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COMMONWEALTH OF PENNSYLVANIA
THE PENNSYLVANIA COMMISSION ON SENTENCING

August 28, 1995

Testimony on House Bill 903 and 904

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Testimony

Thank you for inviting me to testify today regarding HB 903 and HB 904. I believe that this hearing provides an opportunity for this Committee to consider not only the issues of ethnic intimidation and other bias-related offenses, but more broadly to reconsider issues at the heart of sentencing and punishment: fairness, uniformity, proportionality, and certainty.

As background, allow me to briefly describe the structure of the existing legislation. Under the current statute, a person found to have committed certain person, property or public order offenses with malicious intent toward the race, color, religion or national origin of another is guilty of the offense of ethnic intimidation. In other words, in order to be convicted of ethnic intimidation, the offender must also commit one of the underlying offenses enumerated in 18 Pa.C.S. §2710.(a). The offense of ethnic intimidation is classified one degree higher in the classification in 18 Pa.C.S. §106 than the underlying offense. So, a single act in which an individual is found to have committed the offense of simple assault [M2] would also be the basis of a conviction for ethnic intimidation [M1], if it was determined that the offender acted with malicious intent towards, for example, the victim's national origin.

For all convictions in which the underlying offense is less than a felony of the first degree, the statute serves to increase the maximum fine and total period of incarceration the offender may face; the impact is less clear when the underlying offense is a felony of the first degree. Reading the statute literally, the classification for ethnic intimidation when the underlying offense is a felony of the first degree would be one degree higher in the classification: that is, murder of the first degree or of the second degree. If we assume that this is an incorrect interpretation, the result of a conviction for ethnic intimidation is no increase in maximum fine or total period of incarceration the offender may face. In every case of conviction for ethnic intimidation, the doctrine of merger would preclude sentencing on the underlying offense, since it is a lesser included offense.

The Sentencing Guidelines complement the statute by assigning to an ethnic intimidation conviction an offense gravity score [OGS] one point higher than that assigned to the underlying offense. This increases the recommended minimum sentence range to be considered by the courts. There is no increased recommendation when the underlying offense is murder of the third degree, since this offense alone is assigned the highest OGS. Again, based on the merger doctrine, the underlying offense in all cases is considered a lesser included offense to ethnic intimidation, resulting in no sentence for that underlying offense.

Before considering the merits of the proposed changes suggested in HB 903, it may be beneficial for members to reflect on the efficacy of the present statute. Based on the background that I just provided, is it doing what you intended? Is it fair? Has it been applied in a uniform manner across the Commonwealth? Does it provide proportionality based on the underlying offense or the conduct of the offender? What is the likelihood that a person committing this offense will be convicted of and sentenced for this offense?

I do not have the answers to all of these questions. I can tell you that our 1994 sentencing

data found 20 convictions for ethnic intimidation; 13 in 1993; 27 in 1992. Whether this statute and the corresponding guidelines have been effective as a deterrent to such behavior is unknown. My sense is that it has little deterrent effect since it is unlikely that most offenders are aware of the law, and even if they are, the penalty based on an increased grade or offense gravity score of the underlying offense is not likely to persuade such individuals not to commit the offense. On the other hand, as a public policy statement, such legislation does communicate your concern regarding ethnic intimidation and your desire to punish offenders for such behavior.

HB 903 includes two significant changes to existing statute. First, the phrase "actual or perceived" is inserted with respect to malicious intent, clarifying that the motivation of the offender rather than the characteristics of the victim is the key factor. In adding this language, the focus is on the culpability of the offender, and providing an increased sanction linked to this finding. The second change proposed in the bill is the addition of sexual orientation as a category of victim protected under this statute.

A brief survey of selected statutes and guidelines in other states found a wide range of responses. It appears that some states have incorporated both the perceived intent and the sexual orientation in definitions of intimidation and bias, as noted in the following:

> Delaware -- consider 'vulnerability of victim' in guidelines; the legislature is considering 'hate crimes' enhancements.
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> Kansas -- guidelines consider offenses "motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim" a substantial and compelling aggravating factor for departing above standard recommendations.
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> Florida -- statute which provides an increased grading for an offense motivated by bias, sentencing guidelines include an aggravating departure reason based on motivation "by prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim."
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> Ohio -- although its ethnic intimidation statute was found to be unconstitutional, the sentencing guidelines provide a listing of aggravating factors, including consideration of offenses motivated prejudice; sexual preference is one type of prejudice to be considered.
>
> Minnesota -- anti-bias statute increases the grading of an offense due to actual or perceived prejudice based on a number of factors, including age, sex, sexual orientation and race. Minnesota does not include bias as a departure reason, based in part on concerns that the infrequency of the offense does not fit the 'typical case' considered in the guideline system. There were also concerns that any guideline presumption would reduce the use of it as a factor, and would not be sensitive to the degree of bias found in individual cases.

As this committee carefully considers HB 903, I would suggest that a more effective means of achieving the fairness, uniformity, proportionality, and certainty commonly sought in sentencing policies is to direct the Commission on Sentencing to provide ethnic intimidation and other bias-related offenses as an aggravating factor. By this action, the court would be directed to aggravate the sentence when a determination is made that the intent was present. If the burden of proof to support such a determination is a preponderance of the evidence rather than beyond a reasonable doubt the result may be an increase in application. Clearly, it would provide a more proportional and certain penalty than presently exists.
I encourage you to consider this and other changes to sentencing policies as part of the comprehensive review presently under way in the Special Session on Crime.

A brief note regarding HB 904: good information can help you in developing good public policy. To that end, the Commission on Sentencing encourages the use of HB 904 as a vehicle to improve data collection throughout the system. While it is important that the State Police be directed to gather the information noted, it is equally important that the Administrative Office of Pennsylvania Courts and the Commission on Sentencing be directed to monitor the processing of such cases, so as to better understand the impact of charge reductions and plea negotiations on final dispositions.

In closing, I wish to advise you that the Commission has been considering a number of changes to the Sentencing Guidelines, changes we hope to adopt and take to public hearings by the end of this year. These changes are a result of the feedback received since the 1994 Guideline revisions, as well as in response to legislation enacted recently in both the Regular and Special Sessions. As an agency of the General Assembly, the Commission on Sentencing encourages your input, support and direction as we move toward final adoption. Further, if you wanted to direct the Commission to incoprorate ethnic intimidation and bias related offenses as an aggravating factor in the guidelines, we can do so rather quickly.

Thank you for your interest this morning. I would be pleased to answer any questions.