



125 South Ninth Street, Suite 701
P.O. Box 1161
Philadelphia, PA 19105-1161
215-592-1513, ext. 218
(FAX) 215-592-1343

James D. Crawford
PRESIDENT

Deborah Leavy
EXECUTIVE DIRECTOR

Larry Frankel
LEGISLATIVE DIRECTOR

TESTIMONY BEFORE THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE ON MEGAN'S LAW AND OTHER
LEGISLATION CONCERNING SEX OFFENDERS

FEBRUARY 21, 1995

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

LARRY FRANKEL

LEGISLATIVE DIRECTOR

Good morning Chairman Piccola and other members of the House Judiciary Committee. Thank you for providing me with this opportunity to testify on the issue of sex offenders.

My name is Larry Frankel. I am the Legislative Director for the American Civil Liberties Union of Pennsylvania, a nonpartisan advocacy organization whose sole purpose is the protection of the Constitution and the Bill of Rights.

Last year's federal omnibus crime bill included a mandate regarding convicted sex offenders. States have three years to establish a registration procedure for such offenders. The law sets forth specific duties for state prison officials and courts. Any state that fails to comply with these requirements will lose federal funding it would otherwise receive under Section 506 of the Omnibus Crime Control and Safe Streets Act of 1968. I am unaware of any proposed changes by the new Congress that will relieve Pennsylvania from this mandate.

The ACLU recognizes that the Commonwealth has the responsibility for protecting all of its residents from dangerous individuals and that the citizens of this Commonwealth do have legitimate expectations to be protected from "known" dangerous criminals. It is important to remember, however, that there are significant differences of opinion even among experts as to the best way to actually provide such protection.

We also acknowledge the right of a defendant who has served his sentence to move on with his life. To my knowledge, no court in this country has determined that the constitutional guarantee

against cruel and unusual punishment does not apply to people who have committed sex crimes.

There are a number of bills pending in the Pennsylvania House of Representatives and Senate that relate to the sentences imposed on those who commit sex offenses, the registration of sex offenders and disclosure of information contained in a registry of offenders. The notice for today's hearing mentioned Special Session House Bills 29, 75 and 85. Special Session Senate Bill 7 also deals with these issues.

All of these bills have mandatory sentencing provisions. The ACLU is opposed to mandatory sentences because we believe that the constitution requires an individualized determination as to what sentence is appropriate for any individual defendant in light of that defendant's background and the facts and circumstances of the particular crime for which the defendant is being sentenced.

We have come to understand how mandatory sentences take discretion away from our judges and vest it, instead, with prosecutors. Because most mandatory sentencing statutes require actual notice of an intent to seek a sentence under the statute and proof at sentencing, a prosecutor exercises considerable control over whether a mandatory sentence is imposed. The prosecutor's power is enhanced by his/her authority over what charges to bring and what kind of plea negotiations to enter into. All of these factors result in the placing of a lot power

over the sentencing function with the prosecutor rather than with the judge.

There is little evidence that mandatory sentences have improved our criminal justice system. They have been roundly criticized by many judges and legal scholars because they often result in disproportionate sentences. They have aggravated the overcrowding problems in our prisons and contributed to the astronomical growth in the cost of corrections.

The ACLU is particularly opposed to the use of mandatory sentences and mandatory neighborhood notification in the context of sex offenses involving children. In many of those cases, the perpetrator is related to the victim. The use of mandatory sentences can be too blunt a tool that prevents judges from fashioning an appropriate sentence. In September of 1993, two trial judges testified at a hearing on the legislation that revises Pennsylvania's laws regarding rape and other sexual crimes. Both judges noted that mandatory sentencing provisions create practical problems in cases involving incest fathers particularly since many wives tell the judges that they do not want the fathers of their children to go to jail. More mandatory sentencing statutes as well as mandatory notification laws will further compound the problem of developing satisfactory sentences in those cases.

The ACLU thinks that mandatory sentencing and mandatory neighborhood notification will pose significant obstacles that will diminish our ability to address the problems of sex offenses

committed against children. Mandatory sentences and mandatory notification schemes will only make it more difficult for a reluctant reporter to call up the police or social service agencies and inform them about an alleged criminal incident. Any parent who is already having qualms about exposing her spouse to the traumas of the criminal justice system will only be more reluctant to do so.

Therefore, the ACLU opposes any of the provisions contained in these bills that would result in more mandatory sentences for sex offenses or the mandatory notification of neighbors when an offender is released from prison. We think that such provisions are unconstitutional, ineffective and impractical.

I would like to devote the balance of my testimony to discussing the portion of Special Session House Bill 85 regarding the proposed State Board to Assess Sexually Violent Predators. That Board would consist of three members: a psychiatrist and psychologist appointed by the Governor, and a "criminal justice expert" appointed by the Attorney General. This Board will conduct an assessment of the offender to determine if the offender is a sexually violent predator. A sexually violent predator is defined as: "A person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." The Board's determination must be made within 30 days from the date of

conviction. A report must be furnished to the court that shall then determine if the offender is a sexually violent predator.

Several significant consequences flow from such a determination. A person who has been designated a sexually violent predator is required to register until further order of the court. He will also be subject to quarterly verifications of his residence and must document any treatment he is receiving for a mental abnormality or personality disorder. [Senate Bill 7 also contains a provision regarding the designation of an offender as a sexually violent predator. In that bill, there are even more consequences as a result of that designation, including lifetime parole, required monthly counseling sessions and greater likelihood of neighborhood notification.]

The ACLU believes that there are significant legal and practical problems with the proposed Board. The Board will certainly be challenged on state and federal grounds because of its lack of impartiality. The future life and liberty of a convicted offender will rest upon the decision of the three persons on the Board. That Board is responsible for making an adjudication that will have a fundamental impact on the life of each offender. One of the members of that Board will be chosen by the prosecutorial representative of the Commonwealth - the Attorney General. There is no safeguard against that designee being a person who, if not beholden to the Attorney General, is at least answerable to him.

Pennsylvania courts have long held that one of the fundamental due process principles that applies to adjudicative hearings is that they not commingle the judicial and prosecutorial functions. This Board may run afoul of this constitutional principle because one of the three persons who serves on the Board will represent the prosecutorial arm of the Commonwealth. Lynes v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992); In the Interest of Anthony McFall, 533 Pa. 24, 617 A.2d 707 (1990).

We also think that this Board will be subject to challenge on state and federal constitutional grounds should an offender be denied the right to a complete hearing on a factual matter that will have fundamental consequences on his life and liberty. The proposed legislation makes no provision for the due process rights of the offender. Since this factual decision will have such significance for an offender, it is likely that a court will determine that every offender is entitled to a full and fair hearing.

Finally, the Board and its staff will be subject to subpoena and cross-examination at subsequent hearings on their findings. Offenders will exercise their due process rights to confront the members of the Board and those who have conducted psychiatric and psychological examination. Given the potentially magnified sentence that may be imposed on any offender, it is virtually certain that a federal and/or state court will issue the appropriate remedy to protect the offender's due process rights.

United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3rd Cir. 1966). It does not appear that this statutory scheme provides for adequate compensation and/or staff to handle these kinds of duties.

In closing, I want to thank you for asking me to testify today. I will be happy to try and answer any questions you may have.