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COMMONWEALTH OF PENNSYLVANIA  
HOUSE OF REPRESENTATIVES  
STATE JUDICIARY COMMITTEE

In re: Public Hearing - Oversight of Pennsylvania  
Commission on Sentencing

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

Tuesday, October 26, 1993 - 10:10 a.m.

HON. THOMAS R. CALTAGIRONE, CHAIRMAN

MEMBERS OF COMMITTEE

- Hon. Robert Reber
- Hon. Howard James
- Hon. Andrew Carn
- Hon. Peter Daley
- Hon. G. Fajt
- Hon. Chris McNally
- Hon. Frank Yandresivits

ALSO PRESENT:

- Mary Beth Marschik, Research Analyst
- Galina Milihov, Research Analyst
- Richard Scott, Esquire
- Mary Woolley, Esquire

Reporter by:  
Heather L. Boyer, RPR

C.V.R.A. (717) 233-7901

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SPEAKER	PAGE
John H. Kramer, Ph.D.	3

1                   CHAIRMAN CALTAGIRONE: We'll get started  
2 with today's hearing. It's the Pennsylvania  
3 Commission on Sentencing, the House Judiciary  
4 oversight hearing. Chairman Tom Caltagirone from  
5 Berks County. If the members and staff that are  
6 present, if they'd like to introduce themselves for  
7 the record.

8                   REPRESENTATIVE REBER: Representative Bob  
9 Reber for Montgomery County.

10                   MS. MARSCHIK: Mary Beth Marschik,  
11 research analyst.

12                   MR. SCOTT: Richard Scott, attorney.

13                   REPRESENTATIVE CARN: Andrew Carn,  
14 representative from Philadelphia.

15                   MS. MILIHOV: Galina Milihov, research  
16 analyst.

17                   MS. WOOLLEY: Mary Woolley, counsel.

18                   CHAIRMAN CALTAGIRONE: If you'd like to  
19 start. For the record, Representative Birmelin was  
20 here but had to go to another meeting.

21                   MR. KRAMER: Good morning. I'm John  
22 Kramer, Director of the Pennsylvania Commission on  
23 Sentencing. And in my opening remarks this morning,  
24 I want to focus on some issues in which the  
25 Commission's been looking at in the last two years in

1 which we've met with this Committee previously about  
2 some development and proposals; secondly, talk about  
3 some of the activities the Commission's been engaged  
4 in which may not be so visible.

5 By way of beginning, I also want to make  
6 clear that as opposed to most agencies that you hear  
7 from, just a reminder that we are an agency of the  
8 General Assembly. We are not in the Executive Branch  
9 or the Judicial Branch. We are a legislative agency  
10 and we do have -- attached I have materials that I've  
11 brought this morning. And those materials, I'm not  
12 going to walk through them in any detail this  
13 morning, but they're available before you in terms of  
14 any discussion that might come forward.

15 The last document of that is a copy of the  
16 enabling legislation for the Commission on  
17 Sentencing. There is also an attachment which is the  
18 proposed -- series of proposed changes to the  
19 sentencing guidelines. Those proposed changes are  
20 not before the legislature. These are proposals that  
21 have been developed by a subcommittee, reviewed by  
22 the full commission. Also, reminder that  
23 Representatives Dan Clark and Frank Dermody are  
24 members of the Sentencing Commission.

25 Those documents were published in mid

1 August. This document was basically published in mid  
2 August or a form of it was published. This has some  
3 explanations which makes it a little different. But  
4 we published them in August. We held public hearings  
5 in September. We will be having a subcommittee  
6 meeting to review that testimony in the next couple  
7 of months. We were looking to mid November, now  
8 because of schedules of commissioners probably  
9 looking at early December to somewhere around the  
10 11th or 12th of December. And then after the  
11 subcommittee reviews them, if they can do that in a  
12 two day meeting, they will then bring them before the  
13 full commission sometime in the first part of the  
14 year. And perhaps we might want to talk in a few  
15 moments about that schedule and issues around funding  
16 for counties and some other things that we're  
17 concerned. But I won't focus on those remarks on  
18 that issue right now.

19           The Commission on Sentencing has, as I  
20 indicated previously, been working on a proposed set  
21 of revisions to the sentencing guidelines. And the  
22 basis for this revision process in part was  
23 stimulated by legislation that was sponsored by the  
24 chair of House Judiciary Committee, the Intermediate  
25 Punishment Legislation, and also by the chair of the

1 Senate Judiciary Committee, Senator Greenleaf. Those  
2 pieces of legislation legitimated the use of  
3 intermediate punishment sanctions by the courts  
4 across the Commonwealth, and then provided for a  
5 description of those programs.

6 Those two pieces of legislation, Act 193  
7 and Act 201 of 1990 came together to form the basis  
8 for the intermediate punishment legislation. We in  
9 response to that legislation developed and adopted  
10 and you adopted the sentencing guidelines changes  
11 which increase the -- in a sense the recommendations  
12 for the new guidelines with the use of alternatives  
13 to incarceration, which we were calling intermediate  
14 punishment.

15 So those guidelines went into effect in  
16 1991, August of 1991, have been in effect now  
17 approximately two years.

18 The Commission, however, was in the  
19 process of a broader, more comprehensive review. And  
20 while we wanted to expand upon, we responded to Acts  
21 193 and 201, we also wanted to do a comprehensive  
22 review of the guidelines and to take into account a  
23 number of things that had been going on in the  
24 Commonwealth and across the country that we thought  
25 was important for us to consider in the drafting of

1 the guidelines.

2           One of the things that the Sentencing  
3 Commission does, and I think one of its prime  
4 missions for the legislature and for the Commonwealth  
5 as a whole, is to develop information. When we  
6 started to write the guideline in 1979 -- we were  
7 created in 1978, started writing guidelines in  
8 1979 -- there was basically no information on  
9 sentencing. If you wanted to find out information  
10 about sentencing practices by counties or by judge or  
11 by any other kind of information, the characteristics  
12 of a defendant, there was very, very little  
13 available.

14           What we had to do in the late 1970s and  
15 early 1980s in order to get that information was to  
16 hire individuals, and we did then random sample of  
17 every county in the Commonwealth. And we went to  
18 every county in the Commonwealth collecting  
19 information. Absent doing that we would have had no  
20 information about what sentencing practices actually  
21 look like. That was an important tool for us to look  
22 at in terms of the development of those early  
23 guidelines.

24           Now, looking back in 1993, looking back 13  
25 years, 14 years ago -- 14 years ago when I started as

1 Director of the Sentencing Commission, we now have a  
2 wide reservoir of information that we can use to help  
3 us have a better assessment of sentencing issues,  
4 such as sentencing disparity, sentencing harshness.  
5 We now have guidelines and we can look at departures  
6 from those guideline. And they provide us both  
7 instantaneous feedback as well as now long-term  
8 feedback about what's going on in the Commonwealth.

9           It is still -- that data system is --  
10 certainly we are much better off. We are still  
11 looking and working with the Commission on Crime and  
12 Delinquency to enhance the quality of that  
13 information so that future commissions and future  
14 commissioners and staff directors will have that  
15 information.

16           But that's an important development that  
17 we did not have in the early 19 -- 1980s and the late  
18 1970s.

19           Second, we started writing the  
20 guidelines. We were the second commission created in  
21 the country. We were only six months behind the  
22 State of Minnesota in writing guidelines. Basically  
23 we were cutting new ground. There was very few  
24 conceptual descriptions of guidelines. The idea was  
25 interesting. It had not been tested. Commissions



1 had not really had to write guidelines previously.  
2 So we in a sense were cutting new ground. And we had  
3 a wonderful commission. They worked very hard on  
4 that process.

5           Since that then, however in the last 13,  
6 14 years there's now probably 15 to 20 states and the  
7 federal government have developed guidelines. And  
8 there are a lot of ideas that, one, they've borrowed  
9 from us certainly, but also there are a lot of ideas  
10 and concepts about sentencing guidelines which are  
11 very different today than perhaps information  
12 available to us in the early 1980s.

13           I wanted our commissioners to be aware of  
14 what other commissions had done so that -- remember,  
15 we have an appointment every two years. Appointments  
16 on the commission are for two years, and so that the  
17 commissioners in 1990 and 1989 have not been in the  
18 process of revising guidelines or thinking about why  
19 did we do what we did in 1979.

20           And so in part, I wanted this commission  
21 to be -- to understand the process, understand what  
22 our mission is, and to then also to be informed by  
23 the developments across the country. And that I  
24 think has been very, very important.

25           There are -- there's another issue, which

1 is over the last -- in 1980 and '81 when we were  
2 writing these guidelines we had 8 or 10,000 inmates  
3 in our state prison system. We had a capacity which  
4 was somewhat commensurate with the size of the inmate  
5 population. When the guidelines were going into  
6 effect in 1982 the governor's office and the  
7 Commission on Sentencing looked carefully at what was  
8 projected growth. Governor Thornburg at that point  
9 in time recommended and tied to a mandatory  
10 sentencing bill a recommendation that we add 3,000  
11 capacity to our state prison system to deal with the  
12 impact of the growth of the guidelines and the growth  
13 of the mandatories. That legislation passed.  
14 That -- those additions to that institutional  
15 capacities was expanded and the state went from  
16 roughly a 10,000 capacity to about a 13,000  
17 capacity.

18           Actually, by the way, with the closing of  
19 Eastern and one other facility I believe that overall  
20 capacity of the state system had decreased from 1960  
21 to 1980. So that we had actually less capacity in  
22 1980 than they would have had if we had been writing  
23 guidelines in 1960, '61, '62.

24           I don't know -- I don't remember the exact  
25 year now that Eastern closed, but it's interesting to

1 look at that development. And in a period of time  
2 when legislature was not confronted year in, year out  
3 with expanding appropriations and cost of  
4 corrections -- clearly in terms of inflation, yes,  
5 but not in terms of space and buildings, et cetera --  
6 that was going on. So we sit here today in very  
7 different circumstance than we faced 13 or 14 years  
8 ago.

9           Obviously there's a number of things that  
10 happened in that. And just as a reminder that when  
11 you look at the end result of a prison population, it  
12 is the result of a number of factors, one of which of  
13 course is Thornburg and the Sentencing Commission  
14 recognizing in the early 1980s that it was going to  
15 be an expansion.

16           If we're going to increase the severity of  
17 sentences with mandatories that's going to happen.  
18 If we're going to increase the severity of sentences  
19 with guidelines that's going to happen. And we  
20 projected. There's an interesting phrase you always  
21 want to apply as a researcher: All other things  
22 being equal. All other things being equal we  
23 anticipated that 3,000 bed space would be adequate.  
24 The problem is all other things has not been equal  
25 over the last 12 or 13 years. Numbers of convictions

1 have risen, other aspects of the system have  
2 changed. And as a consequence, our prison  
3 populations have certainly expanded beyond what any  
4 of us would have anticipated in 1982, '83. Not  
5 because of ill will on our part or deceit, but  
6 because perhaps of lack of information and lack of  
7 foresight about what's going to happen with the drug  
8 wars and all of those things that occurred in the  
9 1980s.

10           So it's very important to -- for us to say  
11 as a commission -- most commissions across the  
12 country are very clearly delegated in authority to  
13 stay within capacity or very seriously cautioned to  
14 stay within capacity. Some of you may remember the  
15 associate director Rob Lewis who worked for me for a  
16 number of years, ten years or so. He's now the  
17 director of the North Carolina Sentencing  
18 Commission. Rob's commission came forward with  
19 guidelines early this summer before the legislature.  
20 And their choice as provided by the legislature was  
21 one to either provide a set of sentencing guidelines  
22 that would stay within capacity, or if they're  
23 guidelines were going to recommend a growth in  
24 populations and therefore a requirement to add  
25 capacity, they had to provide the legislature with an

1 option which would have provided no growth. So their  
2 mandate from the legislature was basically one that  
3 was economically driven.

4           The legislature said if you're going to  
5 ask for a growth in prison populations, give us an  
6 option that will call for no growth. Interestingly  
7 enough, the Commission came back with a set of  
8 guidelines that recommended a growth in state prison  
9 population of 4,000 inmates. The legislature tabled  
10 that proposal immediately. They have passed and  
11 adopted the guideline concept -- the guideline  
12 proposal that calls for a no growth scenario. They  
13 rejected in a sense the commission's recommendation  
14 for some growth in favor of one which called for no  
15 growth.

16           That is a common issue across the country  
17 of how much to build, how larger the prison  
18 population should be, and how much are we willing to  
19 invest in prison populations.

20           That is one example. That is not atypical  
21 of what has happened or is happening across the  
22 country.

23           As I indicated before, when you think  
24 about prison populations, guidelines, mandatory  
25 sentences play a part. Increased numbers of

1 convictions, issues about parole release, issues  
2 about parole revocations, all of those factors fall  
3 into the equation about what ends up in terms of  
4 numbers of people we have in our state prison system  
5 and in our county prison system.

6 One other thing that I'd like to mention  
7 in front of the table in a context of perhaps future  
8 discussion is the fact that the counties, when we  
9 talk about the state prison system as though that is  
10 the system we're talking about, we're talking about  
11 sentencing, in effect I would argue that we're  
12 talking about the county system. 80 percent of the  
13 sentences are dealt with at the county level.

14 You and members of the House and Senate  
15 Appropriations Committees must deal with issues about  
16 sentencing. And I think normally you think about  
17 your problems of the growth in state prison  
18 population, appropriations squeals every spring  
19 because of the amount of growth in that state prison  
20 population. And it clearly has been dramatic.

21 We have moved in the 10,000 to 26,000  
22 inmates. So I'm not trying to suggest it hasn't been  
23 a problem. On the other hand, still the county  
24 system is in a sense the bulwark of our system. It  
25 accounts for about 80 percent of the sentences and it

1 takes an awful lot of individuals, about 1800  
2 approximately, that ordinarily that have in effect  
3 state system sentences that stay in the county. And  
4 we will basically be arguing that area that needs to  
5 be strengthened to service well this correctional  
6 system. We've gone to -- moving to a billion dollar  
7 State Department of Corrections budget.

8           But if we're going to control that growth  
9 and do it fairly and wisely and well, I think this  
10 committee along with the Appropriations Committees  
11 and both sides, both House and Senate, have to look  
12 carefully at how we can strengthen the system of  
13 sanctions and punishments which we are now calling  
14 intermediate punishment, as well of course as you've  
15 appropriated 200 million dollars in Act 71 moneys to  
16 help counties build space. But there is another part  
17 of the system which I would argue and I think many  
18 heads will suggest as advisable that we strengthen  
19 sentences which brings people back in rather than  
20 which -- sanctions which merely in a sense isolate  
21 for some limited period of time.

22           So I -- I am here not as an advocate to  
23 some degree for the Commission on Sentencing, I am  
24 here as an advocate to a great degree for what I  
25 think is an often forgotten county correctional

1 system. Which if you hear anything today I want you  
2 to hear that I think that system has been too long  
3 neglected in the system and it really is the system  
4 which -- which in a sense keeps people a part of the  
5 community and in a sense takes care of them upon  
6 their reentry to that community, 'cause that is  
7 probably where they will go back to.

8 Let me just conclude my remarks by saying  
9 that we have a series of proposals which I have  
10 provided you in Appendix A of the document. I have  
11 provided you a description of the proposed revisions,  
12 walking through some of the issues that I was just  
13 talking about.

14 We have -- by the way, one thing I forgot  
15 to mention in terms of our building the changes in  
16 the guidelines -- I'm a sociologist. I'm a social  
17 scientist. I teach at Penn State part time, and I'm  
18 director of the commission part time. As a  
19 sociologist we always begin with a survey. The  
20 Pennsylvania Commission is no different. We  
21 surveyed -- and you should have received your 1991  
22 annual report. You will be receiving the 1992 soon.  
23 But the 1991 annual report reports on a survey in  
24 Appendix A which documents the results of the  
25 survey. When we build -- start looking at changes in



1 the guidelines we go back to the district attorneys,  
2 the judges, and others and ask them for input about  
3 what kind of things they would like to see changes in  
4 the guidelines. We use that very strongly in our  
5 revision process.

6 So we have a series of proposals. Those  
7 are in draft form. We've held public hearings on  
8 those. Several of those proposals were developed by  
9 the subcommittee and adopted by the full commission  
10 as part of interesting debate about what to do -- for  
11 example, let me just pick up one issue that's been  
12 controversial in one of the subcommittees, the issue  
13 of consecutive and concurrent sentences.

14 The parole board in a meeting with both  
15 with Fred Jacobs, prior chair of the parole board and  
16 the current chair of the parole board Alan Castor,  
17 when I first met with Fred Jacobs and I asked Fred  
18 and said well, from the parole board's perspective  
19 what is one of the sentencing issues you as a parole  
20 board chairperson see when you go through the prisons  
21 of the Commonwealth? Do you see maybe disparity in  
22 sentencing, things that you think despite the  
23 guidelines are still a problem?

24 And the one thing that Fred raised with me  
25 was the fact that he saw no rhyme or reason to the

1 use of consecutive and concurrent sentences. It did  
2 not seem to relate to the seriousness of the  
3 offense. It seemed to be more an issue of some  
4 judges tend to use them and some don't.

5           So we -- one of the issues that the  
6 commission has put forward as a -- as a concept is  
7 issues around concurrent consecutive sentences. To  
8 be honest, I don't think the commission has -- in the  
9 final vote on that the only way that passes in the  
10 subcommittee and the final commission was by virtue  
11 of the fact that I said, look, if you're arguing this  
12 strongly about it there's a large enough minority  
13 then why don't you put it forward as an issue for  
14 public hearing and get input on it even if it is not  
15 something that you seem likely or willing at this  
16 point to endorse or to adopt.

17           The issue there is you don't want them to  
18 come back in January, February, the full commission  
19 and somebody say well I still think we ought to do  
20 this and because of the situation get something  
21 adopted that has not been carefully thought out and  
22 been part of public posture.

23           That particular issue, by the way, we met  
24 with the district attorney's for -- in a four or five  
25 hour meeting. That particular issue was resolved and

1 Chairperson Castor was there. And what we determined  
2 to do on that particular issue was go forward with a  
3 study of concurrent consecutive sentences, exploring  
4 that particular issue of disparity in the use of  
5 concurrent consecutive. And particularly there has  
6 been some discussion about the racial link of  
7 consecutive sentences. One of the comments that has  
8 been made -- and we can't substantiate this. Our  
9 sentencing data doesn't allow us to really have -- we  
10 don't get much information on consecutive sentences,  
11 so we're going to probably initiate after the  
12 proposals and perhaps the legislature in the spring  
13 we're going to explore that particular issue through  
14 research by collecting information on consecutive  
15 sentences, see how it's being used, what's the  
16 patterns of its use both across the state  
17 geographically as well as patterns of its usage in  
18 terms of racially and see whether or not do we have a  
19 problem. And then if we determine that we have a  
20 problem we may in three or four years come back with  
21 some recommendation about that particular issue.

22 One other -- one thing that the commission  
23 only focuses upon issues about changing the  
24 guidelines, let me just say that we've been working  
25 with the Pennsylvania Commission on Crime and

1 Delinquency in terms of intermediate punishment  
2 programs. They have obviously -- I think you've had  
3 an oversight hearing on that commission. They have  
4 invested tremendous amount on the intermediate  
5 punishment programs across the state. We have shared  
6 and we share a staff position with Mark Bergstrom. I  
7 pick up roughly half of his salary. They're picked  
8 up -- he's picked up half by the Commission on Crime  
9 and Delinquency. So he works jointly with us in a  
10 cooperative arrangement. We're in the second year of  
11 that particular process.

12           We've offered workshops for 12 counties.  
13 I think -- I think that Berks County has been  
14 actively involved in that process. I know they  
15 have. A number of other counties have as well.  
16 We've had two different workshops for those  
17 counties. We've been working with the Edna McConnell  
18 Clark Foundation. In fact, this summer we sponsored  
19 with -- funded by the Edna McConnell Clark Foundation  
20 one -- basically a one-day training session for  
21 judges and we have also been sending judges to --  
22 they do judicial seminars totally paid for by the  
23 Edna McConnell Clark Foundation at Yale and  
24 Minnesota. We sent 12 judges last year. We are in  
25 the process for the spring semester eight more judges

1 will be going to Minnesota, and I think Judge Ludgate  
2 is going from Berks County and I think Judge Stalone  
3 is a part of that and has promised to go next year as  
4 part of those seminars. So Edna McConnell Clark has  
5 been supportive of that. They have also, by the way,  
6 fund a staff person who is being shared between  
7 Commission on Crime and Delinquency and the  
8 Pennsylvania Commission on Sentencing basically doing  
9 special projects. The first one of those is looking  
10 at the impact of mandatory minimums, which is, I  
11 think, an issue for the Sentencing Commission as well  
12 as I hope will be an issue for this body in the next  
13 -- next year or two.

14           Prison population projections, we work  
15 with the Pennsylvania Commission on Crime and  
16 Delinquency as well as the Board of Probation and  
17 Parole, County Commissioner Association and others in  
18 terms of developing projections for legislation as  
19 well as for the guidelines and in the changes in the  
20 guidelines -- and I'm sure you'll hear more about  
21 that this spring when we submit proposals to you.

22           We are also in the process, the  
23 Pennsylvania Commission on Sentencing and the  
24 Pennsylvania Commission on Crime and Delinquency is  
25 working with the National Counsel on Crime and

1 Delinquency on a grant from the Bureau of Justice  
2 Assistance which is called the Structured Sentencing  
3 Grant. The goal of that particular grant is to write  
4 a prototype for how to write sentencing guidelines  
5 for states that are considering it.

6 So we are currently doing this particular  
7 project, studying sentencing commissions across the  
8 country. In fact, Cynthia Kempinen, who is behind  
9 me, has just returned from Kansas. And Jody, who is  
10 sitting to her left, to my left, to your right, and  
11 Jody Hobbs is getting ready to after today's hearing  
12 she will be going to Washington. Cynthia just came  
13 back from Kansas. I'm not sure I got that right when  
14 I said that first.

15 Regardless, looking at what they've done,  
16 their guidelines, we are preparing that for a  
17 national report. And that is all funded by the  
18 Bureau of Justice Assistance.

19 And finally, a comment that we have --  
20 we're working on updating the data systems. So one  
21 of our goals, again primarily under the leadership of  
22 the Pennsylvania Commission on Crime and Delinquency  
23 and the special set-aside funds that have been  
24 provided as part of their federal funds is to work on  
25 the increasing quality and information that can be

1 available not only to this committee but also to  
2 legislature as a whole to be better prepared and  
3 better informed in making decisions in the area of  
4 crime and delinquency.

5 With that I conclude my remarks and stand  
6 before you for questions.

7 CHAIRMAN CALTAGIRONE: I know that for  
8 some of the new members this might be helpful if --  
9 do you have your total budget figure and the staff  
10 complement?

11 MR. KRAMER: Well, I have it in my head.  
12 Our budget this year is 500 thousand dollars. My  
13 staff -- and that has grown. We had a special  
14 request for appropriations. We are about \$329,000  
15 about three or four years ago. We requested special  
16 moneys in part above the IP as well as the revisions  
17 to the guidelines. And so I think the history of our  
18 budget over the last three years. It's pretty easy  
19 to go through, has been -- well, it was 495. I think  
20 I asked for 485 which I received two years ago. Last  
21 year there was a five percent cut across-the-board at  
22 the end, I went to 456. And this year I requested  
23 500 thousand, which I received. And that's our  
24 current -- our current budget.

25 The staff numbers -- because we're just in

1 the process of moving, so I was looking at this last  
2 night as a matter of fact, not necessarily for this  
3 committee, although it's a good question. We have a  
4 staff complement -- the three main individuals who  
5 are involved in drafting and writing guidelines and  
6 managing the data system are the three before you  
7 today, myself, Dr. Cynthia Kempinen, and -- to your  
8 left, and Jody Hobbs to my left and your right.

9 We then have -- we share Mark Bergstrom  
10 with Pennsylvania Commission on Crime and  
11 Delinquency. We have two people who are data  
12 coders. We get 69,000 forms a year in on sentences  
13 in Pennsylvania. So those -- that information we  
14 get -- we get a piece of paper in -- I did not bring  
15 a copy of the form -- but we get a piece paper in.  
16 We clean that piece of information. We call -- if  
17 need be we do use some resources at the university  
18 that -- work study students that we only have to pay  
19 10 percent of their salary to help us clean data.  
20 And that data is then used for providing random  
21 reports as well as any special requests or if the  
22 Commission on Crime and Delinquency is preparing a  
23 projection that data is often used -- commonly used  
24 to do impacts. We have probably four to five people  
25 working on that data component.



1           And then -- so that takes us to about say  
2 four, and then we have the three of us before you.  
3 And I'm not totally on the commission. I'm about  
4 half time to three quarters time, sometimes 20  
5 percent, depends upon the year and my university  
6 responsibilities. So I think we end up with a total  
7 full-time complement of about 11 people on the  
8 commission.

9           CHAIRMAN CALTAGIRONE: The thing that I  
10 wanted to share with you is that Galina and I have  
11 been working, we put together a seminar workshop  
12 sometime in the beginning of next year dealing with  
13 the root causes of crime. And we have been kicking  
14 around a lot of thoughts.

15           And I think if we could get into a little  
16 bit of discussion about that, because it seems like  
17 the motors are always being driven to build  
18 additional facilities to increase budgets at both the  
19 county and the state level. And it's absolutely  
20 taking the top of the roof off, I think in most  
21 counties as well as this state capital because of the  
22 costs that we're now incurring. And if we don't step  
23 back and get a pretty good picture of where we are  
24 and where we're headed, the costs you had indicated  
25 in your opening remarks, about over a billion

1 dollars, that's very, very true. And it's going to  
2 hit us very quickly. And we can't build our way out  
3 of it. So we've got -- with limited resources both  
4 at the county level and the state level, we've got to  
5 look at other areas to invest our money in and our  
6 limited resources to get a better return.

7 MR. KRAMER: Do you want me to respond to  
8 that?

9 CHAIRMAN CALTAGIRONE: Yes.

10 MR. KRAMER: No. I think the question is  
11 we have been caught up in the last 12 to 14 years  
12 since I've been director of the Sentencing Commission  
13 in responding to the -- to the problem, not to the  
14 causes of problem. And that is in part there's  
15 probably two reasons for that. One, we have the  
16 emergency problem of we have offenders, we have a  
17 serious crime problem in this country. It is a  
18 scary crime problem in this country with violence in  
19 the streets. And I hate using that phrasing, but  
20 when we look at ourselves just as opposed to other  
21 countries, we have more -- from my perspective, more  
22 random violence, random resort to violence than other  
23 countries. And why that happens and the causes of  
24 that as a sociologist is really one of the key  
25 issues.

1           I think we probably had to respond in the  
2 early '80s to concerns of public pressures and  
3 political pressures and other things. And I think  
4 that that has happened. I would hope that we have in  
5 a sense bought ourselves some time to look more at  
6 how we bring these people back in.

7           One of my concerns has been that we have  
8 developed a response -- and partly the commission is  
9 responsible for this. We clearly have written tough  
10 drug sentencing guidelines. We've written tough  
11 guidelines for the judges in Pennsylvania. If they  
12 are going to depart, we can see their departure rates  
13 tend to be below the guidelines. Some offenses 54 --  
14 54 percent, for example, in agg assault, serious  
15 bodily injury departures below the guidelines. You  
16 add mitigating ranges to that, you've got a  
17 communication that either we're too harsh or judges  
18 are too lenient or whatever. But the issues -- and  
19 we generally assume that there's a communication  
20 there that the guidelines are perhaps out of sync  
21 with propriety in the issues. And that's our general  
22 approach to that.

23           I think that looking at the issues of how  
24 the legislature puts out -- puts forth its investment  
25 in terms of positive development of people versus

1 warehousing of people is really a crucial one.

2           Almost all -- 99 percent of the offenders  
3 are going to return to the streets, even those we've  
4 locked up. And if we are not doing something for  
5 them or increasing the quality and the potential  
6 investment and quality of their life in the sense  
7 that they come back and be contributing members of  
8 society, we are going to deal with them again and  
9 again and again. And I think we as a Commission,  
10 while we responded with relatively harsh guidelines  
11 in the early 1980s, have been looking at in the last  
12 two years how can we -- how can we in a sense  
13 respond a little differently. How can we look to  
14 assuring that the violent offender -- I don't think  
15 we -- we're not sure what to do with the violent  
16 offenders. The violent offender is an individual  
17 that the Commission is very comfortable with giving  
18 tough and severe sentences.

19           On the margins there are people that  
20 probably don't need state imprisonment and would  
21 benefit more from treatment, rehabilitation. That  
22 may particularly be true of some of the offenders in  
23 trafficking of small amounts of drugs.

24           There's probably three areas where our  
25 proposal focuses on trying to do more for the

1 offender. And this by the way does not mean  
2 non-punishment, because any of the programs we're  
3 talking about are punitive programs. But those  
4 programs do something hopefully to develop,  
5 particularly for abusers of drugs, that we begin to  
6 invest in treatment. And that's part of the  
7 intermediate punishment.

8           That's still sort of a backdoor approach  
9 issue. But looking at what kinds of programs' out  
10 there, both prevention as well as rehabilitation that  
11 need to be invested in in the community, seems to be  
12 this something to raise the kind of question you're  
13 talking about.

14           Whether drug use -- it's always a debate  
15 whether drug use is an outgrowth of other problems,  
16 and we have crime and drug abuse or drug abuse causes  
17 crime. It's hard to tell how that particular causal  
18 model works. But the issue is clear that drug use  
19 exacerbates the amount of crime. So in that sense it  
20 at least escalates the amount of time invested and  
21 the seriousness of the offenses, the amount of theft  
22 offenses, property offenses, the amount of gain to be  
23 obtained. So it certainly escalates the amount.

24           We probably have to look at some of the  
25 things that are leading to both. And we have a

1 tremendous amount of resources in this Commonwealth,  
2 people who are familiar with those issues, who are  
3 often not in a sense brought in to share perspectives  
4 and ideas and concepts about how we move forward and  
5 move to the year 2,000. But if we think of our  
6 current direction, it seems completely that is clear  
7 that it's going to lead to continued growth in prison  
8 populations. And if we look at it in terms of an  
9 investment in the increase and escalation of  
10 minorities in the state, it becomes a particularly  
11 serious issue.

12 One of the things that -- one of the  
13 themes that as we look at Commissioner Lyden when he  
14 appeared before you when we talked about the issue of  
15 who's being incarcerated and what it means in terms  
16 of particularly minority populations, minority  
17 populations have grown from 45 to 65 percent of our  
18 state prison population. And I want to share with  
19 you that causes a serious problem for the judiciary,  
20 in the sense that as they see the state prison system  
21 being -- becoming more and more dominated by  
22 minorities, judges share more and more that they're  
23 more and more hesitant to use a state prison system,  
24 that they're fearful of what may happen to the -- to  
25 the offenders that they sentence to that state prison

1 system.

2           So we -- one of our things that we looked  
3 at when we were looking at the revision of  
4 guidelines, we went around. We interviewed judges  
5 and others. And it's clear that the way in which  
6 we're housing the kinds of offenders we're housing is  
7 also causing secondary backlash effects on the  
8 judiciary. It's not something anybody wants to talk  
9 about. And it's not something that -- but it is  
10 something that as Director of the Sentencing  
11 Commission I think we need to open a dialogue about  
12 how do -- what do we do about unemployment issues,  
13 what do we do -- what's the relationship of family,  
14 unemployment, and other issues. That's a long-term  
15 investment.

16           We really we're talking -- you're not  
17 going to change anything very quickly. You are not  
18 going to change anything that's going to effect your  
19 next election. It's an -- it's an investment in a  
20 social system to the year 2050. If you look at the  
21 demographics of that state to the year 2050 and if  
22 you say where are we going to be and what's our  
23 population going to look like and the  
24 characteristics, will minorities become majorities.  
25 We're going to be looking at a very, very different

1 mix of population in the next 60 years.

2           So as you look forward, not to the next  
3 election and not to the next two years, four years,  
4 six years, if you start looking forward to long  
5 beyond our lifetimes, and thinking about where  
6 Pennsylvania's going to be, there are certain  
7 building blocks that seem to be worth some  
8 investment; be that education, family. That's all of  
9 those issues that people talk about but are difficult  
10 because they take such -- the potential productivity  
11 is such long-term. Prisons, we know we'll have  
12 them. We know we'll have people in them tomorrow or  
13 next year, four, five years. Once they're built we  
14 know they'll have them. They are easy. They are  
15 within a political time frame.

16           For my perspective I would certainly  
17 encourage you to begin thinking about how we might  
18 look at an investment, longer term investment in  
19 Pennsylvania's Commonwealth.

20           CHAIRMAN CALTAGIRONE: That was one of the  
21 things I would hope to address through that type of a  
22 seminar and possibly even exploring the  
23 reprioritizing our priorities. Maybe what we're  
24 dealing with in where we're pouring our money in as  
25 far as our budget's concerned should be re-examined.



1 And I think it's a very healthy process from time to  
2 time to do that. Just as we have Sunset in all of  
3 the agencies, we really should look over where we're  
4 putting our -- our resources as a study to see if it  
5 really is helping or hurting the situation.

6 And I think some drastic measures are  
7 going to have to be taken at some point with the way  
8 we dole our resources in this Commonwealth in order  
9 to reverse these trends or else I think it's just  
10 going to become more chaotic. That's my own personal  
11 opinion.

12 MR. KRAMER: It's a very difficult issue  
13 because of the time frame and the difficult issue in  
14 investment and prevention is, one, it takes a long  
15 time. And secondly, the payoff, people, you know --  
16 people are confronted with a short term problem of  
17 serious crime. There is no question we have that.  
18 But how do you -- how do you invest in the future  
19 which you're not going to see immediately in your  
20 political lifetime that the next generation of  
21 legislatures and others may be in a better  
22 situation.

23 And I agree with you. I think that's -- I  
24 think that's the serious question. And it's not to  
25 say we're already doing -- we're doing a significant

1 amount of investment in locking people up. We've  
2 done that very well. I mean, I don't think -- in  
3 that sense I think we're all to be congratulated. We  
4 have certainly increased confinement. 64 percent of  
5 people sentenced in Pennsylvania receive a  
6 confinement sentence. As I said, a big portion of  
7 those are county jails, of course.

8           Our state prison populations have grown  
9 from when I started with the Sentencing Commission we  
10 had about a hundred -- about 88 per every hundred  
11 thousand people in our state locked up. Today we  
12 have probably approaching 250 per that. I haven't  
13 looked at the figures lately because they're pretty  
14 ugly and a little demoralizing to think about what  
15 we've had to do.

16           I'm not saying -- we have a serious crime  
17 problem. We certainly have had more effective  
18 prosecutorial practices. There's more people being  
19 convicted. Crime rates have not increased  
20 dramatically in the 1980s, but what has increased is  
21 the conviction rate. And that's particularly true in  
22 the drug area, which is really one of the real tough  
23 areas. Tough in the sense that certainly we've  
24 written tough guidelines. We've submitted those to  
25 you in '88 and '89. Those are currently part of the

1 law as well as the mandatory minimums. Those  
2 things -- those pieces of legislation have clearly  
3 locked and confined more people than we were  
4 confining prior to that.

5 Convictions have risen. I just happened  
6 to look today. Convictions have risen for the drug  
7 trafficking area from around 2500 in 1986 or '87 to  
8 approaching 9,000. So that we're clearly dealing  
9 with a lot more people, a lot more bodies are coming  
10 before the courts for sentencing. And that, of  
11 course, is one of the reasons we have 26,000 people  
12 locked up. It's not that the guidelines have gotten  
13 tougher every year. It's a question of -- a lot of  
14 it is more people are being sentenced.

15 CHAIRMAN CALTAGIRONE: I'd like to open up  
16 for questions. Representative Carn.

17 REPRESENTATIVE CARN: Thank you, Mr.  
18 Chairman. Thank you, Dr. Kramer, for being here.  
19 I'm listening intently to what you're saying. On the  
20 issue of mandatory sentencing, has the Commission  
21 taken any position or requested any development of  
22 information to -- for them to act on as of yet?

23 MR. KRAMER: We have -- the Commission has  
24 always taken a position in opposition to  
25 mandatories. And I -- and I have testified against

1 mandatories before this committee, and for a number  
2 of reasons. I don't need to go into all of that.  
3 I'm sure you're aware of the reasons we do that.

4 Mandatories have hysterically been --  
5 hysterically and historically -- I use that -- notice  
6 the way I merged those two words. There's a little  
7 of both in that for two reasons. One, the  
8 simplification of it is much simpler than we think is  
9 fair for a judge to have to confront. And secondly,  
10 there is the management process. And the management  
11 process is one in which the prosecutors and others  
12 negotiate so many of them away, keep a few, and we  
13 end up with a system in which some people get the  
14 mandatory, some people don't get the mandatories. It  
15 gives great powers to an invisible system. And I  
16 think I much prefer the more visible model. And the  
17 commission prefers that.

18 Now, we have a number of judges on our  
19 commission. And judges have historically been  
20 opposed to mandatory. So it's not unexpected that we  
21 would be in opposition.

22 We are -- the last thing I'll say about it  
23 is that we have because of the number of questions  
24 been raised, well, what's going to be the impact of  
25 the mandatories on the prison system and other things

1 and what can we do. There are two things going on.  
2 One is trying to get better information in order to  
3 provide the legislature. And secondly, there is a  
4 development working with the district attorney's  
5 association to talk about areas that we could explore  
6 mutually, not necessarily to abolish mandatories,  
7 because I think the last time I appeared before this  
8 committee I think that the chair -- Chairman  
9 Caltagirone at the last -- and I believe the minority  
10 Chair Piccola asked me a question about well, let's  
11 assume we're not going to abolish mandatories, what  
12 might we do to move forward with ways to make them  
13 better, where there are blatant unfairness are at  
14 least limited and perhaps some of the impact on the  
15 state prison system is eliminated.

16 That -- there is an individual who's doing  
17 some work on that with the district attorneys, but  
18 there is no specific proposal that has been drafted  
19 on that particular issue. And that's where we stand  
20 at this particular point in time.

21 REPRESENTATIVE CARN: You raised an  
22 interesting concept, the invisible system. Do you  
23 think that invisible system has anything to do with  
24 how 60 percent of the prison population is minority  
25 when only 11 percent of the general population is

1 minority?

2 MR. KRAMER: It could. I think it's  
3 probably more in terms of our targeting of offenders  
4 in the sense of the -- what we end up catching are in  
5 the state system are people who are selling drugs on  
6 the streets. And that -- my understanding, I can't  
7 remember the numbers off the top of my head, the  
8 proportion of those that are minority, but a  
9 significant -- that target the drug -- the drug  
10 growth particularly targets minorities, not -- I  
11 don't know that -- I wouldn't suggest that or mean to  
12 imply that it's necessarily a racist system in a  
13 sense of individual decisions. But I think --

14 REPRESENTATIVE CARN: Well, I imply that.

15 MR. KRAMER: And I think that one can and  
16 that's -- that's one interpretation. Where we see --  
17 I think one of the things is we look at the sentences  
18 that we focus upon and we talk -- go back to Chair  
19 Caltagirone's question about the causes of crime,  
20 whatever, the things that we begin to focus on are  
21 crimes that have limited availability.

22 I think what we focus on are street crimes  
23 and we focused on drug trafficking offenses. And we  
24 have increased the severity of sentences for those  
25 considerably. Unfortunately, if we took the crime of

1 robbery, the arrest across the Commonwealth would go  
2 back to the uniform crime reports. If you look at  
3 the arrest rates for robbery, the proportion that are  
4 in this case just black but not minority, just the  
5 narrow category of being African-American, they  
6 account for anywhere from one year is 86, it's now  
7 running hovering around 76 to -- 76 to 78 percent of  
8 the arrest are African-Americans.

9           To the degree that we began to focus on  
10 with mandatories in others in those particular  
11 offenses, we have selectively, perhaps because we  
12 think those are horrible crimes and we want to deal  
13 with them we are selectively identifying a subgroup  
14 of our population and increasing the incarceration  
15 rate.

16           The issue of whether or not it is -- it  
17 is -- it is racist gets to an issue of whether it's  
18 an intentional link to the racial aspects of the  
19 offender versus the offense that we're concerned  
20 about. And that debate, not only in Pennsylvania but  
21 across the country, is a serious one. There is data  
22 to support both positions on that issue.

23           If we look at -- at Pennsylvania -- and  
24 let me send you an article which has just been  
25 published -- well, published a few months ago in

1 Social Quarterly that myself and another professor at  
2 Penn State wrote on the rule of race in sentencing  
3 decisions -- what I'm getting at really is social  
4 science issue. And to the degree that you control  
5 the severity of the offense and the prior record of  
6 the defendant, what are we -- and other factors that  
7 may be legally important, what do we know about the  
8 role then of race? What does -- just what does race  
9 help us do in explaining the differences?

10           What we basically found that race was not  
11 important as a separate variable independent of  
12 seriousness of the offense and prior record, with one  
13 exception. And that exception happened to be  
14 departures below the guidelines. A white defendant  
15 had about an 8 percent -- and I'm operating off the  
16 top of my head now so I'll send you the article and  
17 you can look at it. White defendant had about an 8  
18 percent greater likelihood of receiving a  
19 dispositional departure from non-incarceration versus  
20 black. That is -- I mean 8 percent is -- some might  
21 argue that's not major, some might argue it is  
22 major. It is clearly an issue that we have to be  
23 concerned about. Some later analysis, looking at  
24 some particular counties, which we don't identify the  
25 particular counties that -- by name, but that we've



1 been looking at finds some greater racial effect.

2 I would -- I think there needs to be some  
3 discourse about this issue. And I -- whether in  
4 terms of you and I may agree or disagree in terms of  
5 how much of it is rasism and what's the length of the  
6 invisible system and rasism. But whether it's the  
7 visible system or the invisible system, I'm not  
8 sure. I think there is an ingredient there that I  
9 think needs to be -- needs to be discussed.

10 A forum I think that the Chairperson is  
11 talking about in terms of talking about the cause of  
12 crime and other issues is things that I -- these are  
13 the things that as executive director and as an  
14 academic in Penn State we constantly are looking at  
15 as well as with gender and other issues, I would like  
16 to see some open discourse and thoughtful discussion  
17 about that issue because it does bring together how  
18 do we respond to crime, what -- what's the impact of  
19 the current way we respond, and what do we do in  
20 terms of investment. So that if an offender's  
21 employed and has -- from a court's perspective has  
22 little going for them, whether they are white or  
23 black may make no difference. But as it happens, the  
24 distribution of that opportunity is very different  
25 across the Commonwealth.

1           So if we were to bring in demographers and  
2 have them talk about the distribution of employment  
3 and other factors that may influence a judge, I think  
4 that's a serious racially linked -- may call it  
5 racist, maybe it's just racially linked -- but racial  
6 issue that we in order to have a better system in the  
7 future need to -- need to look carefully at.

8           I'm glad you asked the question, by the  
9 way, because it's not something I have raised before  
10 this committee before, but it is one which obviously  
11 by suggestion we've been looking at as something I  
12 think we ought to talk about.

13           REPRESENTATIVE CARN: But all the  
14 statistics show with any case there needs to be some  
15 serious dialogue about this matter. My last point  
16 I'd like to ask you about is in your proposed  
17 revisions to the sentencing recommendations. You  
18 pointed out that the Commission is recognizing a  
19 correctional crowding problem of epidemic  
20 proportion. The Commission looked at the impact of  
21 the growing lifer's population as it impacts on that  
22 reality.

23           MR. KRAMER: We have looked at it as an  
24 area of interest but since it is not an area in which  
25 we have defined as having jurisdiction or authority

1 to get involved in, we have not studied that  
2 particular issue. We have talked about it in a sense  
3 bringing before the Commission and mentioning that in  
4 terms of if you think about the overall prison  
5 capacity limit of the state even when all these  
6 institutions that are now being opened are opened,  
7 which will take us to about 24,300, which we are, as  
8 I indicated before, well above that number and by the  
9 time they're all open we'll be even further above  
10 that.

11 REPRESENTATIVE CARN: Still over that.

12 MR. KRAMER: That's absolutely right. And  
13 by the time you take off the -- what's available for  
14 sentencing, if you think of the institution you  
15 really got to think of different populations. And  
16 I'm going to get back to your -- your question.

17 Lifers are always about 10 percent of the  
18 state prison population. And that's with growth and  
19 other areas. So they are taking up basically now  
20 around 2500 beds of a 26,000 or a 16,000 bed capacity  
21 now. And so you have 20 -- so you have about 2500  
22 off of those, if you take out parole violators which  
23 is something like 3,000, by the time you start  
24 thinking about what's available for sentencing, you  
25 have -- you have a much more limited capacity than

1 you may be thinking you have to work with as a  
2 sentencing issue.

3           So that the lifers problem -- the lifers  
4 situation is clearly a serious one. There have been  
5 various proposals which I -- and I have testified  
6 before this committee on the lifer situation,  
7 suggesting that this is one of the few states that  
8 has -- that only has life with -- without parole,  
9 there is no other choice. Other states have looked  
10 at life and have either given some authority to the  
11 -- to the jury to come back with an alternative to  
12 that. That has seemed to work well in some  
13 jurisdictions. Some jurisdictions use a 30 year to  
14 life or a 20 year to life, so that it doesn't become  
15 part of the political context of decision making.

16           I think those are things which I have  
17 endorsed a resolution which you had sponsored which  
18 would have said we should look at this and that  
19 basically the Sentencing Commission come back with  
20 some recommendations. I've endorsed that, continued  
21 to endorse that. I think that some discourse on that  
22 issue is appropriate first and foremost from fairness  
23 perspective. All murder ones and twos are not equal  
24 and yet in a sense we really have left them in that  
25 particular bailiwick at this particular point in

1 time.

2           There's been various proposals. And I'm  
3 not suggesting I know what would be an appropriate  
4 way of approaching it at all. But I guess what I'd  
5 like to see us do is review the range of  
6 possibilities so that this Committee is exposed to  
7 what's going on in other jurisdictions and whether or  
8 not -- obviously this body is the one that has to  
9 make the choice, but we've looked at it as an  
10 impact. We have not looked at it as an area to say  
11 are we going to come forward with any recommendations  
12 about it 'cause we've not entertained that particular  
13 concept.

14           REPRESENTATIVE CARN: Thank you. Thank  
15 you, Mr. Chairman.

16           CHAIRMAN CALTAGIRONE: Representative  
17 Reber.

18           REPRESENTATIVE REBER: Thank you, Mr.  
19 Chairman. From a procedural standpoint, John, let me  
20 make sure that I'm aware of the situation. Public  
21 hearings have been concluded on the proposed --

22           MR. KRAMER: That is right.

23           REPRESENTATIVE REBER: And now the  
24 subcommittee is reviewing the testimony, submissions,  
25 et cetera?

1 MR. KRAMER: Well, we're preparing --  
2 well, we're not quite that far. We are preparing all  
3 copies and transcribing those who did not have  
4 written remarks and then we will be holding a  
5 subcommittee meeting probably it looks like now  
6 around December 11th and 12th. Then -- do you want  
7 to continue or do you me to walk through? Anyway  
8 then at that point we'll have probably a Commission  
9 meeting sometime probably the first part of next  
10 year. And then we will be -- would then be prepared  
11 to submit proposed changes to the legislature.

12 REPRESENTATIVE REBER: And then at that  
13 point it's my understanding from having been involved  
14 in the process back in '81 -- showing my age.

15 MR. KRAMER: Jiminy Christmas. I didn't  
16 realize that. Those were good times.

17 REPRESENTATIVE REBER: Which is ultimately  
18 going to lead into some other remarks. Mr. Chairman,  
19 I think it might be a good idea if we would make  
20 available to the Commission the transcript of this  
21 hearing because I think that would certainly be an  
22 inport as to at least some of the concerns of the  
23 members of the General Assembly and a topic for  
24 consideration by the Commission in the implementation  
25 of that. So I would respectfully ask if we could

1 have that timely done so it could be timely  
2 considered.

3           With that in mind -- and it takes me back  
4 to those days of yesteryear when, as I recall, back  
5 in '81, if my memory serves me correctly, one of the  
6 major concerns that I had when speaking with  
7 Representative McBarry -- who was then the commission  
8 member as I recall during that initial neophyte stage  
9 of this process -- one of the problems I had was --  
10 and still have -- was that the guidelines did not  
11 provide specific guidance concerning reasons why  
12 aggravating and/or mitigating circumstances could be  
13 applied. And I am happy to see that both of those  
14 are considered in the recommendations and, in  
15 essence, done with specificity.

16           And I think that's extremely important  
17 because during the debate in '81, '82, I know I  
18 personally was concerned about the general language  
19 that existed. I think there was some specificity  
20 relative to drug violations. To be quite honest, I  
21 was a little bit more up on the criminal system and  
22 how it worked having been involved much, much more  
23 from '72 until 1981 on a hands-on basis and I've  
24 gotten away from it. But I do know in speaking to  
25 many, many, many members of the bar that many times

1 there is concern of the lack of specificity,  
2 specifically on the mitigating side. And I always  
3 had a tremendous sensitivity for the first time only  
4 time offenders that come into play, that come into  
5 contact. And I think that we have to absolutely make  
6 sure that there is as voluminous and as pragmatically  
7 possible a list of specific reasons for mitigating  
8 circumstances. And I see you have that on page 17.

9 MR. KRAMER: I can't tell you how happy I  
10 am to hear you say that. As my staff behind me knows  
11 --

12 REPRESENTATIVE REBER: I saw the smile.

13 MR. KRAMER: Well, I was smiling  
14 because --

15 REPRESENTATIVE REBER: I've often been the  
16 oracle of Delphi. Unfortunately -- you know, if I  
17 hang around here long enough people are going to  
18 begin to believe it.

19 MR. KRAMER: That is an issue of some  
20 debate because some commissioners believe if you want  
21 to leave some -- a couple of judicial members think  
22 well, let's leave -- you know, the judge, let's leave  
23 it to their authority, they'll be thinking through  
24 this process and all of that.

25 REPRESENTATIVE REBER: Well, there's two



1 things and I tend to -- how shall I say -- agree with  
2 that. And I think the manner in which this is  
3 drafted as I read it, at least paragraph 20 on the  
4 suggested list, gives the judges that discretion.  
5 And paragraphs 1 through 19 with specificity give you  
6 that protection if you are arguing in a sentencing  
7 phase the opportunity where you have that judge that  
8 doesn't want to look at that as part of the rubric  
9 contained in paragraph 20. So I think there's a nice  
10 blend there. And I think I will say in conclusion,  
11 from a brevity standpoint since the Commission will  
12 be seeing this transcript, that I think this is of  
13 sufficient concern that it may warrant the  
14 appropriate rejection by at least the House, in my  
15 mind, if this particular trend in concept is not  
16 contained in the ultimate final product that comes  
17 before us.

18 MR. KRAMER: Oh, I appreciate even that  
19 threat.

20 REPRESENTATIVE REBER: It wasn't a  
21 threat.

22 MR. KRAMER: Well, I will treat it as that  
23 to those who want to argue against it.

24 REPRESENTATIVE REBER: When you're in the  
25 minority it's awful difficult to make threats. And

1 I've been there for the last 12 years.

2 MR. KRAMER: But you see, I get to  
3 translate this to some degree, so -- of course I'll  
4 be part of the record too. I'll scratch out my  
5 remarks now and indicate that --

6 REPRESENTATIVE REBER: You have certainly  
7 editorial liberties I will agree to.

8 MR. KRAMER: And I have heard from judges  
9 across the state that. And there's two reasons for  
10 that, one is I've heard judges who have said to me it  
11 would be helpful if we understood what the commission  
12 felt were appropriate reasons for aggravation and  
13 mitigation. And secondly, what has happened is if  
14 you look at our annual report, we always publish the  
15 list -- the reasons listed by judges for aggravating  
16 and mitigating and for departing below and above the  
17 guidelines.

18 And my feeling is, one, those explanations  
19 are often not very well conceived. And if you look  
20 at the list oftentimes you will hear plea bargain,  
21 which doesn't tell us anything about the reason why a  
22 plea bargain was accepted. I understand in certain  
23 cases one may not want to express that, for example,  
24 if somebody who's turned some state's evidence and  
25 other things you may not want to express that. But

1 we've been concerned about the quality of the  
2 explanations. And that's one of the reasons we  
3 wanted to -- or I've been pushing for some listing of  
4 evaluating mitigating reasons. But I appreciate your  
5 comments. Thank you.

6 REPRESENTATIVE REBER: I think some of  
7 these are very, very well thought out. And just to  
8 name a few that jump really out are the victim was a  
9 willing participant in the offense, the offender  
10 acted under some form of duress, a very important  
11 one. There were substantial grounds to excuse  
12 defendant's conduct, though not sufficient to  
13 constitute a defense to the elements of the crime.  
14 Very, very important. And then it's always difficult  
15 to say the offender played a minor roll in the  
16 offense, your Honor, as a basis for mitigation. But  
17 I think that there is some consideration.

18 And again, I think the specific things  
19 that we go to is what the chairman talked about, the  
20 root causes of crime. And you get into the whole  
21 family and socio-economic environment and the  
22 background. I think a lot of this will be of major  
23 assistance in molding what I think to be fair and  
24 equitable. And really that's what the criminal  
25 justice system ultimately is all about when we look

1 at the scales and everything.

2 MR. KRAMER: I appreciate it. Thank you  
3 very much.

4 REPRESENTATIVE REBER: Thank you, Mr.  
5 Chairman.

6 CHAIRMAN CALTAGIRONE: Thank you. And I  
7 just want to let you know of course as soon as that  
8 transcript is completed we'd like to make sure that a  
9 copy is sent to you. Galina.

10 MS. MILIHOV: John, one of the things that  
11 I wanted to let you know is that the Judiciary  
12 Committee has teamed up with the Appropriations  
13 Committee twice last month to hear about issues  
14 regarding adult probation and parole and juvenile  
15 justice system.

16 And what I am proposing right now is that  
17 you be in the spotlight before the two committees end  
18 and we discuss and bring facts and figures before us  
19 concerning the next 60 years' growth of the  
20 population and how we can strengthen intermediate  
21 punishment and support the county systems.

22 I know that the Appropriation Committee  
23 members are very, very interested in how they can  
24 turn around the funding stream from the state level  
25 corrections to more community-oriented sanctions,

1 development of education, and prevention and rehab  
2 and skills training. And I believe that you have a  
3 lot of the information that they need in order to  
4 work out a projected budget in a way of changing how  
5 we're addressing corrections in the long run.

6 MR. KRAMER: Okay. I would be glad to do  
7 that. And I -- one of the things that the Commission  
8 has toyed with in terms of this proposal -- and by  
9 the way, the current proposal would not in any way  
10 reduce prison populations in terms of growth or  
11 convictions and other things -- but what we are  
12 asking for and suggesting with our proposals -- and  
13 it's clear there's a lot of side issues about the  
14 guidelines -- but one of the primary one issues is  
15 that an investment from this body, meaning the House  
16 and particularly the House Appropriations Committee,  
17 in supporting county resources -- I indicated before  
18 I think that's crucial. Commission on Crime and  
19 Delinquency's, been working with other committees,  
20 other agencies to come up with some formula that  
21 might be a part of an appropriation to help counties  
22 build their programs on intermediate punishment.

23 We -- the Commission will be talking about  
24 in terms of this proposal, if you can't -- we're sort  
25 of caught between a rock and a hard place. We can --

1 it's easy for us to come back with a proposal that  
2 calls for new building of state prisons because  
3 we're a state agency and state's going to have to  
4 fund it. And that's an easy thing for us to do.  
5 It's more difficult for us to come before you with a  
6 proposal which really implicitly says yeah, they're  
7 serious, we've built a lot of state prison population  
8 space, but we think there are areas where we can  
9 strengthen our system by investing in county  
10 programs.

11           And I think I would hope that when you --  
12 when you do receive this proposal in the spring and  
13 we have this joint meeting that we really talk in  
14 great detail about those issues. Because I -- I as  
15 the director of a commission find it very difficult  
16 for me to come forward with a proposal that if you  
17 adopt it will put pressure on the county system that  
18 is currently being overloaded with expectations.

19           And I guess what we will be asking you to  
20 do is think about yourself as representatives of your  
21 counties for a period of time. Obviously you have a  
22 state responsibility, but I also would hope that you  
23 think about what we have done historically and what  
24 we may do in the near future in terms of supporting  
25 those counties. I mean, that's where we're going to

1 bring people back in, the people that have had  
2 problems that are worthy of our investment.

3           And I think that's the question in the  
4 guidelines. How do we define people that are worthy  
5 of our investment in drug treatment and issues like  
6 that? We're trying in the guidelines to do that.  
7 We're trying to help identify people who are worthy  
8 of staying in the community, worrying about their  
9 reentry, worrying about their drug problem, their  
10 drug treatment. So that -- but that we can do that  
11 at the county level, provide the resources for them  
12 to deal with that problem. It's going to save you  
13 money in the short term and I certainly hope it saves  
14 us money in the long-term. And I think even if it  
15 didn't, I think it's time to try. I mean, that's my  
16 personal opinion. And that comes from somebody  
17 who -- we've invested a lot, we've caused a lot of  
18 growth in state prison populations. I think it's  
19 just time to call a time out to that and say how do  
20 we strengthen all the rest of this part.

21           Anyway, enough of my -- on the band wagon  
22 for the county funding issue.

23           MS. MILIHOV: I'm going to put you right  
24 back on it again.

25           MR. KRAMER: Oh, okay.

1 MS. MILIHOV: Would you please go over  
2 again the Commission's response to consecutive and  
3 concurrent sentences and how it relates to current  
4 legislation that we're looking at that is called  
5 truth in sentencing? Consecutive and concurrent  
6 sentences has been one of the areas that we've  
7 received the most calls from judges around the  
8 state. They're very concerned about what their  
9 sentencing options will be and the impact.

10 MR. KRAMER: Yeah. Let me give you a  
11 little history. And I really have to take you almost  
12 to the -- to the meeting of the Commission when we --  
13 when we adopted it. The issue, as I indicated, was  
14 raised by Fred Jacobs first as an issue. It's a  
15 very, very difficult issue and it really involves --  
16 if you put it under the umbrella of ultimate  
17 convictions, a significant proportion of defendants  
18 are coming before the court for multiple  
19 convictions. The court has the jurisdiction to  
20 sentence those concurrently or consecutively.

21 Traditionally probably 95 percent of the  
22 cases are sentenced concurrently. Some are sentenced  
23 consecutively. What Fred Jacobs indicated to me was  
24 that when he goes throughout the state -- and he  
25 deals with state sentences. When he goes around the



1 state he does not find any rationale or basic  
2 justification for the difference. He'll see two  
3 defendants who seem very much the same. One has  
4 maybe a 30 to 60 because they've taken the burglaries  
5 and run them consecutively. Another's got a two to  
6 four and they're all -- and maybe had ten of them and  
7 they're all run concurrently. But the difference  
8 obviously is tremendous.

9           So the problem is there. We have not  
10 developed -- first I want to say we have not  
11 developed a reasonable scheme to address that  
12 problem. So first and foremost, what we talked about  
13 was some -- was really two approaches to it. One,  
14 for example -- and we've backed up. When we talked  
15 about it as staff, the Commission never really looked  
16 carefully at it. Minnesota did something in which  
17 they say if the offense is a personal crime, say a  
18 robbery or serious bodily injury, three separate  
19 robberies, three serious bodily injuries, their  
20 commission would say those sentences should be  
21 consecutive. The philosophical premise of that  
22 consecutive premise is you have three separate  
23 victims who have been seriously injured. The  
24 sentence should reflect all of those victimizations.  
25 So they come forward with the recommendation those

1 kinds of crimes should be consecutive. You have  
2 personal injury involved, you have serious --

3 REPRESENTATIVE REBER: Can I interrupt you  
4 a second?

5 MR. KRAMER: Oh, yes. Of course.

6 REPRESENTATIVE REBER: How about if  
7 there's three separate victims all arising out of the  
8 same occasion or are we talking about 1982, 1986,  
9 1987?

10 MR. KRAMER: No. I think you can have the  
11 same transaction, but the idea that there are three  
12 separate individuals who are seriously a part of it.  
13 Now, you know, but then they say in order to do that  
14 in Minnesota, 'cause they have a population  
15 constraint, what they do is they then have a policy  
16 in which property offenses are run concurrently. So  
17 they have an explicit policy on that.

18 We looked at that issue. We really  
19 debated. We debated mostly internally staff whether  
20 we really wanted to recommend that. And Jody did  
21 most of the work. And I should have her talk about  
22 it. But the issue of how to address the problem of  
23 multiple convictions, how to address the problem of  
24 people who get life sentences for burglaries -- there  
25 is several cases in which, just to give you an

1 example, one of the examples that came up in the  
2 discussion was a case of burglary. The judge gave --  
3 and I use this in my class. The judge gave one and a  
4 half to three on the first one, one and a half to  
5 three on the second and all that. But the important  
6 thing is what the judge said at the end. And if the  
7 judge said concurrent, then they -- then the person  
8 did basically one and a half to three. If the judge  
9 says consecutive it's 45 to 90 years. You have a  
10 life sentence.

11 So we looked at -- we developed initially  
12 and debated. And the Commission looked at the stuff  
13 and debated it. Some commissioners wanted to do  
14 something 'cause they saw it as a serious problem.  
15 Some thought it was an area that we feared to tread  
16 because there was all sorts of implications and they  
17 didn't like the policy and we didn't have a good  
18 policy. No question about that. And but they were  
19 actively debating it.

20 Finally I said, look, there's a  
21 significant enough minority that wants us to think  
22 about that issue. Let's put something out for public  
23 response and get some reaction to it. And that's  
24 what we've done.

25 There are two components of it, as I

1 said. One of which is we call for concurrent  
2 sentences for the -- for basically property offenses  
3 and leave it open for the more serious crimes.  
4 Although as I said, what Minnesota's commission said  
5 was say those should be consecutive. The problem you  
6 get to there is we wouldn't know what that would mean  
7 for your prison system. We don't have the ability to  
8 project it. So we kind of waffled around on that  
9 issue, although I think in certain respects nobody on  
10 the staff felt bad about sentencing consecutive on  
11 those violent crimes as a fairness issue.

12           The other thing that we developed was  
13 something called total confinement cap. And it's not  
14 really a cap, but it's a guidelline which would say  
15 that -- and we debated the amount -- but I think it  
16 was -- and I didn't really get into this. I didn't  
17 mention it before. But we enhanced the size of our  
18 commission considerably in these deliberations. Six  
19 individuals we added were judges from small  
20 counties.

21           The chief justice -- this is really an  
22 aside. But the chief justice appoints four judges on  
23 the Commission, three of those are now from  
24 Philadelphia, one from Pittsburgh. We wanted to have  
25 better representation of the judiciary we appointed a

1 subcommittee. Chad Connelly is the one from Erie  
2 County raised the issue that we have Judge Brown from  
3 Centre County, Judge Farina from Lancaster County,  
4 Judge Eby from Lebanon County, Judge Vanston from  
5 Sullivan and Wyoming County, Judge Creaney from  
6 Cambria County. And they've all -- I may have  
7 forgotten someone, I hope not. But those people have  
8 done a wonderful job in helping.

9           But it was Judge Connelly, as I remember,  
10 who said what if we put a guideline cap that says if  
11 the judges exceed the maximum sentence for the most  
12 serious offense in the transaction, in other words  
13 the minimum would exceed, then that would be -- that  
14 would be a departure from the guideline and the judge  
15 would have to give an argument about why this  
16 sentence deserves more than that.

17           Now let me give you an idea about how that  
18 works. If you had a felony one or five felony ones,  
19 and say you had that -- go back to the burglary  
20 case. One the judge -- the judge where you have the  
21 45 to 90 year sentence, the cap on that under the  
22 guidelines would have been a 20 to 40 year sentence.  
23 As soon as the judge went past the 20 year, the  
24 minimum exceeded the maximum for the most serious  
25 offense, then the judge would have to say I think

1 this particular case warrants a departure above the  
2 guidelines for whatever those reasons might be and  
3 the consecutive sentence could then go on to be 45 to  
4 90. And it could be appealed by the defense in that  
5 particular case if they wanted to. And there would  
6 probably be some foundation for doing so.

7           That number was picked out. And that's  
8 what -- that's the second component to these two  
9 issues. Where we left that with -- in a final sort  
10 of informal meeting of the subcommittee but after  
11 proposals were developed was that the whole issue of  
12 concurrent consecutive is potentially a serious one.  
13 It obviously can get the life sentences for people  
14 who have not committed what you have tailored or  
15 identified as being murder one or murder two. But in  
16 some respects 45 to 90 historically is longer than  
17 people may have done in life sentences.

18           And the question is should we try to do  
19 something with those -- is that an issue of serious  
20 disparity. And if so, should the Commission come  
21 forward with a recommendation on that.

22           What we've decided to do -- what I was  
23 saying earlier, what we have decided to do is we're  
24 going to -- we're not going to do anything with  
25 it. You will not see in the spring any proposal on

1 concurrent consecutive sentences I don't believe.  
2 What you will see is us instituting a study of  
3 concurrent consecutive, particularly with the one  
4 issue raised that is very selective racially in terms  
5 of consecutive sentences. And I have no information  
6 and no way of evaluating that argument at that point  
7 in time. But that we, in a sense, come back to the  
8 commission probably two years after this next spring  
9 submission with information on that and open up that  
10 discussion again.

11           So that's kind of where we stand. There  
12 could be the possibility of going forward with the  
13 total cap issue to address those issues of the -- of  
14 the lengths that get to be 45 and really very, very,  
15 very long minimum sentence for non-life sentences.  
16 And those clearly bother the Commission. And they, I  
17 think, in general in number would like to think that  
18 a defense attorney would have some grounds for  
19 appealing that to make the judge clear that this  
20 is -- this is really effectively a life sentence.  
21 Does this crime warrant that? Does 30 burglaries  
22 warrant 45 to 90 years?

23           I don't know the answer to that. I don't  
24 even know -- I wouldn't pretend to know the answer to  
25 that. The question is whether we should put

1 something out there that requires a judge to be clear  
2 that he or she knows what he or she is doing and that  
3 a 45 to 90 years is effectively probably a life  
4 sentence unless -- it throws the problem to the  
5 commutation board to throw out the judge's sentence.  
6 And that's the other choice. And that is not -- I  
7 don't know how often that happens for those kinds of  
8 cases. But that's not something that's a very  
9 reliable reviewer of a fairness in sentencing.

10 So where's the commission stand? Sort of  
11 all over the place on the issue. It's complex. We  
12 think that multiple offenders who have committed more  
13 than one crime shouldn't get freebees for committing  
14 more crimes. There's no question about that.

15 The question is how to enhance it in a  
16 fair way. We've not come up with any good standards  
17 at that point. That's a long answer to your  
18 question. But it's not an easy question.

19 MS. MILIHOV: Thank you. I have another  
20 question and that is why is it that the Pennsylvania  
21 Commission on Sentencing is not directed to stay  
22 within prison capacity.

23 MR. KRAMER: Well, I think there's two  
24 reasons for that. Now this goes back -- historically  
25 back to the mid 1970s. And first off we didn't. The



1 irony was that in the mid 1977, '78 when -- gee,  
2 maybe Representative Reber even remembers -- Norm  
3 Berson and Tony Surrecho were -- you go back almost  
4 as long as I do, my word. When those individuals  
5 were drafting this legislation there was no prison  
6 population crisis. So and it was -- other  
7 commissions now see that and think about it.

8 Our commission didn't. Minnesota was very  
9 close and in terms of their capacity and their  
10 numbers. We had about 2,000 excess capacity in  
11 1978. And so it wasn't something that people said,  
12 oh, I don't think -- very specifically that oh, this  
13 is what's going to happen. So they didn't --

14 REPRESENTATIV REBER: Some people said  
15 it. Check your record.

16 MR. KRAMER: Yes, some did. No, some  
17 did. And it was considered in fact when the  
18 manditories were looked at in 1976 and that was  
19 rejected. The growth of prison populations was one  
20 of the arguments against that. So there was a  
21 sensitivity out there, but it was not as sensitive as  
22 it would have been today.

23 The second issue was clear when the  
24 commission started to work that the concept was that  
25 fairness in sentencing was not going to be achieved

1 by some restriction by capacity. And again, this is  
2 in the context of not a serious overcrowding and we  
3 haven't had a Department of Corrections budget going  
4 in 20 and 25 percent per year over lots of years. So  
5 we didn't get called before and say we've got to slow  
6 this process up at that point in time.

7 But clearly there was a perspective on the  
8 part of the legislature to get tougher, that there  
9 was a feeling that there was undue leniency in many,  
10 many areas of sentences. The commission's mandate  
11 did not say that specifically, but there was  
12 clearly -- we started to work. Or legislative  
13 members made that very, very clear that it's -- that  
14 the commission should be sensitive to that.

15 So I think to the degree -- as  
16 Representative Reber indicates -- that people did  
17 raise that issue, the response was we want quality  
18 sentences, if that means more space than so be it.  
19 We'll do something with that. And we did look at  
20 capacity. And as I said before, Governor Thornburg  
21 with the mandatories and we looked at the anticipated  
22 impact of both of those, the guideline and the  
23 mandatories in terms of prison population and 3,000  
24 spaces were added. We obviously didn't have the  
25 foresight to say that ten years later we were only

1 off by actually not very far, about 13,000 people.  
2 There were some intervening events there, the drug  
3 mandatories and changes in the guidelines for drugs,  
4 but all of which stimulated more people going in.  
5 But that's my sense of the history of that.

6 MS. MILIHOV: So you feel that --

7 MR. KRAMER: Almost every commission that  
8 is created today has that particular cap. I mean,  
9 they are -- if they are going to be spending the  
10 state money through the guidelines, they have to come  
11 in with an alternative proposal or a particularly  
12 strong rationale why they should do that or stay  
13 within capacity.

14 MS. MILIHOV: So are you satisfied that  
15 the way that Pennsylvania's Commission is set up  
16 enhances the quality of the sentencing and that you  
17 would feel that it would be appropriate at this time  
18 to bring on the requirement that the guidelines make  
19 sure that the population doesn't grow beyond our  
20 capacity.

21 MR. KRAMER: I think that -- I guess what  
22 I would suggest is that the commission should be  
23 sensitive to that. And I think we are. But I think  
24 there should be a statement -- you always have to  
25 make the argument that you should be to them.

1 There's nothing in statute to say that we should.  
2 And others will argue that, hey, that's not your job,  
3 you should stay out of that, worrying about prison  
4 populations.

5           We -- the problem is there's just -- if  
6 you don't have some sort of sensitivity to it's easy  
7 to gain points for getting harsh. There's no  
8 question that the Commission could look real good if  
9 they just sat down and bent to pressures for getting  
10 tougher on violent offenders and doing all those  
11 things. That would be the easiest line to take, even  
12 though you may scream at the cost that it's going to  
13 bring to bear upon you. You probably would be hard  
14 pressed to -- to not accept those proposals.

15           And so I think that -- I think a  
16 statement -- if I were in another state, I have done  
17 this and said if you're going to create a commission,  
18 you should create a commission that understands it  
19 does not have an unlimited budget.

20           Chairman Caltagirone asked earlier about  
21 what our budget is. Our budget's only 500 thousand.  
22 But our costs can be in the millions because of what  
23 we do that can affect 69 thousand cases. So that  
24 while we don't spend much money personally in -- in  
25 stream of the state --

1                   CHAIRMAN CALTAGIRONE: Ripple effect.

2                   MR. KRAMER: -- we can be very expensive,  
3 and in a sense hide behind language about getting  
4 tough and all of that. And I think it would be  
5 difficult. I think we should have a statement in our  
6 enabling legislation which indicates that the  
7 Commission needs to be sensitive to prison  
8 populations and if it's going to come forward with it  
9 it should come forward with recommendations about --  
10 all of these can be accepted and rejected. And one  
11 of the things Representative Reber was suggesting is  
12 that the process you have 90 days to reject the  
13 guide. And it's a concurrent resolution process,  
14 that we either give you alternative proposals, and  
15 that's hard with concurrent resolutions. I've  
16 debated about how to do that. How can we give you  
17 two options which you reject the one you don't want.  
18 That's 90 days is a fairly short term. All of that's  
19 awkward. I've really thought of that because at  
20 times I'd like to have you see two different  
21 proposals and say, hey, what do you really want.

22                   But at this point I'd like to have you  
23 have some statements of caution to us that we don't  
24 have the opportunity of having unlimited expenditure  
25 of your state finances to build prisons. And that

1 could be a caution statement, it could be that the  
2 guidelines should not increase capacity if you wanted  
3 to go that far. And most states what they say is  
4 that the Sentencing Commission shall take into  
5 account prison capacity in writing its guidelines.  
6 And usually that cautionary note is enough that the  
7 commission is very cautious.

8 Two states at least say because they go  
9 through the guidelines and they are passed in bill  
10 form as opposed to rejected by concurrent resolution,  
11 those particular piece of legislation if you're going  
12 to give us one bill that says grow prisons grow, give  
13 us another option that says no this is going to stay  
14 within our capacity, we're not going to spend anymore  
15 money in building. And then the legislature can take  
16 the one and move which way -- either or neither of  
17 them that it wants.

18 MS. MILIHOV: Okay. My final thing that I  
19 would like you to talk about is the so-called  
20 invisible system and the disparity in racial  
21 minorities receiving longer sentences. I'm wondering  
22 two things. One is is there a way that we can look  
23 at the crimes that are targeted that are  
24 disproportionately minority crimes or at least  
25 minority sentence crimes, and make recommendations

1 for rehabilitation or treatment or community  
2 sentencing? And secondly involving the invisible  
3 system, is there a way that we can better guide  
4 prosecutor driven charges and plea bargaining  
5 regarding mandatory sentences?

6 MR. KRAMER: The first one is easier in  
7 the sense that, yes, we can sit -- I think we can  
8 have an intelligent discussion about the conviction  
9 by race, look at the sentencing guidelines. And by  
10 the way, I think that the Commission and guidelines  
11 system is not atypical to Pennsylvania. Guidelines  
12 systems to the degree that if you think back to the  
13 late '70s early '80s, one of the areas that was  
14 perceived leniency was in the two metropolitan areas  
15 of this state. And clearly there has been an  
16 increase in severity of the sentences in those areas,  
17 there has been increasing focus on violent crimes,  
18 street crimes, and particularly robberies. As I  
19 indicated with the arrest rates, that's a  
20 particularly vulnerable one to increasing the risk  
21 and the growth of correctional populations that are  
22 minority.

23 We clearly should talk about the  
24 implications of mandatory penalties and sentencing  
25 guidelines and the drug areas is a newer one, but one

1 that clearly is another target area. We certainly  
2 have the data to talk about that issue looking at the  
3 sentencing patterns, looking at the guidelines, and  
4 looking at its -- at its racial link. And I think  
5 that would be something that would be an interesting  
6 part of our discussion if we have that thing in the  
7 future.

8 So yes, I think we can do that. And  
9 I'm -- I couldn't do that off the top of my head, but  
10 I think preparation and walking through and showing  
11 you and demonstrating that would be more productive.

12 Secondly, the invisible system -- and I  
13 know you put -- both are there. The invisible system  
14 in terms of prosecutorial discretion and power,  
15 mandatories and to some degree sentencing guidelines  
16 increase the power of the prosecutor.

17 We've two areas of real debate we've had  
18 about our proposals are issues about, for example,  
19 one is a school zone enhancement we have currently in  
20 the guidelines which adds 12 to 36 months in the  
21 guideline range if a drug traffic offense occurs  
22 within 1,000 feet of a school system. But we have  
23 only had that applied eight times -- I think it was  
24 eight times in 1991, '92. I forget the date. And so  
25 we said well, clearly prosecutors aren't applying it



1 and therefore we're going to drop it. Well,  
2 obviously we've received letters from prosecutors.  
3 They're screaming saying the commission's dropping  
4 this very important issue.

5 Well, we -- actually it was a very  
6 cavalier process. We dropped it because nobody's  
7 using it. What really comes out in the testimony is  
8 it's sort of being used more as a threat but not in  
9 the real application. And this is a -- you know, I  
10 know we've gone on a long time this morning and I'll  
11 try to stop the discussion -- but it's an issue in  
12 which the prosecutor has a tool, the judge has no  
13 power once, you know, really if the prosecutor  
14 doesn't bring it to the court's attention, they're  
15 not going to apply it retroactively after he had the  
16 sentencing automatically. So we don't have it  
17 applied, but apparently it is helpful to coerce.

18 And the question is should the  
19 guidelines -- I call them paper lions. Should you  
20 set up these sort of paper lions to intimidate  
21 defendants so it can be used as a tool, part of this  
22 invisible system so we can increase the number of  
23 people that are going to turn state's evidence. Is  
24 that a function of sentencing guidelines? I think  
25 that's a real -- there's a real ethical problem

1 obviously with that.

2           Particularly if you take Representative  
3 Reber who has a defendant and ask to in a sense  
4 engage in -- try to come up with a -- what may seem a  
5 fair result in his court of common pleas and has the  
6 risk may not be great that the court will apply it  
7 but it might be, you're never quite sure.

8           Deadly weapon enhancement is another issue  
9 that came up with that. We were really trying -- it  
10 had nothing to do with prison populations by the  
11 way. But our concern was that some counties haven't  
12 applied it in ten years of its existence had never  
13 applied it. So our feeling was that a lot of it's  
14 being used sort of implicitly. If you plead we'll  
15 drop the deadly weapon enhancement which would call  
16 for a year's confinement.

17           We're anxious about our role as a sort of  
18 tool. And so you have what's really done in a sense  
19 real offense sentencing, offensive conviction, and  
20 then you've got these other things. That discussion  
21 is a long one, but it's all by way of illustrating  
22 that I think, yes, there is a serious invisible  
23 system.

24           I think the one reason we argue against  
25 mandatories is that -- and guidelines are not

1 excluded from the problem. They are at least I think  
2 in general somewhat more visible. But we have to be  
3 careful about just giving tools to the prosecutor.  
4 We -- not to say we want to disarm the prosecutor.  
5 On the other hand, you want fair sentences. And if  
6 you're getting sort of idiosyncratic application of  
7 standards, we're getting -- we're not reducing  
8 disparity, we're not creating fairness in sentencing,  
9 we may be increasing conviction rates.

10           And by the way, we certainly have had an  
11 increase in conviction rates over the last 12 years.  
12 I don't know what the cause of that is. We may have  
13 better prosecutors, we may have better county  
14 detectives, but we've also certainly had better tools  
15 at sentencing for the prosecutors than we had a  
16 decade or two ago. All of those things have  
17 increased the numbers of convictions. Crime rates  
18 haven't gone up, but conviction rates have gone up.

19           Obviously these issues require greater  
20 exploration than I'm capable of giving this morning.  
21 But I think there's an awful lot that's not seen and  
22 it's become clearer as we've gone through the public  
23 hearing process that an important part of the  
24 guidelines, especially these add-ons, is a power  
25 issue.

1           And I guess at some point in time you  
2 are -- you are in a sense the boss's of the  
3 Sentencing Commission. One of the things that you  
4 will have to think about is as you hear the screams  
5 about the commission dropping the school zone  
6 enhancement, is that our function? Does that strike  
7 you as a good thing even though it may never be used,  
8 is it good because it is a public statement that we  
9 don't like public -- we don't like public selling of  
10 drugs within an area around the school? Is it a good  
11 thing because it gives the prosecutors a tool to get  
12 better pleas and get harsher sentences for these  
13 people, even though they may not actually apply the  
14 enhancement.

15           Boy, we've kicked this around a lot among  
16 staff. And ultimately perhaps -- I'm not sure what  
17 we're going to do with it. You'll be the ultimate  
18 arbitors of what those -- what we think are pretty  
19 tough decisions. Get tough on crime, that's an easy  
20 decision if that's the only goal. But when you start  
21 talking about disparity, fairness, equity issues,  
22 then other things begin to make it a little cloudier  
23 and a little foggier about what's the right thing to  
24 do.

25           MS. MILIHOV: Thank you.

1           MR. KRAMER: I don't know if that answered  
2 your question or not.

3           MR. MILIHOV: Thank you. Yes.

4           CHAIRMAN CALTAGIRONE: Counselor Scott.

5           MR. SCOTT: Dr. Kramer, quick follow-up to  
6 Representative Carn's and I guess Galina's last  
7 question. Several weeks ago Representative  
8 Caltagirone, the chairman, requested that  
9 Representative James, who is to my right, the  
10 Subcommittee Chairman on Crimes and Correction, look  
11 into the issue of the disparity of African-Americans  
12 and other minorities in the whole judicial system  
13 from the arrest aspect to the sentencing and to the  
14 inmates in the correction system.

15                   On or about December 9th I believe  
16 Representative James is going to have a one day  
17 working session, actual working session. Not so  
18 much -- I guess it would be a prelude to the Senate  
19 in January, because we don't want these issues to,  
20 you know, get lost in the whole umbrella of roots and  
21 crime. And I'd like to know if you, since you did  
22 write this role of raising sentencing decisions, and  
23 any of your other staff would participate in just one  
24 day working sessions, roll up your shirt sleeves and  
25 so forth, can leave your tie at home, would that --

1 MR. KRAMER: Well, with that caveat I  
2 certainly would be willing to come.

3 MR. SCOTT: What we're looking at is for  
4 those folks that, you know, not only be aware of the  
5 problem but to offer some solutions. And since you  
6 wear two hats in academia, you say you're a  
7 sociologist and so forth, it's that kind of input  
8 we're looking for, because we feel though there is a  
9 problem.

10 MR. KRAMER: Oh, I think there's a problem  
11 too. And I would obviously not only be willing to  
12 participate but I think that dialogue is one  
13 that's -- I would like to have seen occurred earlier  
14 and I think the sooner the better.

15 CHAIRMAN CALTAGIRONE: Representative  
16 James.

17 REPRESENTATIVE JAMES: Thank you, Mr.  
18 Chairman. Let me apologize for being late, but  
19 there's always, you know --

20 MR. KRAMER: I'm just glad you're here.  
21 Go ahead.

22 REPRESENTATIVE JAMES: -- other things  
23 that happen. And I'm glad that you're here. I just  
24 wanted to ask a few questions. I'm trying to review  
25 some of the documents. Has the Sentencing Commission

1 done anything -- you might have already answered. If  
2 you already answered just say you have -- done  
3 anything with the -- with the crimes committee with a  
4 gun or in other words that's an automatic five  
5 years?

6 MR. KRAMER: Have we done anything --

7 REPRESENTATIVE JAMES: Have you made any  
8 suggestions or recommendations for other kinds of  
9 circumstances with that or does just flat if you use  
10 a gun -- if you commit a crime with a gun it's  
11 automatic five years?

12 MR. KRAMER: We don't -- and that's the  
13 mandatory penalty of five years for that. Our --

14 REPRESENTATIVE JAMES: But it's not  
15 something you recommended?

16 MR. KRAMER: No, it's not. In fact, we  
17 would recommend --

18 REPRESENTATIVE JAMES: That was something  
19 came out of here.

20 MR. KRAMER: In fact, my recommendation --  
21 no, no, no. I don't support that piece of  
22 legislation. We live with it, but it's too simple.  
23 Let me say something that I did not talk about this  
24 issue, but I did when I testified before this  
25 Committee on mandatories before suggested that where

1 the Commission makes distinctions that the  
2 mandatories go I think increase fairness. And I  
3 would envision a time when that kind of mandatory is  
4 seen by the legislature as being unfair and that --  
5 for example, robbery felony one, use that example, is  
6 two -- really two different kinds of behaviors. It  
7 involves actual serious bodily injury or threatened  
8 serious bodily injury. Under the statute five year  
9 minimum gun, it doesn't matter. If you shoot the  
10 person it's five years, if you don't shoot the person  
11 it's five years.

12 Now, one could argue there's no  
13 difference. I don't take that particular argument.  
14 I think there is a difference. What we do is we make  
15 a distinction in robbery and say if it -- if it's  
16 robbery with serious bodily injury it is clearly more  
17 serious than if it's robbery without serious.

18 And they're both serious. Don't get me  
19 wrong. I'm saying -- talking about no sentence  
20 versus a serious sentence. What we're talking about  
21 is distinction where we tried in the guidelines to  
22 bring together -- and sentencing is complex, criminal  
23 behavior's fairly complex -- we try to scale in terms  
24 of two basic crucial ingredients, the seriousness of  
25 the offense for the victim. Serious bodily injury's



1 a lot worse than threat of serious bodily injury. And  
2 secondly, the culpability. So we make a  
3 distinction. Obviously people who any time a person  
4 would be killed would be obviously more serious than  
5 others if we didn't use the culpability factor. So  
6 we take culpability to the degree it becomes  
7 negligent as opposed to intentional, those kinds of  
8 factors will scale down in terms of the severity of  
9 the sentence.

10 One, we think the mandatory penalties are  
11 unfortunately simplified. And they're simplified to  
12 put into the same category of very diverse group of  
13 people who should not be treated the same. So maybe  
14 it's fair if somebody comes in, shoots a person and  
15 commits robbery. But that's very different than a  
16 case in which they come in with a gun that may be  
17 able under the statute could be changed, for example,  
18 so that it could fire projectile but it couldn't at  
19 the time and no one was injured in the incident. I  
20 don't particularly believe that requires five years  
21 incarceration.

22 REPRESENTATIVE JAMES: Okay. All right.  
23 Well, we may agree or disagree on the different  
24 types. But my concern is if -- since that is done by  
25 the legislature, can the Sentencing Commission make a

1 recommendation on something that's mandatory or have  
2 you?

3 MR. KRAMER: We have -- we have in our  
4 mandate something --

5 REPRESENTATIVE JAMES: You don't want to  
6 do that to offend a legislature.

7 MR. KRAMER: Oh, no. I've been offensive  
8 to the legislature before. I'm sure I'll continue to  
9 be. That's why I keep two jobs, see. I can always  
10 walk away. You don't ever hear me coming forward. I  
11 always remind you that there is an escape patch for  
12 me.

13 Now my staff, you see, I protect them back  
14 here. They don't have quite the same escape patch  
15 that I do.

16 But what we have -- we have two responses  
17 to that. First off, we have in our enabling  
18 legislation an opportunity to make recommendations --  
19 and I think this is pretty much a quote -- make  
20 recommendations to the General Assembly for a more  
21 effective and humane correction system. And under  
22 that rubric I have said -- and the second part of  
23 that is I have said to this Committee and will  
24 continue to say to this Committee that I think  
25 mandatory sentences are a mistake. I think -- while

1 I think judges need oftentimes information and I  
2 think guidelines can be helpful, I think they are the  
3 visible part of the system. I think --

4 REPRESENTATIVE JAMES: The invisible?

5 MR. KRAMER: They are the visible part of  
6 the system. They are the individuals who are  
7 accountable and responsible. We have appellate review  
8 which can be brought forward by either the district  
9 attorney or the defense attorney with a set of  
10 guidelines. To me that is a -- to me that system  
11 getting rid of mandatories is a preferred system.  
12 Now I understand --

13 REPRESENTATIVE JAMES: That's been --  
14 excuse me. Is that in any of the your reports or is  
15 that in this report?

16 MR. KRAMER: It's not in this report, no.  
17 It's been in my testimony before this Committee  
18 before.

19 REPRESENTATIVE JAMES: Okay. Now, so  
20 that's general mandatory sentences?

21 MR. KRAMER: That's right.

22 REPRESENTATIVE JAMES: Okay. What about  
23 specifically the crime of a gun? Has any -- are you  
24 just -- you haven't done any specifically on that?

25 MR. KRAMER: Not specifically other than

1 making a recommendation along the lines I was talking  
2 about before.

3 REPRESENTATIVE JAMES: Do you think that  
4 should be a responsibility or should not be a  
5 responsibility? Should the Commission when they see  
6 that there is some problems as relates to certain --  
7 certain mandatories put in their report what they see  
8 or some recommendation -- recommended changes? Would  
9 that be -- would that be too much?

10 MR. KRAMER: Sure. No, I think that's an  
11 appropriate thing. And I would suggest that this --  
12 particularly this Committee should even demand that  
13 from the Commission. We are a legislative agency.  
14 We work for you. And any time you're considering a  
15 piece of legislation I think -- you know, one, we  
16 could do a report for you about what we see as issues  
17 involved with it. Often do that informally. People  
18 will call me and say --

19 REPRESENTATIVE JAMES: Right. But that's  
20 the problem. It's informal, then it gets caught in  
21 this invisible system.

22 MR. KRAMER: That's right, invisible  
23 legislative system. That's right.

24 REPRESENTATIVE JAMES: So I'm just  
25 thinking. And hopefully the Chairman would consider

1 that, our Chairman would, that maybe we could,  
2 whatever request we have to do, because oftentimes  
3 you have legislators that they come up and make laws  
4 responding to a situation or a concern and they --  
5 and they -- within their district and it has an  
6 adverse impact maybe everywhere else later on.

7           And I think we have agencies like you that  
8 can address some of those concerns and problems, and  
9 let's say maybe would bring to our attention maybe we  
10 need to change this thing and we should be willing to  
11 make those necessary changes because -- because I,  
12 you know, I just heard that some -- and you know, I  
13 believe if you go commit a crime with gun, sure, I  
14 think that's, you know, you should have that. But  
15 there are situations, you know, particularly under  
16 domestic abuse type things, you know, that need to be  
17 looked at.

18           Okay. The other question I wanted to ask  
19 is do you make any -- the Commission make any  
20 suggestions or -- as relates to crack cocaine? In  
21 other words, can you get more time because you have  
22 crack than you can if you have cocaine.

23           MR. KRAMER: No. We don't distinguish  
24 between -- the only distinction we make, we don't  
25 distinguish in the guidelines sentencing

1 recommendations between crack cocaine and cocaine.  
2 We do have in there as a potential aggravating  
3 circumstance, which I don't believe has ever been  
4 used to my knowledge, but which says that if the drug  
5 is in particularly pure form -- and we use in there I  
6 think within correct phrase we say such as cocaine in  
7 crack form, then the sentence may want to be enhanced  
8 for that.

9           That is also alluding to the fact that if  
10 you have a 90 percent purity coke -- heroin versus is  
11 2 or 3 percent purity, that would be also an  
12 exacerbating factor suggesting that this person is  
13 more involved in a major drug trafficking. That is  
14 in there. That is only distinction that we make  
15 within the guidelines.

16           More recently the information regarding  
17 crack cocaine suggested that in fact it's not pure  
18 and that our assumptions or our understanding in '87,  
19 '88, '89 was probably somewhat inaccurate, but that  
20 was our operating assumption when we wrote that  
21 particular aggravating circumstance at that point in  
22 time.

23           REPRESENTATIVE JAMES: So then would I be  
24 correct in assuming that in Pennsylvania that there's  
25 no distinction in sentencing someone for an amount of

1 crack and amount of cocaine would be the same except  
2 for the purity?

3 MR. KRAMER: Under the guidelines at this  
4 point. Now, we can't -- we can't tell if a  
5 particular judge may make some -- may move it up  
6 higher in the range or something like that. That may  
7 happen. But in terms of -- in certain terms of state  
8 policy, there is no specific policy that moves people  
9 further forward because of the crack issue. That is  
10 very controversial issue in some other states.

11 REPRESENTATIVE JAMES: Right. It is. And  
12 I was made aware of that at the -- in Washington at  
13 the National Black Legislative Caucus. And there  
14 was, you know, it was just along in terms of the  
15 disparity in terms of it. And I wasn't sure how that  
16 relates in Pennsylvania. And I thank you for that.

17 MR. KRAMER: A lot of misunderstanding is  
18 out there about the issue and we operated with some  
19 of that in the late '80s. But we fortunately didn't  
20 go excessively far in that direction, although we  
21 took a little step with our aggravating  
22 circumstances.

23 REPRESENTATIVE JAMES: That's probably  
24 because you were at the leadership then.

25 MR. KRAMER: I have been here much too

1 long, yes, for 14 years. Leadership is not a term I  
2 use to describe my tenure of 14 years, yes.

3 REPRESENTATIVE JAMES: Well, leadership is  
4 important because we could -- you know, you could  
5 have got caught up in that moment, you know, as other  
6 states did and that disparity came about. Thank  
7 you. Thank you, Mr. Chairman.

8 MR. KRAMER: Thank you very much.

9 CHAIRMAN CALTAGIRONE: Thank you, any  
10 other questions?

11 MS. MILIHOV: John, I'm aware that you've  
12 worked very closely with Karen Ritter and her  
13 development of the new codification of sexual crimes  
14 and consulted with her and talked about the degree of  
15 aggravation on the victim, et cetera.

16 Could you tell us how your new regulations  
17 or the changed regulations are responsive to that  
18 Act, although it is not an Act yet? I mean  
19 responsive to that Bill?

20 MR. KRAMER: Right. Yes. We -- and I  
21 haven't -- we haven't spoken to that here for a  
22 while. But when -- in developing our proposal, if  
23 you look through the Appendix A you'll see that one  
24 of the proposals we have is a proposal to in a sense  
25 subcategorize rape and involuntary deviate sexual



1 intercourse, the three categories versus the one  
2 classification system.

3           We borrowed to some degree from some of  
4 the concepts that were raised in Karen Ritter's Bill  
5 and by demarcating that if it involves serious bodily  
6 injury -- almost any rape has serious bodily  
7 injury -- but beyond that, of course we played with  
8 terms like torture, you know, other kinds of aspects  
9 to it. And a deadly weapon is used that it has one  
10 category. And that if it -- if it's one of those is  
11 part of another, and then third in a sense is a  
12 residual category called rape, not to -- I don't like  
13 using that term, but it's -- as a descriptor I'll use  
14 that at this point. What we would -- we were trying  
15 to do there was kind of bring out some of the issues  
16 that Ritter's Bill was addressing.

17           What she -- her bill and we were somewhat  
18 concerned about is that her bill would take the  
19 residual rape category and make it felony two. And  
20 we were seeing whether or not a guideline response to  
21 this may not be you can leave felony -- leave it as a  
22 felony one and still in a sense offer -- and we  
23 talked about this invisible system. This invisible  
24 system a caveat for opportunities for plea  
25 bargaining. Because that's one of the issues,

1 particularly with testimony around offenses such as a  
2 rape, that we might be able to keep it as a felony  
3 one but do this through the guidelines or some part  
4 of it through the guidelines.

5 I'm not sure how Representative Ritter  
6 feels about that at this particular point in time. I  
7 have not had a specific conversation about our  
8 specific proposal. But that's the way we developed  
9 it. We looked at her legislation, reviewed the  
10 proposals, earlier drafts of the proposal, and then  
11 in a sense partially borrowing from that and  
12 partially excluding parts of it that we thought were  
13 difficult issues in sentencing. We borrowed the two  
14 major ways of subcategorizing and tried to  
15 subcategorize the offense of rape.

16 We have contacted the Pennsylvania  
17 Coalition Against Rape to get their response to our  
18 proposal. To my knowledge we've not received any  
19 response yet from that particular organization.  
20 Jody, do you -- we have not received any response  
21 from that. They obviously have a lot of time. We're  
22 not going to cut off any opportunity for a response.  
23 So we expect to hear that from the next few weeks.  
24 And if we don't we'll recontact them in the next few  
25 weeks to see what they think.

1           But that's the way we've approached it.  
2 We do have some hesitation about removing the  
3 residual category of rape to a felony two. And the  
4 argument there is basically getting convictions. And  
5 that may be a good one. Again, we've talked about  
6 the invisible system is how do you kind of encourage  
7 pleas in these cases, and we were seeing as one  
8 option in that regard was a sentencing guideline  
9 process that allowed for that and may encourage pleas  
10 in that process. That's the way we've addressed it.

11           MS. MILIHOV: Okay.

12           CHAIRMAN CALTAGIRONE: Thank you for your  
13 testimony, John.

14           MR. KRAMER: You're welcome. Thank you.

15           (Whereupon, the hearing was concluded at  
16 12:00 p.m.)

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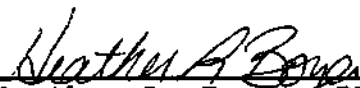
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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.

  
\_\_\_\_\_  
Heather L. Boyer RPR  
Court Reporter-Notary Public