WOOLLEY: Thank you.

23 REPRESENTATIVE REBER: Just one question, Your
24 Honor. I apologize for walking in in the middle of your
25 testimony. Unfortunately, the turnpike was a little in

1 disarray where I had to come from.

2 More of a philosophical question than anything
3 else, and I appreciate the opportunity to have a forum to ask
4 a federal district judge his thoughts on that, something that
5 we grapple with all the time on the entire concept of
6 mandatory sentencing.

7 I've always been one, and I guess it comes from
8 my training as having been admitted to the bar back in 1972
9 and prior to eight, nine years of practicing and doing a lot
10 of criminal work at that time, defense work before coming to
11 the legislature, that you have that experience, if you will.
12 Would mandatory sentencing, I've always been one that's very,
13 very, very, very reluctant in putting the mandatory into it,
14 because I've always had a longstanding feeling that once
15 you've been involved in a case, there isn't any hard and fast
16 rule for each case. Each case is extremely and uniquely
17 different from the one that carried the same identical offense
18 into the issue.

19 I would just like your personal thoughts on
20 whether there is a need for a plethora of mandatories, or
21 whether you feel the judiciary is in a position, and uniquely
22 equipped to mete out the appropriate sentences for the
23 appropriate case that comes before you, on the facts of that
24 particular case?

25 JUDGE COHILL: I spoke to that briefly just

1 before you came in. But no, I certainly, I don't think
2 they're necessary. As I said then, I think most judges are
3 pretty intelligent, decent people, and you may not agree with
4 their decisions but the public does place with their judges a
5 great deal of discretion, and I think if you can just feed
6 everything into a machine and have it spit out the appropriate
7 sentence, then you don't need judges at all. I certainly feel
8 that judges should have discretion.

9 REPRESENTATIVE REBER: Thank you.

10 ACTING CHAIRMAN PICCOLA: Thank you, Judge.
11 Appreciate your coming down from Erie to be with us today.

12 Our next witness is Peter Rosalsky, Esquire, of
13 the Defenders Association of Philadelphia.

14 MR. ROSALSKY: Thank you. Several weeks ago I
15 spoke to David Krantz on the telephone and he told me the
16 topic of the hearing, the topic being how are mandatory
17 sentences working in Pennsylvania, and I thought about it for
18 a while and it seemed to me that if working means that those
19 people who commit crimes within the scope or within the web of
20 the mandatory statutes, whether they're getting mandatory
21 sentences, then the answer is yes, the mandatory sentencing
22 system is working.

23 On the other hand, if working means that
24 justice is being applied, then I think in all too many cases
25 the mandatory sentences are not working.

1 It appears to me that the reasons that
2 mandatory sentences were enacted are probably a legislative
3 belief that to a greater extent than they agreed with, that
4 certain judges were being lenient with certain types of cases
5 and not imposing the sentence that was warranted.

6 In response to that I think there was a move to
7 create mandatory sentences where at least in those particular
8 classes of cases the judges did not have discretion; certain
9 sentences had to be imposed, in essence shifting the
10 sentencing function from the judge to the legislative body
11 that has created the mandatory sentences.

12 The problem that we find with that, we being
13 defense attorneys, is that all too often cases that fit within
14 the scope of the mandatory sentencing law are not those cases
15 that either the legislature or a judge who is imposing a
16 sentence, envisions when they think of that type of crime.
17 And therefore, in those particular types of cases, the
18 defendant, the accused, is subject to a mandatory sentencing
19 law, though, if the judge were free to sentence or if, in
20 fact, a legislative body that passed the mandatory sentencing
21 law were free to hear the facts, they would say, hold on,
22 that's not what we mean, that's not what we believe a
23 mandatory sentence should be directed to.

24 ACTING CHAIRMAN PICCOLA: Could you give us an
25 example? I don't mean to interrupt you.

1 MR. ROSALSKY: Sure. I have three examples
2 which I've chosen, and some of them may strike certain members
3 of this committee as being, as viscerally establishing my
4 position, some of them you might not be moved by. There are
5 other ones that I could mention, but I've chosen three.

6 The first one I'll mention is there's a
7 mandatory sentencing law in Pennsylvania that you have to
8 serve five years in jail if you visibly possess a firearm
9 during a crime of violence. So if you shoot someone, let's
10 say, that's generally a mandatory sentence of five years.
11 That makes sense when we think about robbers who, in the midst
12 of robbery, shoot someone, gang members who are on the street
13 shoot each other, a sentence of five years is reasonable. In
14 fact, it may even be lenient in particular situations.

15 Our office recently had a case of a woman, a
16 young woman, a mother of three, who was a continual victim of
17 what I'll call abuse by her husband. He had beaten her in the
18 past, caused hospitalization. She went for treatment, she
19 came back, and he had been rather physically abusive, not only
20 to her but to the children. Well, one day he came in, he was
21 abusive to her again, he beat her, he beat the kids but then
22 he was done with it. He had had too much to drink, he was
23 done with it and he decided he was going to leave, he had no
24 more beating to do, he had done his full course of beating.
25 As he was leaving, the young woman got the gun which her

1 husband had kept in the house, and, in fact, had used to
2 threaten her on prior occasions but not this occasion at all.
3 She got the gun, she shot him as he was leaving.

4 In that particular case, that shooting was not
5 justified. The self-defense shooting is only permissible if
6 you shoot someone to protect yourself from imminent serious
7 bodily injury, then about to occur. In this case the husband
8 had beat her but he was done with it and he was leaving. She
9 shot him. That required a five year mandatory sentence.

10 Now, there's no question that the woman did
11 something wrong and there's no question that she needed to be
12 punished. The question is was she similarly situated to the
13 gang member who shoots, to the robber who shoots, such that
14 she needed five years in jail to pay back society for her
15 deeds.

16 Another example, which again, I don't know how
17 other members of this Committee will respond to it, has to do
18 with sexual offenses against minors. We have a mandatory
19 sentencing law that says that if you commit a number of sexual
20 offenses against a minor, you must do five years in jail. One
21 of the offenses is involuntary deviate sexual intercourse,
22 which includes oral sex. If you have oral sex with anybody
23 under 16 years of age, 16 years is what the statute defines as
24 a minor, you must do five years in jail. And again, when we
25 think about that, we think about a pedophile, a 30- or

1 40-year-old guy who might go to a park, entice a young girl, a
2 five- or six-year-old, to come to the back of the park and to
3 have some involuntary deviate sexual intercourse, some oral
4 sex, and when we think about that, five years doesn't sound at
5 all excessive. In fact, it may sound a little lenient.

6 But then what about the situation where you
7 have a boy who is a little over 18, which is an adult in
8 Pennsylvania, a girl who is a little bit shy of 16, she's 15
9 and a half or something. They're in love, they're dating each
10 other. They think they're in love, they're dating each
11 other. They engage in consensual sex. They both agree to
12 have sex. Under the law in Pennsylvania, since the boy is
13 over 18, the girl is under 16 and since under the criminal law
14 of Pennsylvania, a girl under 16 or anybody under 16 cannot
15 consent as a matter of law to oral sex, this boy has committed
16 a crime which requires five years in jail. So he would be in
17 jail during what might otherwise have been his college years,
18 from age 18 to 23.

19 Again, it may be proper for this legislature to
20 outlaw sexual relations with somebody under 16, and perhaps if
21 that's the case, then there should be a punishment, but five
22 years in jail in this situation, again, seems not what this
23 legislature had in mind, and it seems excessive.

24 If I could give one more example. It has to do
25 with the new drug mandatory sentencing laws. Under the new

1 drug mandatory sentencing laws, if you have possession of,
2 let's say, cocaine with intent to deliver it and the amount
3 you have is more than a hundred grams, then there is a
4 mandatory sentence of four years in jail. And again, if you
5 have somebody who is a real dealer of drugs, he or she buys
6 drugs, weighs them out, distributes them, gives them to other
7 people to deal, then it's a real distributor of drugs, that
8 four-year sentence does not seem excessive. But you have all
9 sorts of differences of factual situations.

10 We very often see people that I'll call mules,
11 people who transport drugs, somebody who is a drug user
12 themselves and for a hundred dollars, they'll take a package
13 from Philadelphia to Pittsburgh on a train for a hundred
14 dollars, or something like that. A person who is doing that
15 with a hundred grams of drugs, again, gets that same four-year
16 prison sentence. I'm not saying that that person is not a
17 criminal. He is, or she is, and they should be punished. But
18 again, the mandatory sentencing laws create a wide net where
19 there's no discretion and that person who, for a hundred
20 dollars is told to transport drugs from point A to B, who has
21 done a wrong, is treated the same way as the real drug
22 trafficker, distributor, the real person that's involved in
23 the underlying drug problems.

24 Now, I bring up these three instances and some
25 of you may agree that the ones I've picked offend you in terms

1 of requiring mandatory sentences, some of you may not, but the
2 point is, that when the mandatory sentencing laws were
3 enacted, it seems to me that the legislature had in mind
4 certain stereotypic crimes, certain types of crimes that fit
5 within the scope of the mandatory sentencing laws, and
6 inevitably, particular cases come up which don't raise those
7 facts, which raise different facts and where requiring that
8 same mandatory sentence is really excessive.

9 So the bottom line point that I think these
10 examples show, and that I would urge to this Committee, is
11 that a judge who hears the case, hears the particular facts of
12 it. He hears a case, or she hears a case, and maybe it is a
13 pedophile, but maybe it's the young couple that's in love, and
14 as a result of that that judge imposes a particular sentence
15 sensitive to the facts. When you have mandatory sentencing
16 laws there is no sensitivity to the facts, no dealing with
17 unique facts, everything is treated alike. And,
18 unfortunately, it, in all too many cases, creates its own
19 forms of injustice. And as a result of that, our position is
20 that mandatory sentencing laws are just, they paint in such
21 broad strokes that they unnecessarily do injustice in a not
22 insubstantial number of cases, and we believe that more
23 judicial discretion in general would create a greater amount
24 of justice in sentencing. Though in a particular case you can
25 disagree with a particular sentence, at least the judge who

1 has the ability, the power, the authority to try to make the
2 sentence meet the crime and the criminal, I think there's a
3 greater chance that that judge will create a just sentence.
4 Thank you.

5 ACTING CHAIRMAN PICCOLA: Thank you. On the
6 three examples that you cited, is there not some prosecutorial
7 discretion that can take into effect the kind of factual
8 scenarios that you painted for us and affect the end result
9 with the kinds of charges that are actually brought?

10 MR. ROSALSKY: Well, there are two answers to
11 that. The first answer is in the sexual case, no. There's no
12 prosecutorial discretion. This legislature enacted different
13 types of mandatory sentencing laws, and the one that deals
14 with sex offenses against minors does not require the
15 prosecutor to invoke the mandatory. It is automatically
16 invoked. The prosecutor can say, I don't even want the
17 mandatory, but it's too bad. The mandatory must be imposed in
18 the cases involving sexual offenses to minors.

19 So the answer is at least as to my second
20 example of the sexual offense, no, there is no prosecutorial
21 discretion as to whether the prosecutor invokes the
22 mandatory.

23 As to the other two offenses, the one with the
24 gun and the one with drugs, yes, the prosecutor does have
25 discretion as to whether he or she invokes the mandatory in

1 those particular cases. And the only question I would ask as
2 a result of that is, should it be the prosecutor who has the
3 predominant role in determining the sentence by either
4 invoking or not invoking the mandatory? Or should it be the
5 judge, who arguably is the more impartial person trying to do
6 justice in the particular case as opposed to an advocate
7 either for the defense or the Commonwealth.

8 ACTING CHAIRMAN PICCOLA: Our next witness is
9 going to -- wait. We may have some other questions for you, I
10 was just -- our next witness is Mike Eakin, the president of
11 the District Attorney's Association and I don't know if he, I
12 saw he came in during your testimony. I'm going to ask him
13 about your three scenarios and see what his, how he as a D.A.
14 would handle them. So I'm putting him on notice that he's
15 going to respond to the questions that you raised.

16 MR. ROSALSKY: Okay.

17 ACTING CHAIRMAN PICCOLA: Do any other members
18 of the Committee or staff have questions? Representative
19 Reber?

20 REPRESENTATIVE REBER: Just a quick question.
21 On your hypothetical involuntary, the 18-plus and the 15-plus,
22 do you know whether anyone has been charged, convicted and
23 sentenced under the statute you referred to with that kind of
24 set of facts? Or a similar set of facts?

25 MR. ROSALSKY: I don't have any particular case

1 in mind. I know that people come to me all the time at the
2 Defenders Association and ask me about it, so I know people
3 have been charged with it and I know people have been facing
4 that type of question. I don't know any particular case
5 where, in fact, it played out that way.

6 REPRESENTATIVE REBER: That was our
7 understanding, too, just chatting at sidebar up here when you
8 were referring to it, because I suspect there is some
9 prosecutorial discretion. I don't know if there's been any
10 plea bargaining that would have alleviated it or anything of
11 that nature, because I don't think there's any doubt that that
12 at least, speaking for myself, is an obvious scenario that was
13 not intended to take place. I think that goes back to the
14 concern that I had with the judge that preceded you of the
15 concern with mandatories. It obviously highlights, I'm more
16 concerned whether the actual scenario has developed already
17 that has occasioned you to make the comment.

18 MR. ROSALSKY: And I guess I would also just
19 say, I've picked three statutes and three scenarios. There
20 are different scenarios and there are different statutes, and
21 the general point I was trying to make is there are those
22 cases that aren't envisioned by the legislature which do fit
23 within the terms of the mandatory, and whether any particular
24 one has or has not played out, the point is that there are a
25 lot of them out there that do play out.

1 I would also indicate that as I said to the
2 original question, there is no prosecutorial discretion as to
3 whether the mandatories applied in the sexual context. The
4 Pennsylvania Supreme Court in Heath said that it's automatic.
5 So though it's possible that a prosecutor would say, well,
6 because there's the mandatory I'm not going to charge the
7 involuntary deviate sexual intercourse offense, that's always
8 possible, and there are different prosecutors. But I would
9 suggest that to leave such a possibly egregious injustice in
10 the hands of a particular prosecutor may not be the
11 appropriate person to make that decision.

12 REPRESENTATIVE REBER: I'm not advocating that
13 as a safety valve that we want to look to. Thank you.

14 ACTING CHAIRMAN PICCOLA: Mary?

15 MS. WOOLLEY: What's your experience or
16 practice in Philadelphia in terms of judicial compliance with
17 our sentencing guidelines? There is a rumor.

18 MR. ROSALSKY: I don't know the answer. I see
19 we have the chairman of the Sentencing Guideline Commission
20 here today, so that individual would have the answer.

21 I know from my personal experience of trying
22 cases --

23 MS. WOOLLEY: That's what I'm asking you, your
24 personal experience.

25 MR. ROSALSKY: -- they figure out the

1 guidelines at first, then they see what the guidelines require
2 and then they say, what I'm suggesting they should say, is
3 this case an unusual one, is there an aggravating factor, is
4 there a mitigating factor, is there something else going on
5 out there that you can't punch into the guideline numbers, and
6 there is deviation a fair amount of the time. I have no idea
7 what that is.

8 MS. WOOLLEY: Deviation under the standard, the
9 suggested standard range?

10 MR. ROSALSKY: Deviation under and deviation
11 over. Now, I assume that the correct, the actual statistics
12 can be presented to you, but yeah, there's a deviation under
13 and over, and whether it's more under or over I'm not sure.
14 It might be more under, but there is deviation. But I'm
15 suggesting that that is not an evil. That's part of the, I
16 think, our judges' --

17 MS. WOOLLEY: It's certainly permitted in terms
18 of the way we structured the sentencing guidelines law to
19 permit deviation.

20 MR. ROSALSKY: Right, which I suggest is a good
21 idea.

22 MS. WOOLLEY: Thank you.

23 ACTING CHAIRMAN PICCOLA: Thank you very much.
24 We appreciate your coming up.

25 MR. ROSALSKY: Thank you.

1 **ACTING CHAIRMAN PICCOLA:** Our next witness is
2 Michael Eakin, Esquire, District Attorney of Cumberland County
3 and the current president of the Pennsylvania District
4 Attorneys Association.

5 Mike, welcome.

6 **MR. EAKIN:** Thank you. It's good to be here.

7 I apologize for not being able to attend the
8 entire proceeding, but the commissioners set something that
9 had to do with the budget, and that was my first priority.

10 I would like to state first that what we're
11 talking about is not really mandatory sentencing but mandatory
12 minimum incarceration. Mandatory sentences exist and are
13 really unchallenged in everything from speeding offenses which
14 dictate a mandatory sentence, if you are found guilty of
15 speeding, to murder, which if it's murder of the first degree
16 has a mandatory fixed term of life in prison.

17 What we're talking about are the individual
18 crimes that have a mandatory minimum in terms of
19 incarceration, not fixed terms of incarceration but minimums.
20 And I would suggest first they've been around for a lot longer
21 than just the last 10 years in various forms, but the last 10
22 years has seen the enactment of legislation because of the
23 outcry from the public, the prosecutors, victims of crime that
24 because of the unbridled discretion given to the courts, what
25 is a sizable state sentence in one county is a term of

1 probation in another. In response to whatever factors might
2 be important to that individual judge, be it a prison cap, be
3 it the fact that they personally do not see this offense as
4 serious, or otherwise, it is an attempt to make a floor. And
5 to say that the judge has no flexibility above that floor is
6 wrong, and if there is some criteria that calls for the
7 imposition of a greater sentence, the judge should have that
8 flexibility.

9 Likewise, if the prosecutor is to invoke these
10 mandatory minimums, there is discretion, and while there are
11 several hundred judges, there are only 67 prosecutors, and
12 while there are differences between counties in our approaches
13 to various mandatories, there is that discretion in the
14 elected, and therefore responsive to the people, office to
15 decide whether it's appropriate to prosecute the 18-year-old
16 for acts with his 15-year-old girlfriend, and if there is a
17 decision to prosecute, do we prosecute the crime that carries
18 the five-year minimum? Or do we prosecute something that does
19 not?

20 We are being called upon in our county just
21 yesterday in a serious case of a gunman taking hostages in a
22 public store, yet everyone says how nice a fellow he was, how
23 it was in response to circumstances, domestic and otherwise,
24 whether there was an intent to harm the individuals or the
25 like. Yet we have 25 victims and 25 victims have a voice in

1 this. And in determining the ultimate prosecutorial decision
2 in this case as to whether or not the five-year penalty that
3 would attach if aggravated assault is the final conclusion, is
4 a difficult one. It's one that will require some thought,
5 deep thought on the part of our office.

6 The sexual aspect, the sexual crimes are
7 unique. I agree that it is inappropriate to put an 18
8 year-old in for five years for acts consensual with a
9 15-year-old girlfriend. At the same time there are other
10 things that we have found the five-year mandatory to be the
11 only appropriate means by which to address the problem. We
12 have a 23 year-old committing acts with a 13-year-old. The
13 23-year-old was, in fact, supplying not only means of
14 vandalism to the 13-year-old and friends of the 13-year-old,
15 but encouraging other criminal activity. It was a terrible
16 situation. It adversely affected the psyche of the
17 13-year-old. The 13-year-old is in counseling, having a rough
18 time dealing with it, and according to the reports, probably
19 would have for the rest of the 13-year-old's life.

20 We had a five-year case. We were under much
21 pressure from defense and court to get rid of the five-year
22 mandatory in this case, and the only reason that we were asked
23 to get rid of the five-year mandatory is because, in this
24 case, the sex of the parties was reversed. The 23-year-old
25 was the female and the 13-year-old was the male. And the

1 judge, had this come up to him without a mandatory minimum
2 sentence, likely would not have incarcerated the person who
3 committed these crimes on a 13-year-old and affected the
4 13-year-old for life.

5 The common joke of the office and the court
6 was, well, where were these women when I was 13, ha ha ha.
7 It's an easy attitude to take. Yet when you cut past that and
8 get to the bottom line of what should be done because of this
9 23-year-old's acts to that 13-year-old, if we didn't have a
10 mandatory minimum sentence the person would not have been
11 incarcerated, and I think that would have been a travesty of
12 justice.

13 There are a lot of mandatory loopholes. The 18
14 year-old, the 15-year-old, certainly is one. Homicide by
15 vehicle while DUI carries a mandatory three-year minimum term
16 of incarceration. On many occasions that's totally
17 appropriate. Most occasions it's totally appropriate. But
18 the nightmare fact situation the prosecutor does dread seeing
19 is the couple driving home from their 40th wedding anniversary
20 and dad having a little too much champagne, runs off the road
21 and kills his wife of 40 years. At age 65 is it appropriate
22 to put him in jail for three years?

23 They're difficult calls. There are ways around
24 them. Don't bring the charge. Charge the DUI, charge
25 involuntary manslaughter, give it to the judge's discretion in

1 those cases. That has been done in many places. The
2 flexibility is there.

3 There are cases where the call, however, is
4 very, very difficult.

5 There are places that need cleaned up, and
6 perhaps the sex offenses are the clearest. Guns is another
7 one. The definition of gun includes everything from a loaded
8 44 that is fired during the robbery of the local convenience
9 store, to the CO2 pistol, a pistol that is not operable while
10 being used but is readily capable of being transformed by
11 something that's in the car, perhaps.

12 Five years? Maybe, maybe not. We've had those
13 cases, we've wrestled with them, and we've determined that if
14 it is inappropriate under the circumstances, we don't bring
15 the charge.

16 I would suggest that in the area of drunk
17 driving, however, the clear benefit to the public of mandatory
18 minimum sentences couldn't be clearer. Prior to 1983 in
19 Cumberland County, and I will speak on behalf of Cumberland
20 County in this regard, drunk drivers didn't go to jail. They
21 had a chance to go to jail on a second offense if they really
22 upset the judge. But if there was nothing heinous, no serious
23 injuries, there was no poor attitude on the person's part,
24 they didn't to go jail on the second offense. Third offense,
25 they likely went for a couple of weeks.

1 Since the first offender now gets two days in
2 jail unless he qualifies, or she qualifies, for the ARD
3 program, the public's aware of that. I can't tell you how
4 many times at a cocktail party someone will say, oh, the
5 D.A.'s here, I better not have that second or that third
6 drink, ha ha ha, and they'll laugh and it's a joke. But they
7 don't have that drink. The bartenders complain about these
8 laws to me because their business is down. Their take-out
9 business is up but their sit-in-the-bar and drink-all-night
10 business is down. The public is aware of it.

11 If it takes the second offense and 30 days in
12 jail to get someone's attention that they have a problem, so
13 be it. Individual hardships, sure. Good people going to
14 jail, yes. But deaths are down. Deaths in Cumberland County
15 are way down, and it's a direct response to the mandatory
16 minimum incarceration. Not just because the public is aware
17 of it, but because the police are aware of it and the police
18 are enforcing it, whereas, in the early '80s they did not.

19 In 1984 we prosecuted something like 400 drunk
20 driving cases. Five years later we had 1,100 drunk driving
21 cases. The police are enforcing it and that word is getting
22 around. And people with a problem are getting help, whether
23 they like it or not. And if we didn't have mandatory minimum
24 sentences, that wouldn't be happening.

25 I would like to address not just the sexual

1 case that was mentioned but the other two as well.

2 The battered wife. I just got a flyer in my
3 office for a defense symposium to be held two days to teach
4 defense attorneys how to present the battered wife defense.
5 It is a hot defense at the moment, if you will. It's not to
6 say that the defense legitimately does not exist, it does.
7 But when I get that and see that there are experts waiting in
8 the wings to come in and say this person was battered, she
9 shot her husband, she assaulted her husband, here is the
10 readymade defense and here is a list of experts ready to come
11 in, I wonder about it.

12 Yes, there are cases where it's inappropriate.
13 But again, if it is not self defense, is it wrong to put the
14 person in jail for five years because of shooting someone?
15 When the danger is over? I would suggest that the problem is
16 not the concept of mandatory minimum incarceration, but the
17 complaint is how much. If there is going to be some
18 modification of it, I would suggest in those cases that
19 guidelines that determine how much mandatory time is the
20 answer, not the question of whether there is mandatory time.
21 Because if someone takes a gun intentionally and shoots
22 someone and are fortunate enough not to kill them, I would
23 suggest the letting it up to the luck of the draw of what
24 judge you pull and what the judge's attitude might be is
25 inappropriate.

1 I have two female law clerks, senior law
2 students who attended a class, first class of the year and we
3 were discussing it in the office the other day. They had a
4 professor who was remarking about the good old days when, as a
5 visiting judge, he would go to counties that had lay judges
6 and how he liked that system because he could, in domestic
7 assault cases, lean over and ask the lay judge who knew the
8 parties, did she deserve it or not? That's scary. That's a
9 humorous anecdote, I suppose. They were able to laugh about
10 it and shake their heads but somewhat in fear that this person
11 was a judge. If they felt the wife deserved it, here is what
12 the person gets; if they felt the husband deserved it, here's
13 what he gets. If someone pulls a gun and shoots, that ought
14 to be an option that is removed from the realm of
15 reasonableness by the legislature.

16 The drug case. First, I would suggest someone
17 carrying a hundred grams of drugs is not a mere user of
18 cocaine, is not a mere user but someone who is active in the
19 business, be it as a mule or otherwise. The law, particularly
20 in the drug cases, gives the prosecutor discretion that if
21 you've got it, you want out from under that mandatory minimum
22 incarceration, you cooperate. In other words, you take us to
23 the dealer.

24 Why do the dealers use mules? They use them to
25 insulate themselves. And if there's no mandatory minimum, and

1 I mean a serious mandatory minimum for serious quantities of
2 drugs, are we going to turn that mule? No. The mule's going
3 to say, fine, I'll do my county time because I can tell the
4 judge I was just a courier. I'm just an innocent little cog
5 in the wheel, but I'm scared to death of the big wheel so I
6 can't tell on him. But don't put me away, judge, I'm not the
7 one you want. We're not going to make that leap to the dealer
8 unless we can turn him.

9 We have more drug defendants wanting to
10 cooperate than we have police to supervise them. That's how
11 strong, how effective this mandatory law is. Again, if you
12 want to fine tune what quantities require what time, that's
13 another situation. But the bottom line is that mandatorics do
14 work. They do give the prosecutor the ability to root out and
15 deal with serious crime. They take the whims of sentencing
16 and serious offenses out of the hands of the spin of the wheel
17 as to what judge you get and that judge's attitude. They
18 allow the prosecutor to look the victim in the eye and say,
19 for this offense, this is what the person is going to do and
20 in Pennsylvania mandatory minimum incarceration means you will
21 do that amount of time.

22 You can't know how reassuring that is to the
23 victims, particularly in assaults, sexual assaults, to tell
24 the rape victim, this man is going to do at least five years
25 in jail and he's not going to be out before then. Say, well,

1 he's getting five to ten, what's that mean? He'll do six
2 months? We've heard the horror stories on TV. You can say
3 no, he's doing five years. It's a whole lot better than
4 saying, well, fine, you testify and you put your life in front
5 of the public eye, you told these horrible things that
6 happened to you, and now we'll see if the judge agrees that it
7 was serious or if the judge feels that consent was somehow
8 there or doesn't like the cut of your skirt or where you were
9 that evening.

10 These are serious things we're talking about.
11 The legislature did not enact these for things that were not
12 problems. This is not the response to just the desire on the
13 part of some people to get re-elected by being tough on
14 crime. These are things that were responses to community
15 outcry, victim outcry, prosecutor outcry.

16 Believe it or not, the prosecutor has the
17 obligation to do justice and even more than the judge, whose
18 duty is to do what is appropriate but with larger concerns for
19 the appropriateness as to the defendant. The prosecutor has
20 the responsibility to the entire Commonwealth. It's a
21 responsibility we don't take lightly as we prepare for our
22 first year of mandatory continuing legal education on ethics.
23 As education chairman for the Association, I assure you that
24 that obligation is going to be through every bit of training
25 that we do, and for the most part will be taken by our

1 membership as we know them. That's what we've been doing and
2 that's what we'll continue to do.

3 I'll be happy to entertain questions from the
4 panel.

5 ACTING CHAIRMAN PICCOLA: Thank you, Mike.
6 We've been joined by Representative Heckler
7 from Bucks County.

8 Any members have any questions? Representative
9 Reber?

10 REPRESENTATIVE REBER: No.

11 ACTING CHAIRMAN PICCOLA: Representative
12 Heckler?

13 REPRESENTATIVE HECKLER: I apologize for my
14 tardiness, and I apologize for getting here partway through
15 your testimony, Mr. Eakin.

16 What I hear you saying, and I think it's
17 something that a number of us have thought as these various
18 mandatories were being enacted, is that in general they should
19 remain in place, that it may be appropriate and that it might
20 not offend at least your sense of justice, I don't know to
21 what extent you're speaking for the Association, to look at
22 some of the numbers with the idea of, not notching some of
23 them down, perhaps creating additional distinctions between
24 classes of either defendants or offenses within the structure
25 that exists, and in that way perhaps addressing some of the,

1 you know, that's worth revisiting at any rate, but that we
2 shouldn't be pitching these things out the window.

3 MR. EAKIN: I couldn't have said it better and
4 probably didn't say it better.

5 REPRESENTATIVE HECKLER: I'm sure you could,
6 but you're very kind. Thank you.

7 ACTING CHAIRMAN PICCOLA: Mary Woolley?

8 MS. WOOLLEY: This is on DUI, Mike. We've been
9 contacted by Juniata and Mifflin Counties with a concern about
10 underage drinking, aside from all the strange Supreme Court
11 decisions that came out over the summer. This issue is once a
12 kid is convicted, the kid can either go ARD and get the 90-day
13 suspension or plead guilty and get the 90-day suspension, and
14 they say the kids want to avoid the hassle of ARD so they're
15 just pleading guilty. They don't have to pay for the ARD
16 program and they're getting the 90-day suspension, anyway.

17 So our Representative, Dan Clark, who was the
18 D.A. up there, is suggesting maybe in order to encourage ARD,
19 to get them to go through ARD, to give them time off their
20 90-day mandatory suspension as an encouragement to get the
21 kids into ARD rather than this attitude of, so I'm wondering
22 if the same thing is occurring in Cumberland County?

23 MR. EAKIN: It's a concern that we see from our
24 district justices who deal with most of them, being the
25 summary offense, that there is no carrot, if you will, to get

1 the person into not necessarily ARD itself but into some kind
2 of counseling or educational devise. Some of our district
3 justices, and I understand this is something that's being done
4 pretty much outside the law, if you will, if the juvenile goes
5 to a certain program, attends a certain counseling or
6 training, educational program, they'll dismiss the charge and
7 they don't get any suspension. So it's sort of an informal
8 I'll do what the law, I'll get around this suspension if you
9 do that.

10 I think the concept is one that has been
11 discussed by our Association and probably would not be
12 opposed. We would obviously have to see the specific
13 language, but the concept itself I think is a good one, if it
14 encourages the young person to get in.

15 At the same time, nothing means more to a
16 16-year-old than their driver's license, and I would suggest
17 that there not be some total wiping out of mandatory but a
18 reduction.

19 MS. WOOLLEY: Thank you.

20 ACTING CHAIRMAN PICCOLA: Thank you very much,
21 Mike.

22 MR. EAKIN: Thank you, sir.

23 ACTING CHAIRMAN PICCOLA: Our next witness is
24 Janet Leban, Executive Director of the Prison Society.

25 MS. LEBAN: Good morning, and thank you for the

1 invitation to appear before you today.

2 I would like to start out by saying that more
3 than five years ago on the 9th of June, 1987, William Babcock,
4 who at that time was the executive director of the Prison
5 Society, testified at the Senate Judiciary Committee hearings
6 on mandatory drug sentencing. At that time he testified in
7 opposition to these mandatory sentences, basing his opposition
8 on the effect of mandatories on prison population, and this
9 was five years ago, and the need for trial judges to maintain
10 sentencing discretion, and also on the need for more emphasis
11 on treatment than on punishment, especially relating to drug
12 mandatories.

13 In his testimony, Mr. Babcock said that his
14 comments that day would be in the minority and that it is not
15 very popular to come out against mandatory sentences. We at
16 the Prison Society have not changed our position in the past
17 five years, not with increased prison overcrowding,
18 exponentially increasing corrections costs, and a singular
19 lack of evidence that long prison terms, especially
20 mandatories, reduce crimes.

21 But it is reassuring to observe that other
22 people today are joining our position and that we no longer
23 find ourselves necessarily espousing a minority view.

24 Many state legislators across the country have
25 been reassessing their past proclivity to pass more and more

1 mandatory sentencing laws, including crimes with use of a gun,
2 drug sales, DUI, crimes on public transportation and against
3 senior citizens and crimes committed by habitual offenders.

4 A few legislatures have repealed some mandatory
5 sentencing laws. Others have been working under formal or
6 informal moratoriums on mandatorics. And Pennsylvania seems
7 to be in the latter category.

8 This is reassuring and no doubt in large part a
9 result of the data on prison overcrowding and its monumental
10 cost. You've heard what Commissioner Lehman gave you in terms
11 of figures here involving the costs to the system, and the
12 fact that after we spend all this money and build all these
13 new prisons, the prison population in the state is still going
14 to be 15 to 20 percent over capacity. You've read reports
15 that have filled you in on the numbers.

16 We see that mandatorics are simply a luxury
17 Pennsylvania cannot afford, and I think it's important for the
18 citizens of the state to realize that.

19 We are happy that Pennsylvania has shown
20 courage in passing intermediate punishments on the county
21 level, by passing boot camp legislation and by not passing
22 more mandatorics. We see this as a good start. But we need
23 more and we would like to suggest that legislation be enacted
24 permitting intermediate punishments on the state level. We
25 feel that legislation is needed allocating more funding for

1 alternatives so that they can really work, especially in drug
2 offenses. We feel that the General Assembly needs to look
3 again at earned-time legislation as a separate piece of
4 legislation. We need more options for appropriate
5 life-sentenced prisoners, and Pennsylvania needs greater use
6 of furloughs, pre-release and community corrections centers.

7 This hearing today we see as a positive sign
8 for the future. We stand ready to help you in any way
9 possible, and we certainly appreciate your interest and your
10 concern. Thank you.

11 ACTING CHAIRMAN PICCOLA: Thank you. What kind
12 of alternatives to sentencing would you be advocating for
13 state sentence prisoners? What types?

14 MS. LEBAN: Well, I think that there are many
15 routes to go, and certainly house arrest, electronic
16 monitoring, effective drug treatment programs that would be
17 based in the community rather than within a prison wall, these
18 would be certainly possibilities that would make sense for
19 state prisoners.

20 ACTING CHAIRMAN PICCOLA: Thank you.

21 Any other any questions from members of the
22 panel? Representative Reber?

23 REPRESENTATIVE REBER: Just simply a comment.
24 I agree with a lot of your testimony. I did take objection to
25 the comment that Pennsylvania has shown courage by not passing

1 many more mandatorics or any more mandatorics. I would simply
2 say that I think there's not much left. It seems to be pretty
3 popular and expedient to go after, so that's probably the real
4 reason why you haven't seen much more done. Be that as it
5 may, thank you for your testimony.

6 ACTING CHAIRMAN PICCOLA: Representative
7 Heckler, questions?

8 REPRESENTATIVE HECKLER: No. Thank you.

9 ACTING CHAIRMAN PICCOLA: Thank you very much.
10 Our next witness is Thomas B. Schmidt, III,
11 Esquire.

12 MR. SCHMIDT: On behalf of the American Civil
13 Liberties Union, thank you for inviting us to present
14 testimony this morning.

15 What I have placed on the side table is a copy
16 of the policy that has been adopted by the Pennsylvania ACLU
17 on sentencing that covers a number of issues, including
18 alternatives to incarceration, the use of sentencing
19 guidelines, and so on.

20 ACTING CHAIRMAN PICCOLA: For the record, is
21 that policy number 242?

22 MR. SCHMIDT: Yes.

23 ACTING CHAIRMAN PICCOLA: We'll make it a part
24 of the record.

25 MR. SCHMIDT: I have not prepared to supplement

1 that any written testimony, but especially recognizing the
2 hour of the morning and knowing there are a few more witnesses
3 I would like to make some oral comments and then try to answer
4 questions if there are any.

5 As some of you know, I have appeared before
6 this Committee on behalf of the ACLU in a variety of bowties
7 and on a variety of issues over the last 15 years, and it is
8 usually the case and sometimes I feel that I have an assigned
9 role, which is to be the looney witness who takes a position
10 quite different from those of almost every other witness. It
11 intrigues and encourages me this morning to say, and it's not
12 just a rhetorical device to say this, that I could have said,
13 well, I don't need to testify because you've heard from
14 Commissioner Lehman or Judge Cohill, or Janet Leban, or even
15 on some respects from my friend Mike Eakin.

16 I think you've really heard a unanimity of
17 views on some of the issues that have been presented to this
18 committee, and if I could, I would like to go back to provide
19 a little structure to these remarks before I stop, and mention
20 again some of the questions that Commissioner Lehman started
21 this morning with, and give you a version of the ACLU's
22 position on them, because I think his questions really do
23 structure the kind of assignment this Committee has taken on.

24 The first one that I recall or made a note of
25 is, does mandatory minimum incarceration, to use Mike Eakin's

1 formula, does it work? On one hand, that's a correctional
2 sociological question, perfectly designed for legislatures to
3 wrestle with, and no one believes that it's an easy answer to
4 provide, does it work. There are a number of reports that
5 have been published, one I'm sure you're familiar with in
6 August 1991 by The Sentencing Commission on the effectiveness
7 and impact of mandatory sentencing.

8 There's also an organization known as The
9 Sentencing Project. If the Committee and its staff does not
10 have a copy of their February 1992 report, I would be happy to
11 obtain a copy of it for the staff. But it's a similar
12 analysis to that of The Sentencing Commission about quite
13 simply what is the impact of mandatory minimum incarceration
14 on the occurrence of crime, on the occurrence of recidivism,
15 and the ability in this country both nationally and in places
16 like Pennsylvania, to deliver other kinds of rehabilitation
17 services or whatever.

18 I think that the detailed research, as opposed
19 to the intuitive research, demonstrates that largely mandatory
20 minimum incarceration is not a panacea for drug-based or other
21 kinds of criminal conduct. I think it's appropriate to say
22 that the ACLU's position is not that all mandatory minimum
23 sentences are ipso facto or by definition wrong or somehow
24 unconstitutional.

25 I think Mike Eakin's comments on the

1 effectiveness of DUI as a mandatory minimum sentencing
2 demonstrates that in some selected circumstances perhaps a
3 mandatory minimum will work, and if it works in a way that's
4 fair, it meets most of the tests that this Committee has to be
5 concerned about and that, in fact, the ACLU would be concerned
6 about.

7 But then we go to the next several questions
8 that Commissioner Lehman asked, because statistics may show
9 that something works. His next question was, should the
10 nature of the crime be the only criterion for deciding what
11 the sentence is, or must there be a multiplicity of criteria
12 that the sentencing decision is based on. I think Judge
13 Cohill's comments from somebody who of all of us in the room
14 was most experienced about doing that hard work of a judge,
15 suggests that the greater the number of factors that go into
16 the sentencing decision, the more likely it is that that will
17 be a fair and just sentence. That is the kind of issue that
18 the ACLU is concerned about and that is addressed in the
19 policy statement that I handed up this morning, and that is,
20 that any fair sentencing system has to do more than be a
21 single factor system. It has to take into account not only
22 the characteristics of the offense but the characteristics of
23 the offender, including as many aggravating and mitigating
24 circumstances that can be established.

25 That leads to the next question that

1 Commissioner Lehman posed, and that is, because there is
2 inevitably some discretion in the system, where should that
3 discretion be exercised? Judge Cohill suggested, and it's the
4 ACLU's position, too, that the discretion should be exercised
5 by a judge and to the greatest degree possible, it should be
6 exercised in public view. It should not be a discretionary
7 decision that's made at the police station or even in the
8 district attorney's office, but it should be exercised on the
9 record in a court with pre-sentencing reports and all the
10 other paraphernalia that go into developing and establishing
11 those sentencing criteria.

12 What you heard and I heard is the testimony of
13 Mike Eakin who is a seasoned, very respected, very fair
14 prosecutor, somebody I've had the pleasure of working with,
15 unfortunately not very often, but the sort of prosecutor that
16 any other attorney would be happy to call and work with and
17 feel that he or she was getting a seasoned and well-based
18 decision about how to handle a particular case. But what I
19 heard Mike say was really, trust us, us 67 elected
20 prosecutors, because we will exercise our discretion fairly
21 and appropriately, even in the strange cases that crop up, you
22 can't trust the judges to do the same thing.

23 Even if Mike is right about the trustworthiness
24 of prosecutors versus judges, I think just by putting his
25 solution out on the table like that, you can see what the

1 problems are that his solution can't be a true solution for.

2 If we have discretion and it's to be exercised,
3 let's exercise it in as much a public way as possible, which
4 means judges have to be involved, and if we need structure,
5 use a guideline system. Give the judges the framework and the
6 criteria that are in published form. Don't put it inside a
7 prosecutor's office.

8 Discretion is unavoidable, but give it more to
9 judges than prosecutors. Not because one group is more or
10 less trustworthy, but because one group does it more in public
11 and more subject to written and prepared guidelines than the
12 other group does.

13 The last comment that Commissioner Lehman made
14 that I made a note of gets to the last issue on which the ACLU
15 has no real expertise, and I certainly don't, but it does
16 touch on issues that I think are germane. That is, what I
17 think the Commissioner called the economics of lost
18 opportunities. What do we have to do with our limited
19 financial resources? Incarceration is expensive. There are
20 alternatives to incarceration. Some of those work. Some of
21 those are not being tried because they are literally made
22 unavailable in situations because of mandatory minimum
23 incarceration.

24 Those resources, whether it's drug counseling
25 that doesn't take place because the money has to be spent on

1 building prisons or hiring more guards, whether it's because
2 out-of-prison programs aren't given a fair chance to operate
3 because they're not really used or properly funded, they do
4 touch on issues that have a civil liberties component, if only
5 in the sense that Judge Cohill referred to, and that is, that
6 overcrowded prisons, prisons that are required to be
7 overcrowded, if you will, because our physical resources don't
8 match the outcome of mandatory sentencing, lead to all sorts
9 of other problems that do present civil liberties issues. I
10 won't go into prison litigation because it's not the subject
11 before this Committee, but to the extent mandatory sentences
12 drive us in that direction, when we misuse resources to the
13 constitutional harm of inmates, then I do think that's a
14 factor that has to be taken into consideration. Thank you.

15 ACTING CHAIRMAN PICCOLA: Thank you, Tom.

16 I haven't had the opportunity yet to read your
17 policy, but judging from what you've testified to this
18 morning, it would seem, and perhaps I'm not reading it
19 correctly, but it would seem, carrying it to its, I guess,
20 illogical conclusion is that the position of the ACLU would be
21 that the legislature should simply create the crime and then
22 mandate that every prosecutor prosecute and bring charges
23 against anyone who is suspected of the crime, and then leave
24 the finding of guilt and the amount of sentence or whatever
25 punishment is going to be rendered entirely in the hands of a

1 judge? Am I overstepping your position?

2 I guess the follow-up question is: If that is
3 not your position, then what, if any, role do mandatory
4 minimum terms of incarceration, what value do they have in our
5 criminal justice system?

6 MR. SCHMIDT: Two answers. First, I think
7 you've overstated the position, and that may be a fault of
8 mine for not having stated it clearly.

9 I think the ACLU's position is that a
10 guidelines approach to sentencing is appropriate and that
11 looking at some guidelines system, and the policy discusses
12 briefly the federal guidelines, the critique is not their use
13 but that they don't take into enough account certain
14 mitigating factors that should be part of the sentencing.

15 I think Pennsylvania's system, as I understand
16 it, and I haven't had much personal experience with it, in
17 fact, does try to deal with that by allowing for deviation
18 from public guidelines. It's a flexible system. It does
19 guide a judge's discretion and anybody who has, I think,
20 wrestled with this issue has seen that the main thing in
21 sentencing is to combine some protection from pure
22 arbitrariness with individual treatment of an offender or
23 individualized sentencing.

24 At some level it always produces a kind of
25 paradox, because you can't be purely individual without

1 running the risk of being completely arbitrary. But a good
2 guideline system does produce a close approximation to the two
3 things that balance, so the ACLU does support a guideline
4 system as I understand the ACLU policy.

5 The second part of your question, which is the
6 illogical conclusion of what sounded like my testimony, I
7 don't think is quite right. I think what I tried to suggest
8 is that the ACLU's policy recognizes that there is no simple,
9 pure solution to any problem in the criminal justice system
10 and certainly not to sentencing. The guidelines position is
11 sort of an example of a recognition of the complexity.

12 What the ACLU's policy suggests is that there's
13 a lot of discretion at all levels in the system, from the
14 decision to arrest to the decision to prosecute, to the
15 decision of what offense to prosecute, to whether to seek a
16 certain kind of trial base activity to the judge's decision,
17 to the extent those discretionary decisions can be made in the
18 open rather than in a closed setting, it's preferred.

19 Nobody pretends, certainly the ACLU doesn't,
20 that you can somehow eliminate discretion down below, and we
21 always are going to rely on tough but fair prosecutors like
22 Mike Eakin to make sensible human decisions in the
23 prosecutor's office, and if we don't like them, we support
24 another candidate in the next election.

25 But the preference is to do it as much in the

1 open as possible. So I don't think the ACLU's approach is as
2 simple as to say write the law, make every offense be
3 prosecuted to the hilt and then leave the final decision up to
4 a judge.

5 I think what the ACLU's policy also implicitly
6 suggested and what I tried to do is that many of these
7 decisions may have an impact on a civil liberty issue from
8 conditions of incarceration to fairness in exercising
9 discretion, but in many, many respects they are traditional,
10 legislative decisions about how to spend public money, and
11 we're just citizens then and call on you for your wisdom and
12 don't pretend that the Constitution answers every question.

13 ACTING CHAIRMAN PICCOLA: Within Pennsylvania's
14 system of guidelines, is it your position that there is no
15 room for any mandatory guideline? I guess it's sort of an
16 oxymoron, but is there no role for a mandatory sentence at all
17 in your view?

18 MR. SCHMIDT: Well, I may be straying from the
19 prepared ACLU text when I say that reading it, it appears to
20 me that what the ACLU is arguing for and what I hear other
21 people who are in the system, day in and day out, the
22 commissioner, the judge and the prosecutor, saying is that you
23 look -- and the public defender, I'm sorry, I forgot the
24 public defender -- but you look for a certain appropriate
25 balance that guides discretion. I don't think the ACLU's

1 policy is that for some offenses there isn't an appropriate
2 use of a mandatory minimum incarceration. I understand
3 Pennsylvania's guidelines, on which I am not an expert, to
4 deal mostly with the Crimes Code and not with certain other
5 offenses that fall under other statutes and to allow for a
6 certain amount of discretion.

7 I can revert back to the Sentencing
8 Commission's study which indicates that when you have a true
9 mandatory minimum, the system is abused by people changing the
10 charge so that, for instance, the impact on racial or ethnic
11 groups and the variety of sentencing patterns between circuits
12 that the Commissioner referred to, suggests that if the people
13 who work in the system day in, day out, don't like how the
14 system operates in particular cases, they find a way around
15 it. I think the solution to that problem is to have a system
16 of guidelines that makes those decisions operate within the
17 system rather than forcing them out the back door. I don't
18 know if that answered the question.

19 ACTING CHAIRMAN PICCOLA: Thank you.

20 Questions? Representative Heckler?

21 REPRESENTATIVE HECKLER: First, I think a
22 rebuttal, since I don't believe Mr. Eakin will have an
23 opportunity to speak again, I would like to sort of broadly
24 reject the proposition that you advanced to the effect that
25 what the prosecutor does in exercising discretion is somehow

1 done in the dark of night or behind closed doors, and
2 therefore, should be somehow inherently less desirable than
3 the discretion the judge exercises.

4 The system, criminal justice system, is set up,
5 as it should be, in our society as one which primarily
6 concerns itself with the rights of the defendant. It is, in a
7 sense, a set of hurdles we make ourselves go through before we
8 punish those who, or otherwise attempt to correct, those who
9 violate our rules, as a society.

10 If we were omniscient, we would simply grab
11 each of these folks by the scruff of the neck and, you know,
12 thump them about the head and shoulders or do whatever it is,
13 speak kindly to them, whatever we're going to do to set them
14 on the right path, you know, in the form of the police officer
15 at the scene of their apprehension.

16 We set all the rest of this up so that we're
17 not thumping the wrong folks and so that we as members of
18 society presumably who are law abiding, can be assured that
19 somebody is not going to thump us because we happen to be of
20 the wrong political party or whatever. I don't mean to be
21 telling you, of all people, how important that is.

22 But any time I as a defendant don't like, I
23 mean, anything a prosecutor is going to do to me, they can
24 only do after marching through this whole system, which is
25 eminently public in all respects. The only thing a prosecutor

1 is going to do is something that I want him to do, is extend
2 to me some consideration, either in not charging or in
3 recommending a sentence or in some other way doing less than
4 100 percent of what he could do, and inherently any time he
5 does that, if I don't like it, I have a whole panoply of
6 recourses, all of which is on the record, all of which
7 involves recourse to a judge and then public bodies about
8 three deep.

9 So I just think, you know, it may be the right
10 prosecutor's discretion, it may be the judge's discretion, we
11 got into this mess because at least in Philadelphia, I don't
12 think we even say it was perceived, plainly judges weren't
13 doing a job which anybody in their community thought was
14 adequate, let alone all the rest of us from outside of
15 Philadelphia who think that's, you know, a modern
16 approximation of Sodom and Gomorrah.

17 So you know, enough said. I've given my
18 speech, and you're welcome to a rejoinder, but I would like to
19 get on to a question, and I don't know, we have John Kramer
20 coming up yet so that maybe we'll hear something about just
21 desserts. I recall a judge, a very thoughtful judge -- a
22 judge, let me back up on just desserts.

23 You have suggested in your initial testimony
24 that some mandatorics such as the DUI laws in Pennsylvania now
25 may not be such a bad thing because they appear to be

1 working. I've watched this system for a lot of years. I'm
2 very skeptical that we can ever believe that the system is
3 working at any given time. I think how much crime we have has
4 a lot more to do with how many 14- to 23-year-olds there are
5 in the population and where you happen to be geographically
6 and what kind of societal supports there are for families
7 trying to raise these particularly volatile members of our
8 society. And I think that what we fall back on and at least
9 what I've known judges over the years fall back on, is at
10 least in certain classes of crimes, the fact that society,
11 however sad and sorry the defendant is, certain kinds of
12 crimes at least that involve victimization require
13 punishment. In order for the fabric of society to remain
14 whole, I have a right to expect that somebody who burglarizes
15 my house is going to be substantially inconvenienced for
16 having done so.

17 And I don't see that, I certainly don't see it
18 in policy 242, and I haven't heard it in some of the other
19 comments today and I wonder if you think that has any
20 legitimate role in all of this?

21 MR. SCHMIDT: Actually I made a note because
22 the Chair I think asked Commissioner Lehman whether punishment
23 was an appropriate criterion to decide on sentencing,
24 sentencing alternatives, whatever. And I think it may not be
25 explicit but it's certainly implicit in that policy statement,

1 that for people who are guilty of a crime, punishment is part
2 of the consequence that, and in fact, I'll go a little bit
3 beyond that, because I think it brings in some other things
4 that the ACLU has tried to address even through me in
5 testimony on other issues here, that not everything that
6 someone does is the subject of treatment. It's not always a
7 health problem or even a mental health problem, that there are
8 some things that call for just plain old punishment type
9 consequences. And that is one of the things that this body
10 has to do in trying to balance how it's going to spend its
11 resources.

12 If punishment is part of the package that
13 follows from conviction, there has to be at least as you put
14 it, some kind of inconvenience, whether it's supervised
15 probation, house arrest, incarceration for a greater or lesser
16 degree of time, whatever it is, punishment is an appropriate
17 consequence of a conviction, so I think ACLU agrees with
18 that.

19 In fact, I think part of what this Committee is
20 doing, and there were references to it, but the concept of
21 mandatory incarceration has come up on a sort of 20-year cycle
22 in our society. There were the Boggs Acts back in the early
23 '50s, there were the Rockefeller Drug Laws in New York in the
24 early '70s, and in Pennsylvania there is a very interesting
25 publication that came out at the same time as the Rockefeller

1 laws did, I think called "The Struggle for Justice" that the
2 American Friends Service Committee published that was
3 substantially produced by people in Philadelphia, and one of
4 their recommendations was incarcerate everybody as punishment,
5 punishment is the only legitimate social goal for post
6 convicted people, make it certain and make it short and make
7 the incarceration humane. And those are some of the same
8 efforts that I know have gone into even what I might judge as,
9 you know, inappropriate mandatory minimum sentencing.

10 So it's not a new debate. People on both sides
11 of the issue have wrestled with minimum incarceration as a
12 solution. I would love to see somebody who is involved in
13 that debate now reread that American Friends Service report,
14 because from what you might consider the ACLU's perspective
15 and in some respects they're coming up with the same
16 recommendations.

17 On your earlier comment, if I could be
18 permitted to say something.

19 REPRESENTATIVE HECKLER: Oh, please.

20 MR. SCHMIDT: I didn't mean to suggest that
21 there was anything necessarily sinister in the district
22 attorney's discretion. It's just a direction that the ACLU
23 would like to push things in, which is more into the arena
24 where what happens is subject to some sort of relatively more
25 public disclosure.

1 I think what the Sentencing Commission found in
2 its report that was published last summer is that 85 percent
3 at least at the federal level of sentencing decisions are
4 based on a plea bargain. The plea bargain occurs in the
5 prosecutor's office, although it has to be accepted by the
6 court, and as Mike Eakin said, the existence of mandatory
7 sentencing provides a wonderful piece of leverage in creating
8 a plea bargain, but the bargain itself tends to abuse as much
9 as use the existence of those mandatory sentences, which is
10 why you get the great disparity on racial and ethnic lines in
11 terms of incarceration that were found in the report.

12 I'm not able to quote the statistics, but all
13 I'm suggesting is as a kind vector we should be pushing
14 sentencing discretion more towards judges and less towards
15 prosecutorial offices and mandatory sentencing schemes, I
16 think the research suggests, may lead to discretion in the
17 prosecutor's office that was not the intent of mandatory
18 sentencing, which is to provide fixed and predictable
19 sentences for everybody who is guilty of that crime.

20 REPRESENTATIVE HECKLER: And you're saying that
21 this data suggests that if two people committing the same
22 crime or at least being in a position to be charged with the
23 same crime, the minority member is more likely to receive a
24 harsher sentence?

25 MR. SCHMIDT: Yes.

1 **REPRESENTATIVE HECKLER:** I would be interested
2 in seeing that. I do think that we're approaching wisdom, at
3 least what's always seemed to be wisdom to me. I think it's
4 one of the reasons the DUI mandatories seem to be perceived as
5 working, and I had forgotten that Friends report, I was aware
6 of it years ago. It is at least my perception and I think one
7 of the reasons we need to go back and look at some of the
8 mandatories, that short but certain sentences tend to be
9 effective in the system, that we have perhaps exercised so
10 that on occasion a view that if we just lay, you know, make
11 that sentence a big one, that that's going to affect behavior,
12 and in fact, the folks who are committing these crimes
13 generally don't think beyond 10 minutes from now, let alone do
14 I want to spend five years in prison.

15 So that, I think, that we probably do have a
16 common ground, if we can acknowledge the validity of
17 punishment as an objective and as a mandatory sentence at
18 least in some cases together. Thank you.

19 **ACTING CHAIRMAN PICCOLA:** Representative
20 Reber?

21 **REPRESENTATIVE REBER:** No, I'll await oral
22 argument and submission of briefs. Thank you, Mr. Chairman.

23 **ACTING CHAIRMAN PICCOLA:** Thank you.

24 Our next witness is John Kramer, Executive
25 Director of the Pennsylvania Commission on Sentencing. John?

1 MR. KRAMER: I've been talked about a lot. I'm
2 not sure now, I'm glad I didn't -- last evening I decided to
3 scuttle my prepared remarks and start over again, so that I
4 don't have written remarks, although I could put these in some
5 form, but I didn't like what I read last night so I
6 reorganized.

7 I will abbreviate my remarks a little bit. I
8 think the issues you've raised by questions suggest some other
9 directions that we may want to pursue in terms of some
10 questions and so I will abbreviate my comments slightly and
11 we'll try to get some of the issues about Philadelphia,
12 departures, et cetera, about guideline mandatory issues and
13 some other issues that you seem to have an interest in.

14 Let me say that I've been a director of the
15 Pennsylvania Commission on Sentencing for 13 years. I'm also
16 a faculty member of Penn State and I've been involved in
17 sentencing. I got involved with the Commission on Sentencing
18 here, I guess, because I had done research in Maine on
19 sentencing reform in that state before Pennsylvania created
20 its commission.

21 My view, and I speak for the Commission on
22 Sentencing in this issue, is that mandatory sentences are
23 inappropriate for a number of reasons. I want to really share
24 particularly three of those. I'm going to skip past one in
25 terms of my comment about subterfuge, because that debate has

1 been going on. If you want to pursue that in moment, you
2 can. But for a number of reasons and I think three primary
3 reasons that I want to set on the table before you from my
4 perspective, first I think they're unnecessary. Secondly, I
5 think they're unfair. And third, I think they're
6 ineffective. And so those three basic premises, I want to
7 pursue talking about each of those particular items.

8 I think it's unnecessary, and this is a theme
9 which has been sounded today on several occasions, and I feel
10 like I'm being a little redundant but I'll pursue it a little
11 bit anyway.

12 We have a qualified judiciary. They're elected
13 by the county voters, they are representatives of the people
14 of the county, they are paid by the state, they are given the
15 responsibility when they run for that office to be judicial
16 authorities, and they have judicial authority far beyond just
17 sentencing. If you don't trust their sentencing decisions, we
18 probably ought to look at some other areas and we might find
19 some other issues that we ought to be even more concerned
20 about if we do not trust them.

21 I believe, after working with the judges in
22 Pennsylvania for 13 years, that they are worthy of our trust.
23 And I think that if there are concerns about the sentencing
24 decisions that they are rendering, that there are other
25 avenues.

1 Secondly, we have in Pennsylvania and we've had
2 now for 13 years, a commission and had guidelines for over 10
3 years, that after having done this for about 10 years with
4 sentencing guidelines, I think it's important to reiterate
5 that this commission is, one, it's a legislative agency, we
6 are composed of 11 members. Four judges are members of this
7 commission. We have four judges, four representatives, one of
8 which Representative Clark from this Committee and
9 Representative Dermody are members of the Commission,
10 previously Michael Bortner was a member.

11 In fact, getting to a point that Representative
12 Piccola raised earlier about the standards under the
13 guidelines, House Resolution 200 was sponsored by
14 Representative Bortner several years ago. We did not pursue
15 pushing that resolution, but it was directed at looking at the
16 authority of the guidelines and whether or not the standards
17 on appeal and standards for presumptiveness of guidelines
18 should be reviewed. That was raised by the District Attorneys
19 Association, and in fact, a couple of years ago they had
20 suggested that we look at that carefully, and they were
21 proposing at that point in time a constitutional amendment
22 because of the concern about the constitutional right of a
23 legislative committee, which included judges on it, from
24 basically having discretion to write guidelines which were not
25 passed in a sense into law but only didn't go into effect

1 unless vetoed by a concurrent resolution of the House and
2 Senate.

3 So there were issues there about how to
4 construct that. But that has been visited to some degree.
5 That was put off in terms of its support by the Commission on
6 Sentencing a couple of years ago who said let's wait and see
7 what appellate review of sentencing looks like. Let's see
8 what the Supreme Court does with some cases, and it may well
9 be in terms of from the legislative point of view, time to
10 revisit that issue and examine what some of the options are.

11 The commission itself is composed of these
12 members, it is a legislative agency. It establishes, and a
13 point we want to make about mandatorics in a moment, once you
14 have this set of guidelines for the judiciary, in which part
15 of that guideline process is to look at the gravity of the
16 offense, and by the way, when we compare that to the gravity
17 of the offense as measured in mandatorics, mandatorics we use,
18 for example, in the five-year mandatory minimum, we use one
19 classification, the commission will look at those offenses, it
20 will sub-categorize those offenses, it will change them in
21 ways which we think reflects the seriousness of the impact of
22 the crime on the victim, and also the seriousness and the
23 culpability of the offender in committing that crime, and
24 those are two ingredients which we think a commission and a
25 guideline process much more effectively addresses than very

1 general broadly based and broadly written mandatory
2 penalties.

3 Basically, when you look at the commission with
4 its set of guidelines, with sentences attached to the
5 seriousness and frequency of the prior convictions, the
6 gravity of the current offense, whether or not a deadly weapon
7 was possessed in the commission of the crime, you look at
8 those factors, you look at the guidelines that are attached to
9 that, you have then a wide range of sentencing ranges provided
10 for the court. You have aggravated mitigating circumstances
11 that are in ranges that are provided within the guidelines,
12 and the judge at that point in time can decide to depart above
13 or below those guidelines, giving written justification for
14 that particular departure. That departure, and I think a
15 major part of the implementation in the long-term development
16 of sentencing policy in the state, is the fact that those
17 departures then can be reviewed either by an appeal by the
18 prosecutor if the prosecutor is dissatisfied, or by appeal by
19 the defense if the defense is dissatisfied with the results.
20 That appeal can be initiated whether the sentence is within
21 the guidelines or outside the guidelines.

22 So the appellate review process theoretically
23 should be a standard review of sentencing and provides an
24 opportunity for both sides of the issues to examine the facts
25 of the matter.

1 Now, for that reason when you bring the judges
2 together to set up sentencing guidelines, which I think
3 structures their discretion, allows for the legislature to
4 express its concerns about resource constraints and other
5 issues, and I would remind this committee that a couple of
6 years ago right after the Camp Hill riot this committee,
7 particularly two members, Representatives Piccola and
8 Haggerty, wrote to the commission asking the commission to
9 make some recommendations. We pursued that request and that
10 letter to us, we pursued that. The changes that were
11 created -- we had hearings before this committee -- the
12 changes that were made at the initiative brought by that
13 particular letter went into effect last August 9th. We are
14 also in the process of looking more carefully at our
15 guidelines and we will have other proposals prepared for you
16 by the spring.

17 I've mentioned, and other individuals have
18 already talked a great deal about it, I think one of my major
19 concerns about the issue of mandatory penalties is the
20 unfairness. And again, Joe Lehman and others have mentioned
21 the fact that it identifies generally a single factor, or as
22 Representative Piccola indicated earlier, there is the one
23 case, there are two cases in which prior convictions make a
24 difference: Five-year mandatory minimum for second conviction
25 on any of those offenses and for the DUI. In those particular

1 cases, the legislature has begun to identify in one case
2 perhaps we might say a career criminal, and another case we
3 might say from the DUI it's at least a repeat. We might not
4 label that person arrested as a career criminal but certainly
5 a repeat, a potentially dangerous offender.

6 Other than those two cases, the statute really
7 identifies offense. So if you look at robbery with felony
8 one, for example, you think that robbery felony one involves
9 both threatened and actual serious bodily injury. The
10 Sentencing Commission takes that general classification and
11 takes that classification and says there's a difference
12 between whether there's actual and threatened serious bodily
13 injury. I think any victim will recognize being threatened is
14 one thing; actually being seriously injured is another. The
15 commission takes that one offense, robbery felony one,
16 subdivides it in terms of whether there's actual serious
17 bodily injury or just threatened. It does the same thing for
18 agg assault.

19 For agg assault we're now looking at whether
20 there's, because we see and we hear prosecutors saying there's
21 a real difference between whether the victim of that agg
22 assault is in a sense partly a culprit in that offense or is
23 an innocent victim. So we see sentencing patterns that
24 reflect that and the commission, looking at that information,
25 tries to not only pursue those but find better measures of

1 ways of getting at what we think are fair sentences attached
2 to the crime.

3 That takes a lot of work, it's a very complex
4 issue. Historically, we have and I think we shall always
5 continue to rely upon judges to pursue that and look at the
6 nuances of the case. But the commission can at least begin to
7 establish standards which are, I think, much more reflective
8 of fairness and in a sense much more commensurate with the
9 dessert philosophy of punishment commensurate with the
10 severity of the crime, meaning the impact on the victim, the
11 culpability of the offender, both of the current offense as
12 well as the culpability of the offender in terms of the prior
13 convictions that that person has occurred, has had in the
14 past.

15 That I will pass, again, I have some examples
16 of that. Judges have passed me many examples over the years
17 and I think I need not go into any, to pursue that at all.

18 Finally, let me just conclude by talking a
19 moment about effectiveness or ineffectiveness. The last
20 comment I made, the last issue I want to set on the table is
21 that there is concern about when you look at mandatories,
22 there are two basic premises as I see it as a purpose for
23 that. Both of the -- or three, I guess. We'll take the
24 punishment, the dessert, the fact that they deserved the five
25 years, and I would argue that the mandatories don't measure

1 that very well, so it leads to unfairness.

2 In terms of what we might call utilitarian
3 purposes, there are basically two that you are pursuing in the
4 legislation with mandatory. The first of those would probably
5 be called deterrents. Basically, you're hoping that either
6 that offender, or others by seeing that offender being
7 punished, is going to desist or not engage in that activity.
8 To establish public policy on that hope I think is likely to
9 be a failed public policy.

10 If you look at the literature on that, whether
11 it's for DUI, and I would refer you to the Commission on Crime
12 and Delinquency's evaluation of the Pennsylvania's DUI
13 legislation, look at H. Lawrence Ross's Detering the Drunk
14 Driver, looking at the Scandinavian experience, the English
15 experience. It is sorrowfully a frustrating experience to
16 look through that and see and in a sense short-term impact and
17 long-term no impact. And that's been a fairly recurrent
18 theme. And I think basically Bill Renninger is here today, he
19 can speak to P.C.C.D. research on that, but that tends to be
20 confirmed all around. That I think is unfortunate but it is
21 something that I would argue. It is not a good premise on
22 which to base public policy for sentencing.

23 Even if we were to find marginal impacts, for
24 example, when you look at in Massachusetts where they
25 instituted a one-year firearm, mandatory minimum sentence for

1 possession of a firearm with the idea of trying to get
2 firearms out of the commission of robberies and other things,
3 what they found was within a short term that there was some
4 movement to the use of other weapons, but there wasn't much in
5 terms of changing any of the crime rates. It did not seem to
6 be an impact on it.

7 And the horror stories that people who came
8 into the state, the truck drivers and others that got picked
9 up and did the one year. One was a truck driver who by
10 mistake got going down a road that he could not make because
11 his truck was too tall, had to get the state police to help
12 him back up the highway to get off. The state trooper, when
13 looking in the cab, found or saw a firearm. This person was
14 from a southern state, firearms were expected to be carried as
15 part of that process. Ended up arresting and giving the
16 person a one-year sentence because that was mandated as part
17 of the statute.

18 Those kinds of stories we will hear and I
19 think, again, the legislature has to be careful about what it
20 means when it's saying and whether its public policy is
21 deterrence. I think that's one that I would just recommend.
22 Look very carefully at that literature before pursuing that as
23 your avenue of intent.

24 Secondly, there's incapacitation. And if you
25 look at the incapacitation, and look at the number of people,

1 which I have with me, the number of people sentenced for
2 mandatory sentences in 1990, and you think that one of the
3 fulfillments of your legislation is that it is identifying
4 people for five years or three years or one year or whatever,
5 that that incapacitation is going to protect the citizens. It
6 probably does a little bit. There are some of those
7 offenders. But if that is your intent, we need to look much
8 more carefully, specify what we mean by incapacitation, what
9 we are trying to do and try to specify much more clearly which
10 offenders are the ones that we really would intend to
11 incapacitate. Who are the dangerous offenders? I think that
12 issue could be pursued.

13 Tomorrow at our commission meeting here in
14 Harrisburg we are, in a sense, talking about another category
15 within our prior records score that we are identifying and
16 we've considered many factors, looking at employment issues.
17 The question with employment issues is you've got 40 percent
18 minority, young males in Philadelphia that are unemployed. If
19 You Buy unemployment as a factor in the prediction, you're
20 also buying the risk of an accusation that that is indirectly
21 a racial factor.

22 The same thing with when you're talking about
23 education, unemployment, other factors that evolve with that,
24 you can pursue that policy and it's one that is worth
25 discussing. I'm just saying that there are cautions about how

1 many factors you want to build in.

2 Therefore, in our building in of the factors,
3 we're really relying mostly and totally upon prior
4 convictions, because we feel that one to some degree, if it's
5 not racially neutral by any means, but it is less racially
6 located than some other factors that we think would be risky
7 and would not necessarily increase predictability all that
8 much.

9 So we're talking about it. I'm not sure what
10 we're going to do with it in the next four or five months but
11 it is something that we are concerned about, identifying the
12 dangerous offender, separating them out and clearly letting
13 the court know that that offender has a serious prior record
14 and if the commission thinks that individual has such a
15 history of prior convictions for serious crimes that they
16 should sentence that person very severely. If they decide not
17 to do that, then they depart from the guidelines. The
18 prosecutor might appeal that particular case if he or she felt
19 that was appropriate, and that's the recourse that we suggest
20 and we pursue in setting up guidelines.

21 Let me stop with that and take any questions or
22 comments that you might have.

23 ACTING CHAIRMAN PICCOLA: Thank you, John.

24 While I respect your viewpoint about mandatory
25 minimum sentencing, I think it's fairly certain that the

1 legislature at least as presently constituted is not prepared
2 to eliminate mandatory minimums. In any --

3 MR. KRAMER: I concur with that analysis.

4 ACTING CHAIRMAN PICCOLA: -- in any significant
5 way. And given that fact, but perhaps given the fact that
6 some concerns over their applicability, their contributions
7 toward prison overcrowding, perhaps some fairness issues that
8 have been raised in forums such as this, what direction would
9 you suggest be taken so that something perhaps can be done to
10 address those kinds of concerns?

11 MR. KRAMER: Operating with the premise that
12 there is not likely to be an abandonment or a doing away with
13 the current mandatory penalties, or with the idea of mandatory
14 penalties, at least, well, I guess I hadn't -- there are
15 obvious concerns about, for example, if you take the homicide
16 by vehicle three-year mandatory minimum, I think there are
17 ways of, and it's been suggested by others today, of looking
18 at ways of detailing that in a much more sophisticated and a
19 much fairer way of identifying the victim. I mean, going
20 around the state I know there are one, prosecutors take
21 different positions on how they prosecute that. And I think
22 it means that some prosecutors pursue it to the letter of the
23 law, even though some don't believe it's appropriate. And
24 they hope that eventually this legislature gets the message
25 that these people don't necessarily all deserve three years.

1 Other prosecutors use their discretion to say
2 we're not going to pursue that for this particular three-year
3 mandatory minimum.

4 I think there would be ways to structure that,
5 I think Michael was suggesting that, ways of structuring that
6 when you talk about the factors that what makes it more
7 serious versus less serious. The numbers of victims is one of
8 those. Do you punish somebody who is riding in the car with
9 somebody who is, in a sense, jointly involved in the drinking
10 and leaving, the same as an innocent family person driving
11 down the highway and they cross the road and kill those
12 people? There are a number of factors that you could pursue
13 to begin to explore where it is we, i.e., the Commonwealth,
14 think there should be distinctions, and I think then you would
15 find much greater visibility to the decision process, and I
16 think prosecutors would be much more comfortable as well, of
17 course, as I think judges would be much more comfortable with
18 that particular decision.

19 So I would pursue looking at when is it
20 appropriate to deal with it as an eleven-and-a-half to
21 twenty-three month sentence? What are the facts there that
22 makes that a commensurate just dessert sentence versus a two,
23 and what are the cases, what are the facts that really merit
24 the three-year mandatory minimum?

25 I don't know what those facts are but it

1 certainly would be certainly not easy. I don't mean to
2 suggest it would be easy, but it would certainly be
3 appropriate and I think it would be a search worth making to
4 arrive at a fairer result.

5 The same thing with the five years for a gun.
6 You have types of guns that are at issue. When a person has
7 no prior convictions, they get five years, if they've got
8 prior convictions alone they'll get five years. That putting
9 all those dissimilar people into the same category is as
10 serious a form of disparity as that in which we were concerned
11 about 13 years ago in which people were getting, similar
12 people were getting very dissimilar sentences.

13 So I think, I guess looking at an in-between
14 position, I would suggest doing something that Mike was
15 suggesting, and that's beginning to look at the way in which
16 we could stratify the penalties and come back with
17 recommendations more specific to the seriousness of the
18 offense. And then the culpability of the offender would be
19 attached to that, the prior convictions, et cetera.

20 We, for example, in the commission talking
21 about DUI, homicide by vehicle, about a year ago we pursued
22 concerns we had that there is a real vacuum, once you leave
23 homicide by vehicle while DUI, once that is negotiated away,
24 there is no floor. What we did on the commission was we began
25 to develop a guidelines floor for that process. We said in

1 two ways, one, if it's a homicide by vehicle and DUI is a
2 conviction concurrent with it, which is a way of splitting, so
3 you get both convictions but you don't have a mandatory, we
4 see a lot of those. For example, when we pursued these, I
5 think we looked and we had about 172 cases at one point in
6 time that we looked at that seemed to be mandatory sentencing
7 homicide-by-vehicle cases, but when we ended up there were
8 about 22 that were actually prosecuted and had the three-year
9 sentence attached to it.

10 So what happens is they'll split that. That's
11 one way of doing, you can split that and then the mandatory
12 doesn't apply. You could drop the DUI. There are various
13 mechanisms that a prosecutor can avoid it. And I think that
14 that would be, what we did is we came up with guidelines
15 specific to those cases so that we were clearly calling for a
16 confinement sentence and a fairly serious confinement
17 sentence, not three years but something that would cover that
18 gap when they negotiated away the homicide by vehicle.

19 The same thing, there's another major gap there
20 that the legislature has not addressed and that is, and Rich
21 Lewis, the D.A. of Dauphin County, is the one that sponsored
22 this on the commission, and that is the issue of people who
23 are not killed but are seriously injured as a consequence of a
24 DUI accident. The commission about a couple years ago wrote
25 guidelines specifically for that particular area because there

1 was an absence of any particular concern with homicide, with a
2 DUI and serious bodily injury. And I think he had couple of
3 cases, very horrible cases in Dauphin County, that he used as
4 demonstration of the seriousness of that problem. We now have
5 special guidelines depending upon the previous convictions of
6 that defendant, and whether it's a DUI and there was an
7 accident with serious bodily injury involved.

8 Obviously, those are just two fairly minor ways
9 in which the commission has tried to step in and move
10 commensurate, somewhat commensurate with the homicide by
11 vehicle DUI and fill that gap in.

12 ACTING CHAIRMAN PICCOLA: I'm familiar with one
13 of those cases.

14 Representative Heckler?

15 REPRESENTATIVE HECKLER: Thank you, Mr.
16 Chairman. I'll attempt to restrain myself. I've been
17 pontificating and carrying on up here and having a fine old
18 time, but I do want to thank Mr. Kramer both for being here
19 and for the work of the commission, because I think that you
20 folks have literally done more than anybody else over the last
21 decade to bring about some sense of fairness and some actual
22 semblance of fairness in the sentences which are imposed in
23 this state.

24 MR. KRAMER: Thank you.

25 REPRESENTATIVE HECKLER: I can't resist

1 pontificating altogether.

2 I would suggest that your very existence and
3 the value, the necessity of your work kind of undercuts your
4 first premise. You started out telling us that we've got a
5 fine batch of judges out there and we ought to have more
6 confidence in them, and that's certainly true of the judges in
7 Bucks County, but I just don't know how, I think that any
8 human being, I must have made decisions on at least a thousand
9 defendants' cases in terms of work, or at least handled the
10 guilty pleas and seen sentences both by a judge or plea
11 bargained it myself.

12 ACTING CHAIRMAN PICCOLA: Can I interrupt you?
13 Our court reporter needs a short refill break.

14 (Discussion held off the record.)

15 REPRESENTATIVE HECKLER: I didn't have a clear
16 feeling about how to differentiate between somebody who was
17 coming up for his second burglary as opposed to somebody who
18 had committed an unarmed robbery as opposed to somebody who
19 had engaged in some kind of assaultive behavior. I think it
20 is, and frankly, I had more experience in thinking about
21 weighing those different defendants than most of the judges on
22 our bench, at least by in terms of volume, if not wisdom.

23 So I think that it is not safe to suggest that,
24 well, there are a lot of fine, thoughtful judges on the bench
25 throughout this state, even in Philadelphia. I think it's a

1 mistake to suggest that they are in a position, given the
2 vagaries of human nature, given the limited information or the
3 limitations upon the information which may come before them,
4 to make societally appropriate decisions in every case. I
5 think the guidelines go a long way towards preventing that
6 from happening. I would suggest that in some cases
7 mandatorics are necessary, also.

8 MR. KRAMER: I guess my concern about that
9 would be that the replacement of that, not necessarily the
10 prosecutor and the negotiation process, but the replacement
11 for that decision is the legislative arena. And I guess
12 perhaps putting it in context, and what I have observed over
13 13 years in the legislative arena, I'm not so sure that I
14 would suggest that your concern about that judge who has got
15 to wrestle with the complex issue is better replaced by a
16 legislature, and I won't ask each one of you whether when you
17 went out and were called to vote for a mandatory bill, that
18 you may have had some concern it, whether you voted or not.
19 But you know that if you get a mandatory bill on the floor of
20 this House or Senate, people are going to vote for it. And I,
21 and that to me is obviously of concern, and is one reason in
22 looking at that process, thinking, well, where do I have my
23 trust and confidence? In terms of the legislature having to
24 publicly make this vote, coming up with mandatory minimums of
25 five years with no distinctions, versus a judge who is sitting

1 there with information, looking at the facts of the case, has
2 the information that can be provided, unless the prosecutor
3 decides to stand moot at the sentencing, which is one way of
4 kind of negotiating. But unless that happens, the prosecutor
5 is there to push the point of what that prosecutor believes is
6 appropriate.

7 The defense attorney, on the other hand, has
8 the opportunity to bring facts to bear that he or she feels
9 would be mitigating circumstances.

10 So I guess on balance, and the other thing is,
11 I want to make a comment about this, there's a flexibility
12 issue and I think Representative Piccola began this
13 questioning of me with the foundation that it's not likely the
14 legislature is going to change or do away with it. The issue
15 is maybe we'll think about changing it.

16 I think that immutability of mandatory
17 penalties is something that makes it unreceptive to changes.
18 Now, you can think in terms of changes of knowledge, of
19 information, you can think in terms, I mean, treatment, for
20 example, and other things, although I'm not a, I don't have a
21 great deal of confidence in that, but let's assume that
22 information came to bear, changes in public attitudes and
23 standards, I mean, those are issues which from my point of
24 view require a fair amount of flexibility. Now, we may argue
25 let's let the prosecutor deal with that issue of flexibility

1 versus the judge, but it seems to me that that's another
2 reason that I would prefer that those changing standards for
3 getting harsh or not, and judges got harsher long before the
4 mandatories came along, do not, I don't think it would be
5 appropriate for the legislature to take the credit for the
6 prison overcrowding or for the getting tougher sentencing
7 standards in the early '80s. We looked at sentencing in '77,
8 we looked at it in 1980, when we were writing our guidelines.
9 Sentences had changed, there was no legislative action in that
10 time frame between '77 and 1980, and sentences began to get
11 tougher.

12 So I mean, I think that and if you look at the
13 numbers, if you look at the numbers that are convicted of the
14 mandatory minimums in Pennsylvania and are prosecuted for, I
15 know I have to leave and I'll try to get done here in just a
16 moment, but there were 202 people who were convicted under the
17 repeat offenders statute, the five-year mandatory minimum. We
18 don't know how many that might have applied to, but it's not
19 a, I mean, it's a significant number, and it does induce and
20 help to exacerbate overcrowding. But it is probably a fairly
21 small proportion of the numbers of people who actually were
22 repeat offenders and had convicted, had committed a serious
23 crime, because we've been looking at that data lately and it
24 suggests to me that it's not often being applied.

25 REPRESENTATIVE HECKLER: Well, I think actually

1 what happened in 1977 is that I left the employ of the
2 District Attorney's Association and they immediately became
3 much more effective and that's how come sentences started to
4 increase.

5 Let me ask one other question. Given that I
6 think most of us here feel that it would be appropriate for us
7 to revisit mandatory sentences, and not with the idea as Bob
8 pointed out earlier of finding something new that we can
9 tackle, but refining them, is there an appropriate part for
10 you and/or the commission either formally or informally in
11 that process?

12 MR. KRAMER: I think first, I guess if I were
13 beginning that process, I would look back to what the, we have
14 operated fairly independent of the mandatories, and we do that
15 for a couple of reasons. One, we think we have to operate
16 independently and establish penalties that we think are
17 appropriate. And by the way, we have not tried to, the
18 economic issue may be important but it is, you notice I did
19 not bring that issue up. I think the major issue if you think
20 what we're doing is right and fair, then our job is to tell
21 you that you need to provide more space. I think we have
22 plenty of space and we're going to have plenty of space.

23 I would suggest that one, we should look back
24 at what the commission has done or is in the process of doing
25 relative to what the mandatories call for, examples being the

1 difference between actual serious bodily and threatened
2 serious bodily injury or robbery one and agg assault. I think
3 those are important differences.

4 I'm pulling a number out of the air but if you
5 say, well, we think for the actual serious bodily injury, with
6 a firearm, that is a five-year, regardless, that may be true.
7 But we may look at the threatened serious bodily injury and
8 say, a three-year, two-year floor is a much more reasonable
9 floor.

10 And we could look at two things. We could look
11 at what the guidelines call for that, and off the top of my
12 head I don't know, we could look at combining with prior
13 conviction kinds of issues, and we could begin to look at what
14 the commission's called for. Your determination of what we
15 called for as to whether it's appropriate, but at least I
16 think you would have a foundation that would be more
17 commensurate with probably the sentencing practices and, by
18 the way, that's the other issue. We could then look at
19 sentencing practices to see where it is and look at some of
20 the specific cases and whether we think there are some
21 egregious results occurring out there.

22 So I think the first thing is let's begin with
23 information and then see what you think is reasonable, because
24 you are the judges of that. But I think we as the staff of
25 the commission could help you in at least getting a fix on

1 what the issues are and what other standards are out there.

2 **REPRESENTATIVE HECKLER:** Well, it's been my
3 observation that we do some of our best legislation in the
4 absence of any information at all and that information tends
5 to spoil the fun, but I think that that would be extremely
6 valuable. Thank you.

7 **ACTING CHAIRMAN PICCOLA:** Representative
8 Reber?

9 **REPRESENTATIVE REBER:** Just two real quick
10 comments. I would agree wholeheartedly with the initial
11 observations that Representative Heckler made at the outset of
12 his testimony, among other things, most specifically your
13 contribution on the issue over the years, and I personally
14 deeply appreciate it.

15 **MR. KRAMER:** Thank you.

16 **REPRESENTATIVE REBER:** Additionally, I think
17 this particular committee and our counterpart in the Senate
18 really do have a deep responsibility and role in making sure
19 that the mandatory scenarios, if and when they ever do reach
20 the floor of the House, don't reach the floor unless they
21 really should be there. It's been my personal opinion, and I
22 have been in the minority on this on too many occasions in the
23 recent past on this Committee, that I fear that we've lost
24 sight sometimes of what should come out of committee and then
25 allow it to develop a life of its own, which it seems to

1 always do when it gets to the floor of the House, and I think
2 that's consistent with some of the warnings that you're
3 sending up, and I would concur that that's something this
4 Committee should continue to resolidify its position on a lot
5 of these things, to fully and openly debate and not
6 necessarily take the popular political position, but what is
7 the appropriate juris prudence type of position should be
8 taken. Thank you.

9 Thank you, Mr. Chairman.

10 MR. KRAMER: I would be glad to work with the
11 Committee in terms of looking, re-examining that. We could
12 begin doing that this winter and prepare it for the next
13 session.

14 REPRESENTATIVE REBER: And I would
15 parenthetically say also that my fellow colleagues that are
16 here today, I think probably the three of us are oftentimes at
17 various ends of the spectrum, but on the kind of issue that
18 I'm concerned about in seeing it is done the right way, I
19 think the minds always do come to some very close agreement
20 about not allowing hysteria and political opportunities take
21 the day in this kind of issue, and I'm deeply appreciative to
22 my two colleagues that are here today for always coming to the
23 forefront to that kind of battle when it tends to develop.

24 MR. KRAMER: Let me just say that this
25 Committee, by virtue of having this hearing and but primarily

1 its actions it's taken over the last two, three, four years in
2 terms of sentencing issues and other issues and raising the
3 questions, I think has opened up discussion and/or debate
4 about what we all may disagree about particular issues but I
5 think that open forum and that opportunity for discussion
6 will, I think, make Pennsylvania one of the leaders in this
7 country in terms of at least thinking through these issues and
8 discussing these issues, and I think you've all acted very
9 responsibly.

10 I really have, you commented to me, I have
11 enjoyed working with this Committee -- legislature, but
12 primarily this Committee over 12 or 13 years, with a great
13 deal of enthusiasm and excitement. I really do appreciate and
14 respect the work that you do, and it's made my job much more
15 fun, believe me.

16 ACTING CHAIRMAN PICCOLA: Mrs. Woolley?

17 MS. WOOLLEY: I didn't get to ask the
18 Philadelphia question. You know why I'm going to ask the
19 Philadelphia question, and the senior member of the
20 Philadelphia delegation isn't here today, but there is a
21 profound distrust of Philadelphia judges in terms of their
22 willingness to impose what are perceived to be tough sentences
23 or appropriate sentences.

24 So my question is: Can you compare
25 Philadelphia County's rate, compliance rate, with other

1 counties? Can you give us a sense of what judges do there?

2 MR. KRAMER: Well, I could give you much more
3 specific but what I can give you, what I have with me is from
4 the end report, so let me give you a brief reaction to that.

5 Overall, in terms of -- when I say overall, we
6 have three ranges, aggravated, mitigating and standard range
7 and then outside of those are departures. If you combine
8 those three ranges, the conformity in Philadelphia is, and by
9 the way, the municipal court takes a range of offenses that we
10 don't really get information on, which would ordinarily fall
11 in guidelines in other areas, so with that caveat, there are
12 about 60 percent were in the standard range, 3 percent were in
13 the aggravated range, 12 percent were in the mitigated range,
14 and then there were 3 percent departure above the guidelines,
15 I'll give you a copy of this, and 22 percent were departures
16 below the guidelines.

17 Now, I could give you information about which
18 offense --

19 MS. WOOLLEY: How do they compare to statewide
20 average?

21 MR. KRAMER: Statewide overall the standard
22 range of conformity is 74 plus another 11, about 85, 86
23 percent overall conformity. So it's about 11 percent below
24 the statewide average, and that's, by the way, that statewide
25 average includes Philadelphia. So that distorts it a little

1 bit, so it pulls it down a little bit. But the overall
2 conformity rate is about 10 or 11 percent lower.

3 I think the question you might want to look at
4 is whether it's lower in some of those areas that probably you
5 as a Committee are most concerned about, violent crimes, some
6 of those and maybe some of the drug areas, and we certainly
7 can provide that information to you and look at that.

8 Allegheny County, just to close that, Allegheny
9 County has about, in terms of conformity to those three
10 ranges, is about, and I'm adding together here real quick,
11 about 85 percent, about right on where the state average is.
12 So it's about 10, 11 percent higher in conformity rate than,
13 and its departure below the guidelines is about, in Allegheny
14 County, is about 16 percent versus 22 percent in
15 Philadelphia.

16 MS. WOOLLEY: Thank you.

17 ACTING CHAIRMAN PICCOLA: Thank you, John.

18 MR. KRAMER: Thank you very much.

19 ACTING CHAIRMAN PICCOLA: Our last witness is
20 supposed to be Mary Beth Rhodes from the County Commissioners
21 Association, but I don't believe she's present.

22 Is there anyone here from the County
23 Commissioners Association who wishes to testify?

24 (No audible response.)

25 ACTING CHAIRMAN PICCOLA: Then this -- yes,

1 ma'am?

2 MS. JARBOE: Is it possible for the public to
3 testify or not?

4 ACTING CHAIRMAN PICCOLA: Well, if it's
5 relatively short?

6 MS. JARBOE: It will be.

7 ACTING CHAIRMAN PICCOLA: Will you come forward
8 and identify yourself?

9 MS. JARBOE: Thank you. I'm Abigail Jarboe
10 from Lebanon, Pennsylvania.

11 I am acquainted with a teenage boy who was 16
12 at the time he was taken hostage by a friend of his and he was
13 handcuffed and he had ankle restraints put on him and he had a
14 gun pointed at his head and was held in this condition for
15 about six hours. The gentleman who did it was a friend of his
16 and he eventually did release him and let him call the
17 police.

18 Then there was a plea bargain that the
19 gentleman who did it would only get four and a half months to
20 five years of house arrest. And I was interested in knowing
21 is this legal? Does this often happen?

22 ACTING CHAIRMAN PICCOLA: Well, we're not here
23 to answer those kinds of technical questions. You would have
24 to take that up with either defense counsel or the
25 prosecutor. It sounds to me as if it's something that is

1 permissible under Pennsylvania law, but I wouldn't want to
2 give you a definitive answer on that.

3 MS. JARBOE: I see. Well, I would like to ask
4 the legislature to please consider that this sort of thing is
5 going on out there, and I don't think it should be, and
6 perhaps that's why you have people who are very, very strongly
7 in favor of mandatory sentencing, because the people that I
8 have talked to thought it was kind of strange that there would
9 be such a lenient sentence for someone who, although he didn't
10 hurt the kid, nevertheless did use a gun, and I am concerned
11 for his safety and I am concerned for the safety of the
12 general vicinity. This is Lebanon, it isn't Philadelphia. It
13 shouldn't be going on in Philadelphia, but certainly we
14 wouldn't want it going on in our community.

15 And I would also like to say that I would like
16 to encourage you to look at what the Bible says to do. It
17 says when justice is not speedily executed, the heart of man
18 is fully set in him to do evil. And part of the reason we're
19 having the crime problem we have is because sentences are so
20 slow.

21 Another acquaintance of mine was only arraigned
22 in July and has no scheduled sentencing, and this sort of
23 thing goes on and on and on. And also, long, long, long terms
24 of incarceration don't seem to help anyone very much. What
25 happens is I have a foster son, a former foster son, who has a

1 history of not paying support. He really isn't able to
2 support himself. They put him in jail and he can't support
3 himself, what good does it do? There are better ways to do
4 it.

5 I would like to encourage you to consider that
6 possibly it might be better to beat these people rather than
7 to lock them up for years and years. It would save money and
8 it would also be better for the community.

9 Thank you very much.

10 ACTING CHAIRMAN PICCOLA: Thank you.

11 This hearing stands adjourned.

12 (Whereupon, the hearing was adjourned at
13 12:28 p.m.)

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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.



Emily Clark, RPR
Court Reporter-Notary Public