

HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA

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House Bill 2329

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House Judiciary Committee  
Subcommittee on Crime and Corrections

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Room 60, East Wing  
Main Capitol Building  
Harrisburg, Pennsylvania

Wednesday, August 21, 1996 - 10:00 a.m.

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BEFORE:

Honorable Jerry Birmelin, Subcommittee Chairman  
Honorable Stephen Maitland  
Honorable Timothy Hennessey  
Honorable Al Masland  
Honorable Jere Schuler

Honorable Thomas Caltagirone, Minority Chairman  
House Judiciary Committee  
Honorable Greg Fajt  
Honorable David Mayernik  
Honorable Kathy Manderino

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ORIGINAL

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**ALSO PRESENT:**

**Judy Sedesse**  
Committee Administrative Assistant

**Brian Preski, Esquire**  
Chief Counsel for Committee

**Dan Fellin**  
Counsel for Committee

C O N T E N T S

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State Representative - Adams County 5

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Pennsylvania Commission on Sentencing 17

Mark Bergstrom, Associate Director  
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1           CHAIRMAN BIRMELIN: I don't have to  
2 bang very hard in this room. You can hear it, I  
3 am sure. I am Representative Jerry Birmelin,  
4 the Chairman of the House Judiciary Subcommittee  
5 on Crime and Corrections. Chairman Tom Gannon  
6 has asked me to do the public hearing today on  
7 House Bill 2329. The prime sponsor is  
8 Representative Steve Maitland, who is with us  
9 today. We also have, to my left, Members of the  
10 Judiciary Committee, Representative Al Masland,  
11 and my immediate right is the Democratic  
12 Chairman, Representative Tom Caltagirone, and  
13 next to him is Representative Jere Schuler.  
14 Next to him is Dan Fellin from our staff. We  
15 may be joined by some other staff people as the  
16 hearing proceeds.

17           This could be a short meeting. Some of  
18 you who are here are happy to hear that, I am  
19 sure. And our first person to testify at the  
20 hearing is going to be Representative Maitland,  
21 the prime sponsor of the bill, who will testify  
22 on behalf of the President Judge of his county,  
23 Adams County, who couldn't be here with us  
24 today.

25           And, Representative Maitland, after you

1 have given your testimony and Members have had  
2 an opportunity to ask you some questions, if  
3 they have any, you may want to shift and then  
4 join us because you are also a member of the  
5 Subcommittee and the House Judiciary Committee.  
6 So you may begin, if you like.

7 REP. MAITLAND: Okay. Thank you,  
8 Chairman Birmelin, and Members of the  
9 Subcommittee and the Judiciary Committee. I  
10 appreciate the opportunity to testify on behalf  
11 of Judge Spicer, the President Judge of Adams  
12 County, who recommended the legislative change  
13 that is House Bill 2329 to me. The Judge had  
14 intended to be here today, but circumstances and  
15 a trial situation prevented him from coming. So  
16 I would like to present the testimony that he  
17 would have presented had he been here.

18 This says, Dear Representative Maitland  
19 and Members of the Crime and Corrections  
20 Subcommittee of the House Judiciary Committee,  
21 thank you for giving me the opportunity to  
22 comment about sentencing procedures and law.  
23 Generally speaking, procedures are described in  
24 Pennsylvania Rule of Criminal Procedures 1406,  
25 which has been recently amended. I do not

1 believe the amendments affect the issue  
2 presented for consideration today and therefore  
3 enclose a copy of the rule that has been in  
4 effect since 1975. Authority for sentencing is  
5 generally described in the Sentencing Code, 42  
6 Pa.C.S.A. Section 9721, a copy of which is also  
7 appended. You will note that the legislature  
8 has granted trial courts the power to impose  
9 sentences either concurrently or consecutively,  
10 and the Rule would seem to allow the sentencing  
11 judge wide discretion as to the commencement  
12 date of a sentence. However, this is not true.  
13 Superior Court has ruled that sentences may not  
14 be imposed to run partially concurrently and  
15 partially consecutive. I enclosed copies of an  
16 opinion which explains why, and you will see  
17 that it involves the suspension of some former  
18 rules and statutes.

19 Policy reasons dictating limitations of  
20 a sentencing judge's power seem to involve  
21 parole powers. It has become rather clear that  
22 our appellate courts have taken the position  
23 that sentences imposed by a single judge must be  
24 aggregated, that is, minimums are added together  
25 and then maximums are added. For example, if

1 two consecutive six- to twelve-month sentences  
2 are imposed, the effect of such sentences will  
3 be a twelve-month to twenty-four month sentence.  
4 The Supreme Court has recently ruled that a  
5 judge cannot impose a series of twenty-three  
6 month maximums without invoking aggregation.

7           When maximum sentences total two years,  
8 the Court of Common Pleas loses parole powers  
9 which are then vested exclusively in the State  
10 Board of Parole. Thus, when one judge sentences  
11 a prisoner to several sentences, which do not  
12 run concurrently, the law is firmly established  
13 that the local court loses parole powers when  
14 the aggregated maximum exceeds one year and  
15 three hundred sixty-four days. Yet to be  
16 addressed are cases involving different judges  
17 and sentences originating in different counties.

18           It has never been thought that the rule  
19 applies to different judges and different  
20 counties, but if policy dictates that parole  
21 powers should be shifted in one instance, the  
22 same policy should apply wherever and whenever  
23 sentences are imposed. Either that, or the  
24 policy reasons are invalid.

25           There are certainly situations when a

1 county probation office should retain control  
2 over a defendant. Two such times are those  
3 involving intermediate punishment and parole  
4 violations.

5 I am frequently presented with plea  
6 arrangements which call for partially  
7 consecutive/partially concurrent sentences and  
8 many involve new charges coupled with parole  
9 violations. It is common for the District  
10 Attorney's office to propose that parole  
11 violations run from the expiration of a minimum  
12 sentence imposed in another case. Another  
13 situation of recent origin involves intermediate  
14 punishment. At present, it is my understanding  
15 that intermediate punishment is similar to  
16 probation even though it may involve partial  
17 confinement such as sentences served in a local  
18 jail, with the opportunity for work release. We  
19 recently considered a plea arrangement where  
20 restrictive intermediate punishment, in the form  
21 of partial confinement, began at the expiration  
22 of the minimum sentence imposed in another case.  
23 If intermediate punishment is subject to the  
24 rules of aggregation, then the arrangement was  
25 illegal. That would mean that the sentences



1 could be attached at some distant time in the  
2 future.

3           There are two fairly significant policy  
4 reasons I would propose support for change in  
5 the law. Sentencing judges and local district  
6 attorneys who are in the best position to judge  
7 the factors which influence choices of  
8 sentencing, retain flexibility to fashion  
9 punishment that will both protect society and  
10 rehabilitate a defendant. Secondly, appellate  
11 courts have made it quite clear that a deviation  
12 from what has been determined to be an  
13 acceptable practice makes a sentence illegal.  
14 And illegal sentence can be attacked and set  
15 aside at any time. Thus, although a defendant  
16 may be admonished to appeal within thirty days  
17 or lose his right to complain, the passage of  
18 years makes no difference when a sentence is  
19 deemed to be illegal.

20           This is important because it affects  
21 the finality of judgments. Rights are  
22 reinstated by re-sentencing and a person may  
23 appeal trial issues years after it might be  
24 thought those issues had become extinct.

25           Very truly yours, Oscar F. Spicer,

1 President Judge of Adams County.

2 CHAIRMAN BIRMELIN: Representative  
3 Maitland, do you have anything to add to the  
4 Judge's testimony?

5 REP. MAITLAND: No. I believe it  
6 speaks for itself.

7 CHAIRMAN BIRMELIN: I will give the  
8 opportunity then for members of the panel here  
9 to ask questions, if they would like.

10 Representative Masland.

11 REP. MASLAND: No, I don't have any  
12 questions.

13 CHAIRMAN BIRMELIN: Representative  
14 Caltigirone.

15 REP. CALTIGIRONE: No questions.

16 CHAIRMAN BIRMELIN: Representative  
17 Schuler.

18 REP. SCHULER: I just have one  
19 question, and I don't know, Steve, if you can  
20 answer this. I am a little confused, and maybe  
21 some of the members with more legal background  
22 can answer this for me, why does a judge do a  
23 consecutive or concurrently? Why does he take  
24 one or the other or both, what is the purpose  
25 behind that? If anyone, maybe Brian?

1 MR. PRESKI: Do you want me to answer  
2 it attorney?

3 REP. SCHULER: Yes. I am confused. I  
4 don't know.

5 CHAIRMAN BIRMELIN: I will call on our  
6 Chief Counsel from the House Judiciary Committee,  
7 Brian Preski, to respond.

8 MR. PRESKI: Many reasons. One is the  
9 proper retribution effect of the law to the  
10 criminal. Assuming that a defendant has  
11 multiple convictions, a judge might want to make  
12 that sentence consecutive for the rehabilitative  
13 slot's retribution effects.

14 REP. SCHULER: An example would be?

15 MR. PRESKI: A guy with multiple car  
16 theft convictions.

17 REP. SCHULER: Okay.

18 MR. PRESKI: The first time he gets  
19 probation; the second time he gets a county  
20 sentence, eleven-and-a-half to twenty-three  
21 sentence; the third time, a judge says, look, I  
22 have given you a shot at probation, I have given  
23 you a shot at a minor sentence in the county,  
24 now it is time for you to go to the state, he  
25 imposes a state sentence. If he imposes a

1 concurrent state sentence, that defendant might  
2 not necessarily go to state incarceration. If  
3 it is concurrent to the county sentence that  
4 he's serving, he'll stay within the county and  
5 at the same time the state sentence will run.  
6 If he makes that sentence consecutive, well, he  
7 goes to the state.

8 Under a case that Representative  
9 Maitland had referred to, it is Commonwealth  
10 versus Tilghman, there is a decision that said  
11 that that sentence, that state sentence and that  
12 county sentence, must be aggregated, aggregated  
13 for parole purposes. Any parole that is greater  
14 than two years is a state parole, overseen by  
15 the state; anything less than that is a county  
16 parole.

17 Such are the reasons why:

18 - A judge might want to give someone  
19 whose second offense -- first offense is maybe  
20 an aggravated assault, second offense is a  
21 retail theft conviction, that judge might say,  
22 okay, for this case, you were in, you messed up,  
23 I don't want you to go to the state, I want to  
24 keep you under my thumb and under my parole, he  
25 would make that sentence concurrent to the one

1 he is already serving. The reasons are many and  
2 varied and might even go into the health of the  
3 inmate, it might go into the specific  
4 circumstances of the crime, but usually that's  
5 up to a judge.

6 - Now, a judge, on the other hand,  
7 might also sentence, and say, you have an  
8 eleven-and-a-half to twenty-three, I am going to  
9 give you a second eleven-and-a-half to  
10 twenty-three, so that, parole purposes, that  
11 would be vested within the state.

12 REP. SCHULER: Okay. Thank you very  
13 much. I appreciate it.

14 REP. MASLAND: If I could maybe just  
15 add one thing that is common to Brian and I  
16 because we are used to hearing it, but other  
17 people may hear it and say, why  
18 eleven-and-a-half to twenty-three?  
19 Eleven-and-a-half to twenty-three is technically  
20 the maximum sentence that you can get and still  
21 serve your time in the county. If it is twelve  
22 to twenty-four, that gets into the aggregation  
23 fact, then you get into the state sentences. So  
24 that's what a lot of judges would do.

25 MR. PRESKI: Yes. I should say that

1 the way that the sentencing scheme is currently  
2 within the statutes, any sentence that is less  
3 than two years is a county sentence; any  
4 sentence that is from two years to five years  
5 can be state or county and determined by the  
6 sentencing judge; any sentence over five years  
7 must be served within state incarceration.

8 Two minor things that you should just  
9 note: parole's jurisdiction attaches to the  
10 state for any sentence over two years, and there  
11 is also a requirement in Pennsylvania that the  
12 minimum sentence must be one-half of the  
13 maximum. That's why we speak in terms of the  
14 eleven-and-a-half to twenty-three.

15 CHAIRMAN BIRMELIN: I have one question  
16 for our Chief Counsel. Brian, how prevalent is  
17 this practice that this judge described as being  
18 illegal currently?

19 MR. PRESKI: I would say it was more  
20 prevalent before the Commonwealth versus  
21 Tilghman decision. Prior to serving up here, I  
22 was the Assistant District Attorney in  
23 Philadelphia. We had many cases where  
24 aggregation controlled. This stems from a  
25 series of cases, the first one being

1 Commonwealth versus Allegheny, two subsequent  
2 cases are Abraham versus The Department of  
3 Corrections and Commonwealth versus Harris.  
4 These cases, which have been bouncing back and  
5 forth between the Commonwealth Court and the  
6 Superior Court, have led to the Tilghman  
7 decision and led to the problem that the Judge  
8 complains of and is the basis of Representative  
9 Maitland's bill: we had conflicting courts,  
10 co-jurisdiction, the Superior Court and the  
11 Commonwealth Court, come down with the same  
12 opinion but came down different ways.

13 In Abraham versus the Department of  
14 Corrections, the Commonwealth Court stated that  
15 for parole jurisdiction purposes and for  
16 placement of incarceration purposes, sentences  
17 do not aggregate. In Commonwealth versus  
18 Harris, the Superior Court came down and said,  
19 for parole jurisdiction purposes, they do  
20 aggregate, but they didn't speak to place of  
21 incarceration. The Supreme Court muddied the  
22 issue by issuing a per curiam affirmance in  
23 Abraham versus D.O.C. that just said order  
24 affirmed. Nobody knew what that meant and what  
25 kind of precedential effect it had.

1           So what the problem we had was, was  
2           that, some judges followed the Commonwealth  
3           Court, some judges followed the Superior Court.  
4           Such as the reason we have the problem that: the  
5           judge speaks to, under one interpretation of the  
6           law, that we have an illegal sentence because  
7           you have a court retaining parole jurisdiction  
8           purposes for intermediate punishment in what  
9           another court would call a state case. I  
10          believe the Commonwealth versus Tilghman spoke  
11          to this, I believe it is probably addressed, but  
12          the confusion remains out there within the  
13          counties.

14                   CHAIRMAN BIRMELIN: Thank you.

15                   Representative Maitland, do you have  
16          anything further to add?

17                   REP. MAITLAND: No. Thank you, Mr.  
18          Chairman.

19                   CHAIRMAN BIRMELIN: Well, put your  
20          second hat back on, if you would, and join us  
21          here at the panel.

22                   At this time, I would call Dr. John  
23          Kramer, who is the Executive Director of the  
24          Pennsylvania Commission on Sentencing, to  
25          testify. And with him, today, is Mark



1 Bergstrom, the Associate Director of the,  
2 Pennsylvania Commission on Sentencing.

3 Gentlemen, you may proceed.

4 DR. KRAMER: Thank you. Good morning,  
5 Chairman Birmelin and Members of the House  
6 Subcommittee on Crime and Corrections. Thanks  
7 for the opportunity for the Commission on  
8 Sentencing to testify regarding House Bill 2329  
9 dealing with the amendment to Section 9721 of  
10 Title 42.

11 As this discussion before, by the way  
12 indicates, there is a fair amount of confusion  
13 about concurrent/consecutive sentences. And  
14 your question was an excellent one, by the way,  
15 Representative Schuler, because the issue of why  
16 judges do it. In fact, when the Commission  
17 began about twenty years ago, the Pennsylvania  
18 Commission on Sentencing to write guidelines, we  
19 looked at concurrent/consecutive and tried to  
20 decide whether we should write guidelines for  
21 concurrent/consecutive. There was about three  
22 percent of the cases that were getting  
23 consecutive sentences and so we kind of left it.

24 There have been an awful lot, a number  
25 of cases, some of them targeting particular

1 judges, who had a philosophy that you should  
2 sentence consecutive to reflect the separate  
3 culpability of the defendant. The results of  
4 that sometimes become what some might describe  
5 as bizarre. And the Superior Courts looked at  
6 them, but there is not much power on appellate  
7 review.

8           There is one case out of Allegheny  
9 County: thirty burglaries, a year-and-a-half to  
10 three years for each of those counts, run  
11 consecutive versus concurrent, the consecutive  
12 sentence made it an effective sentence of  
13 forty-five years to ninety years for those  
14 burglaries; another judge may well have given  
15 concurrent and you would have had an effective  
16 sentence of one-and-a-half to three years in  
17 that particular case. And there are other cases  
18 like that that end up, in a sense, can  
19 effectively become life sentences.

20           But you might also, in note, by the way  
21 in this particular case out of Adams County,  
22 that the Judge could have sentenced from a five  
23 to ten, five to ten and run a concurrent and  
24 gotten basically the same sentence with the  
25 effective sentence that he may have been wanting

1 to achieve or could have gone five to  
2 twelve-and-a-half or whatever and achieved the  
3 effective minimum sentence that is desired. So  
4 there is different ways of approaching the  
5 issue.

6 In general, judges approach multiple  
7 convictions by increasing the base sentence and  
8 tend not to give consecutive sentences and so  
9 they tend to run them concurrent but they tend  
10 to increase the length and severity of the  
11 primary sentence with the primary offense, the  
12 sentence attached to the primary offense. That  
13 is our research looking back over the years and  
14 one reason the Commission stayed out of getting  
15 involved in it back in the late '70s, early  
16 '80s.

17 Let me return to my testimony after  
18 that digression.

19 The proposal before this Committee  
20 would permit the court to consider and select  
21 one or more of the sentencing alternatives, and  
22 impose them partially consecutively and  
23 partially concurrent.

24 My first reaction to House Bill 2329  
25 is, admittedly, confusion. What is a partially

1 consecutive and partially concurrent sentence?  
2 How would such a sentence be implemented within  
3 our current sentencing scheme? What purpose  
4 would such a sentence serve? Does the proposed  
5 amendment achieve the outcome sought? What is  
6 the potential for unanticipated negative  
7 consequences? As I considered I these  
8 questions, I recalled the advised Hippocratic  
9 Oath imparted to physicians: As to diseases make  
10 a habit of two things -- to help, or at least,  
11 to do no harm. I think that his words are just  
12 as relevant as you consider legislation. Will  
13 House Bill 2329 help to correct some problem in  
14 the sentencing code? And perhaps more  
15 importantly, will it do no harm?

16 In order to begin to answer these  
17 questions, I considered the Judicial Code (Title  
18 42) and relevant appellate court decisions, and  
19 in particular the case of Commonwealth versus  
20 Ward (524 Pa. 48, 568 A.2d 1242 (1990)) (369 Pa.  
21 Super. 94, 534 A.2d 1095 (1987)). In this case,  
22 the defendant was convicted of robbery and  
23 burglary in the Adams County Court of Common  
24 Pleas. Following an initial remand relating to  
25 the statutory maximum, the court sentenced the

1 defendant to two-and-a-half years to ten years  
2 on the robbery conviction and two-and-a-half to  
3 twelve-and-a-half years on the burglary  
4 conviction. The court directed that the minimum  
5 sentences be served consecutively and that the  
6 maximum sentences be served concurrently,  
7 resulting in a total sentence of five years to  
8 twelve-and-a-half years.

9 Now, again, the court could have given,  
10 on the one conviction, the felony one burglary,  
11 a five-and-a-half to twelve-year sentence and  
12 then run the other concurrent to it and would  
13 have achieved that particular result.

14 On appeal, the Superior Court  
15 characterized this as a partially concurrent-  
16 partially consecutive sentence, relying on its  
17 earlier interpretation of 42 Pa.C.S. Section  
18 9757 which required aggregation of consecutive  
19 sentences as a matter of law, the Superior Court  
20 concluded that the trial court had abused its  
21 discretion by attempting to impose  
22 non-aggregating consecutive sentences. The  
23 court held that such a sentence was not legal,  
24 it being neither consecutive sentence nor a  
25 concurrent sentence.

1           House Bill 2329 would create a  
2           sentencing hybrid to fill the void suggested in  
3           Ward between a consecutive sentence and a  
4           concurrent sentence, and arguably address the  
5           concerns raised by the Superior Court. This  
6           partially consecutive and partially concurrent  
7           sentence might be particularly useful to a judge  
8           sentencing an offender currently incarcerated on  
9           another offense. Under this amendment, the  
10          court could extend the minimum sentence being  
11          served while preserving the original maximum  
12          sentence, an option not always possible under  
13          current statute. It would also be useful when  
14          combining a short period of total confinement  
15          with an intermediate punishment sentence. The  
16          amendment might also provide the court with  
17          greater flexibility in determining place of  
18          confinement, parole eligibility and jurisdiction  
19          to grant parole, as you were all discussing  
20          previously. However, the fundamental question  
21          before you today should be: does the amendment  
22          which would provide these benefits undermine our  
23          present sentencing system?

24                 The sentencing scheme in Pennsylvania,  
25          as related to incarceration, requires an

1 offender to be supervised on parole for a period  
2 of time equal to or greater than the period of  
3 incarceration.

4 And that gets to Mr. Preski's notion of  
5 the minimum being no greater than one-half of  
6 the maximum sentence and that's what that is  
7 referring to.

8 This post-release supervision period, a  
9 built-in safeguard for communities, provides the  
10 offender with a structured transition back into  
11 society while at the same time creating a  
12 mechanism for the collection of restitution,  
13 fines and costs. During this parole period,  
14 the offender may be required to participate in  
15 drug and alcohol treatment, employment  
16 development, and other rehabilitative programs.  
17 In addition, for any case in which the  
18 consecutive sentences of total confinement are  
19 imposed for multiple sentences, 9757 requires  
20 the court to indicate the minimum sentence to be  
21 served for the total of all offenses, which  
22 shall not exceed one-half the maximum sentence.  
23 Recently, the Supreme Court upheld previous  
24 decisions by the Superior Court which interpret  
25 9757 as mandating an aggregation of both the

1 minimum and maximum of consecutive sentences of  
2 total confinement for multiple offenses.

3           The degree to which this amendment  
4 would benefit or undermine the present system is  
5 dependent upon a number of factors. Would this  
6 amendment allow the court to extend the minimum  
7 to the point that it exceeds one-half of the  
8 maximum sentence, or to the point that the  
9 result is a flat sentence?

10           For example, two-and-a-half to five  
11 plus a two-and-a-half to five would get you a  
12 five/five, if you ran the minimum consecutive.  
13 Two-and-a-half would add to two-and-a-half and  
14 get you five. And you ran the maximum's  
15 concurrent, which you would have a five maximum,  
16 you would end up with a five to five year  
17 sentence. And there is a lot of states  
18 proposing the flat sentences so that is not  
19 necessarily bad, by the way. That is an  
20 implication that one has to think about.

21           Does this amendment limit the partially  
22 consecutive portion to the minimum sentence? In  
23 other words we are asking, what is the intent of  
24 the legislation? Would you like it to just  
25 apply partials to the minimums or just to the



1       maximums or to both? I think this legislation  
2       applies to both.

3               Is a partially consecutive and  
4       partially concurrent sentence subject to the  
5       provisions of 9757, created to eliminate the  
6       practice of constructive parole and to require a  
7       minimum sentence which does not exceed one-half  
8       of the maximum sentence?

9               Assuming that the safeguards of 9757  
10       would apply to partially consecutive and  
11       partially concurrent sentences, I am nonetheless  
12       concerned that this amendment would further  
13       complicate an already difficult process of  
14       determining credit for time served and  
15       computation and order of service of sentences.  
16       The fact that the amendment would apply as well  
17       to other sentencing alternatives, particularly  
18       probation and intermediate punishment, only  
19       compounds the problem.

20              This hearing today provides an  
21       excellent opportunity for the Subcommittee to  
22       consider modifications to the Judicial Code  
23       which could improve the quality of sentencing in  
24       the Commonwealth. House Bill 2329 suggests one  
25       such amendment which would significantly alter

1 the status quo, providing courts with greater  
2 flexibility in the crafting of sentences for  
3 offenders with multiple convictions. The  
4 Commission on Sentencing has attempted  
5 unsuccessfully in the past to address this all  
6 or none impact of the consecutive/concurrent  
7 sentencing dichotomy, and so we have an  
8 appreciation of the policy benefits of a  
9 partially consecutive, partially concurrent  
10 sentence. Nonetheless, we also appreciate the  
11 unanticipated consequences that may result from  
12 major changes in public policies.

13 For this reason, I would encourage the  
14 Subcommittee to exercise caution, and use House  
15 Bill 2329 as a vehicle for a more comprehensive  
16 modification of the sentencing statutes.

17 For example, one question I would raise  
18 as an aside: will this move to partially  
19 consecutive, partially concurrent move us away  
20 from what one may refer to as truth in  
21 sentencing which is a common notion? In fact,  
22 the federal government is encouraging states to  
23 adopt some policies which they are referring to  
24 as truth in sentencing systems. I see the judge  
25 pronouncing the sentencing two-and-a-half to

1 ten, two-and-a-half to ten and then running with  
2 the minimum for the second conviction  
3 consecutive at the end of one year so the  
4 effective sentence is three-and-a-half to ten.

5 Will victims understand this kind of  
6 policy and this kind of statement of sentences?  
7 Should judges be permitted to sentence violent  
8 offenders to a minimum sentence of greater than  
9 one-half of the maximum sentence? (And that is  
10 an issue which I probably would encourage. In  
11 fact, Senator Fisher has a bill which would  
12 encourage that at this point.) Should Common  
13 Pleas judges be permitted to sentence offenders  
14 to a flat period of incarceration of ninety  
15 days, as permitted for summary offenses, when  
16 used in conjunction with probation or  
17 intermediate punishment? Should the standards  
18 of place of confinement, parole eligibility and  
19 paroling authority be modified? By carefully  
20 studying these and other fundamental issues of  
21 sentencing, I believe the Subcommittee can draft  
22 legislation that is both responsive to immediate  
23 needs within Pennsylvania's criminal justice  
24 system, and that provides a framework for long  
25 term policies supporting a more rational,

1 integrated and purposeful use of correctional  
2 resources.

3 Thank you for the opportunity to  
4 testify, and obviously would be pleased to  
5 answer any questions or discuss the issues.

6 CHAIRMAN BIRMELIN: Thank you, Mr.  
7 Kramer. We have been joined, to my far right,  
8 by Representative Dave Mayernik.

9 And, Representative Mayernik, do you  
10 have any questions?

11 REP. MAYERNIK: No questions at this  
12 time. Thank you.

13 CHAIRMAN BIRMELIN: Representative  
14 Schuler? No.

15 Representative Caltagirone?

16 REP. CALTAGIRONE: Just briefly.

17 John, you are suggesting then that we  
18 could use this particular piece of legislation  
19 as an omnibus piece of legislation to draft some  
20 of the other concerns that the Commission on  
21 Sentencing really has. Have you put that in for  
22 any form work?

23 DR. KRAMER: No. And there are a  
24 number of pieces that have been significant  
25 discussion among a number of groups. And there

1 is Senator Fisher's bill which is out there on  
2 sentencing. There is the old 20, what is it, I  
3 am trying to think, when Joe Lehman's bill from  
4 a couple of years ago which would have made  
5 significant changes to sentencing.

6 I would really, perhaps, suggest at  
7 establishing a dialogue to begin talking about  
8 those. In other words, I understand the problem  
9 with partially -- concerned with the current  
10 issues and constraints on  
11 consecutive/concurrent. And I think that is,  
12 raises policy issues that we should probably  
13 address.

14 Along with that, there are a number of  
15 other issues which I think we need to look at.  
16 Long minimum tags, one to ten year sentences,  
17 for example, are not particularly productive.  
18 So that, I mean, what happens, I think the  
19 language there, it is important, is the minimum  
20 would be no greater than one-half the maximum.  
21 So you will see a one to ten where you saw a  
22 five to twelve-and-a-half in this particular  
23 case -- or a two-and-a-half to  
24 twelve-and-a-half. It is a long time to parole  
25 supervision.

1 I would argue, I am not sure that I  
2 would be convincing, but I would argue that a  
3 seven- or ten- or twelve-year period of parole  
4 supervision is not particularly effective. It  
5 takes a lot of resources, theoretically, to  
6 supervise those people for that period of time.  
7 And they may not be discharged prior to the  
8 expiration of the maximum sentence, so it really  
9 means that they are under parole supervision for  
10 a long period of time, and lose their street  
11 time if they are reconvicted of a new offense  
12 during that period of time; technical violation,  
13 they do not lose it.

14 It seems to me that there are a lot of  
15 issues that I certainly do not have the answer  
16 to, but I would like to see bodies such as this  
17 wrestle with as we think about our sentencing  
18 system and we look at what other states have  
19 done.

20 There has been a considerable movement  
21 in the last twenty years, to go to what we have  
22 referred to as determinant sentences, flat  
23 sentencing schemes with a good time provision of  
24 one-third to fifteen percent which is what the  
25 federal government is encouraging. And, in

1 fact, they are holding out money for states to,  
2 in a sense, adopt somewhat of a guideline system  
3 with a presumptive, the flat sentence that would  
4 be attached with a good time provision of about  
5 fifteen percent and that's where that  
6 eighty-five percent comes, that is a federal  
7 sentencing law.

8 I happen to be also the Staff Director  
9 of the U.S. Sentencing Commission right now. So  
10 while they are helping them work through a  
11 period of change in Washington and looking at  
12 that system, it is something that they are  
13 looking to the states to try to encourage with  
14 some financial resources, for prison  
15 construction and other things. And they attach  
16 it to violent offenders.

17 I just think that we, it has been a  
18 number of years we have thrown a lot of, we kind  
19 of put like a sentencing commission on top of  
20 the current sentencing model, we have appellate  
21 case issues which have been hanging out and we  
22 have appellate review of sentences which have  
23 been hanging around for a number of years,  
24 debates but no real constructive discussions or  
25 movements on the issues. I would just encourage

1 this Committee to think more broadly. I will  
2 try it. Well, this is certainly a significant  
3 problem. There are, I think other issues that  
4 warrant your attention more.

5 REP. CALTAGIRONE: Thank you.

6 Thank you, Mr. Chairman.

7 CHAIRMAN BIRMELIN: Representative

8 Maitland.

9 REP. MAITLAND: Yes.

10 Thank you, then, Dr. Kramer. Three of  
11 us on this panel today are not attorneys which  
12 is unusual.

13 DR. KRAMER: I am not either, by the  
14 way.

15 REP. MAITLAND: That's good, that's  
16 good.

17 DR. KRAMER: Nor is Mark. In fact, the  
18 Pennsylvania Commission on Sentencing has never  
19 really had an attorney on staff which is sort of  
20 interesting.

21 REP. MAITLAND: That is interesting.

22 Could you maybe rephrase or sum up for  
23 me, what would be the primary policy benefit you  
24 see in House Bill 2329?

25 DR. KRAMER: I think you framed it, and



1 I try to allude to as well, I support judges  
2 having the flexibility of crafting sentences to  
3 go with the particular cases. And I think that  
4 that provision, to me, that's the main benefit  
5 of the provision.

6 I am not, I am not, certainly, I don't  
7 know the cases, but I think the result the judge  
8 was trying to get at in this particular case was  
9 certainly not unreasonable. It seemed to me,  
10 let's assume it was fair and we looked at the,  
11 at the aspects of the case, whatever that would  
12 mean. And I think there would be circumstances  
13 in which the linkages between intermediate  
14 punishment and other could probably benefit. I  
15 think that discretion is, in crafting sentences,  
16 is probably the key opportunity here.

17 My concern is when we go to that, you  
18 have 325 judges sentencing in Pennsylvania, how  
19 are they all going to use this new -- I mean,  
20 some won't even really know what happens for a  
21 number of years. Others, such as Judge Spicer,  
22 may use it a lot, in Adams County, may use it a  
23 lot.

24 How does the Commission look at it in  
25 trying to bring some rhyme and reason to that

1 process so that we don't have unreasonable  
2 disparity as a consequence and yet have this  
3 flexibility for the court? I think that is the  
4 question I would have to raise, but.

5 MR. BERGSTROM: Yes. I am just going  
6 to suggest one example that might clarify this a  
7 bit, and that is: assume that Judge Spicer has  
8 before him on a given day an individual that he  
9 sentences to six to twelve months, that is a  
10 county sentence, served in a county facility,  
11 Adams County. Let's say a month later, that  
12 same individual was before another judge in  
13 Adams County, a similar type of offense, and  
14 that individual is looking at the offender and  
15 saying I think the right sentence for this  
16 offender is also six to twelve months.

17 Now, in that kind of situation, the  
18 judge has sort of two options. The judge could  
19 say I am going to run this sentence concurrent  
20 with Judge Spicer's earlier sentence which means  
21 that, in effect, the person is serving a six to  
22 twelve month sentence, maybe a bit of a  
23 modification there. Or the other alternative  
24 is, I am going to sentence this person to a  
25 consecutive period which automatically makes it

1 a twelve to twenty-four month sentence wherein  
2 the county that judge loses authority for the  
3 case because it becomes a state case and the  
4 Parole Board is now the paroling authority.  
5 Now, that judge can determine if the person  
6 serves that sentence locally or at the state,  
7 but, nonetheless, it is a state case.

8 So the judge is sort of held there with  
9 all or none. Either concurrent or consecutive.  
10 And I think what this type of bill does is give  
11 a little more flexibility where the judge could  
12 say I want to expand the period of time that the  
13 person serves in this jail, but I want to retain  
14 this as a county case. I think Mr. Preski's  
15 earlier point regarding the Tilghman decision,  
16 and how that impacts state versus county,  
17 attaches to that kind of example.

18 One other variance of that that I think  
19 might be important addresses Judge Spicer's  
20 concern about intermediate punishment. If you  
21 have that same person that is before Judge  
22 Spicer, gets a six to twelve month sentence and  
23 is serving it and then it is before this other  
24 judge on a new offense, the other judge might  
25 say, well, I think for this person the best

1 thing would be to place him on intermediate  
2 punishment as soon as he finishes his period of  
3 incarceration.

4 The way things are structured now, at  
5 least our view and the view of many in the state  
6 is, that the person would have to finish the  
7 total period of incarceration which includes the  
8 maximum so he would have to finish the twelve  
9 month period of that sentence before the new  
10 sentence of intermediate punishment kick in.  
11 And it really is sort of bizarre that a person  
12 would serve six months, be released to parole,  
13 and then after six months of parole start house  
14 arrest or something like that. And this type of  
15 language would probably remedy that.

16 As we said, though, there are many  
17 other things, maybe unanticipated consequences  
18 that could create problems and that is why we  
19 are just cautious about how we approach this.

20 REP. MAITLAND: Okay. Do you believe  
21 that Judge Spicer's concern that some of the  
22 current sentencing proposals that he has given  
23 could be ruled illegal in the future and the  
24 sentences set aside, is that valid?

25 MR. BERGSTROM: Well, I think Judge

1 Spicer's own case is an example of that. The  
2 Commonwealth versus Ward case that we were  
3 reviewing was one of Judge Spicer's cases where  
4 that occurred. And I think there is cases every  
5 day that come through the courts that we read  
6 about where that has occurred.

7 REP. MAITLAND: Would you be willing to  
8 provide some suggestions to me in taking this  
9 further?

10 MR. BERGSTROM: Sure.

11 DR. KRAMER: Absolutely.

12 REP. MAITLAND: Thank you.

13 Thank you, Mr. Chairman.

14 CHAIRMAN BIRMELIN: Representative  
15 Masland.

16 REP. MASLAND: Thank you, Mr. Chairman.  
17 I just want to make one brief comment first, and  
18 that is, John, you didn't convince me. I  
19 personally think there are situations where a  
20 long tail is appropriate, be it one to ten or  
21 two to ten in situations where possibly, and you  
22 can think of a few different ones in talking  
23 with Brian here, just the person that has a  
24 credit card problem and maybe you don't need to  
25 incarcerate them but you certainly want to keep

1 tabs on them for a while, or, a situation maybe  
2 where a person, with a sex offender, that you  
3 want to keep tabs on again for a while because  
4 you know that person is never going to be,  
5 quote, unquote, cured. So there are  
6 circumstances where I think it is appropriate.

7 And as I listen to this, as I am  
8 looking in the bill, I just remembered the  
9 nightmarish scenes we had in Cumberland County  
10 trying to figure out how these sentences were  
11 all going to work, and you almost had to be very  
12 adapt with a slide ruler to kind of calculate.

13 And I guess it comes down to, on page  
14 four of your testimony, the question: should the  
15 standards for place of confinement, parole  
16 eligibility and paroling authority be modified?  
17 I think what we are ultimately talking about  
18 here is not whether it is consecutive,  
19 concurrent --

20 DR. KRAMER: That's right.

21 REP. MASLAND: -- not whether you  
22 aggregate or don't aggregate, but really whether  
23 the judge is going to maintain authority in  
24 parole situations. And maybe that is what we  
25 need to be looking at a little bit closer, along

1 with some of these other issues. So what, at  
2 first glance, as I see the bill and listen to  
3 the argument, what at first glance appears to be  
4 a relatively simple issue, compounds rapidly.

5 DR. KRAMER: That's our concern.

6 REP. MASLAND: Yes.

7 DR. KRAMER: That phrases it more  
8 simply.

9 REP. MASLAND: And initially and  
10 somebody had asked Chairman Birmelin whether we  
11 would need another hearing. Well, we may not  
12 need another hearing on this particular issue,  
13 but on the broader issue that this really gets  
14 us into, that that might be necessary. So it is  
15 kind of, it kind of opened the doors to a  
16 broader issue; and, for that, I think  
17 Representative Maitland should be congratulated,  
18 but, on the other hand, I don't think we want to  
19 necessarily rush on this point of view.

20 DR. KRAMER: That expresses our view  
21 perfectly.

22 REP. MASLAND: And then maybe you do  
23 have an attorney working for you?

24 DR. KRAMER: Just you. Part time.

25 CHAIRMAN BIRMELIN: Chief Counsel

1 Preski.

2 MR. PRESKI: Yes, I have one other  
3 question. You talked about unintended  
4 consequences. One of the things I am sure you  
5 have seen in the Sentencing Commission is that  
6 prosecutors don't often take all the charges  
7 they have prepared against a certain defendant  
8 to the jury or to the judge at the time of  
9 decision, the guilty or not guilty. Do you  
10 think that the adoption of this language would  
11 further reduce charges brought to the judge?

12 Assuming the defendant is charged with  
13 robbery, he has got a robbery in there, he also  
14 has weapons offenses, other offenses, the  
15 prosecutor knows that the judge might have a  
16 tradition of lenient sentences, given that he  
17 might be able to do partial consecutive/partial  
18 concurrent, do you think then the prosecutor  
19 would only go to the jury or to the judge with a  
20 lead charge, withdraw the rest, to force  
21 sentences a certain way?

22 DR. KRAMER: Well, the last phrase,  
23 explain, force sentences a way.

24 MR. PRESKI: Particularly agree to  
25 specs. The woman with the baby carriage that



1       terroristic threats? For example, he sentences  
2       that to one-and-a-half to twenty-three, he takes  
3       the robbery and says this is that one robbery I  
4       have just convicted you of, you are getting ten  
5       to twenty on that. I mean, ultimately, for  
6       incarceration purposes, that guy serves  
7       eleven-and-a-half.

8                   DR. KRAMER: Right.

9                   MR. PRESKI: I mean, he has a long  
10       tail. But then the judge can say, I am tough on  
11       crime, I give maximum sentences on every case, I  
12       mean when, in reality, when you look at your  
13       sentencing, he is not going to do that. I mean,  
14       by having the prosecutor withdraw on the  
15       terroristic threats, you then have one charge  
16       that goes to the judge and that judge is going  
17       to be forced to make that a jail term case. I  
18       mean, that a judge will have to show himself for  
19       an eleven-and-a-half to twenty-three on the  
20       robbery charge and can't say I am giving you ten  
21       to twenty.

22                   DR. KRAMER: Well, it is clear that --  
23       I am not sure if that's the game that would be  
24       played, but it is clear that the process of  
25       doing this will change the rules of the game to

1 somebody comes up and puts a gun in her face and  
2 threatens her and her child to give up a  
3 pocketbook, it is clear that is a jail time,  
4 incarceration case. In that kind of case, you  
5 get the robbery, you get a VUFA violation, you  
6 get the Firearms Act, you get terroristic  
7 threats. The DA's before a judge, knows that  
8 the judge is lenient, more or less in the past  
9 used partially consecutive/partially concurrent  
10 sentences, to appear to be tough on crime, but,  
11 in reality, he gives minor sentences. Do you  
12 think the DA's in those kinds of cases would  
13 withdraw on the VUFAs and the terroristic  
14 threats, only go to the juries with the  
15 robberies, or to the judge with the robbery, and  
16 then kind of force the hand of the judge? I  
17 mean, that's what I mean by that forced or  
18 compulsion then.

19 DR. KRAMER: I guess I am not sure how  
20 that is going to force the hand of the judge, in  
21 a sense, by dropping the ancillary charges of  
22 other charges.

23 MR. PRESKI: Well, then what would  
24 happen if we would allow the judge to sentence  
25 on what I assume is the minor charge, the

1 some degree, and whether that would be one of  
2 the adaptations. We refer to them as kind of  
3 courtroom work groups, and the norms of that  
4 environment process in cases. You might expect  
5 that kind of adaptation. That goes beyond my  
6 sense of knowledge of how prosecutors would  
7 adapt in some particular cases, but I wouldn't  
8 be surprised that there would be certain  
9 adaptations on the part of prosecutors and the  
10 kinds of, in the cases and charges that are  
11 made.

12 There is a big difference now across  
13 counties, numbers of charges that are brought.  
14 Some tend to bring lots of charges and some tend  
15 to narrow it down to the basic and most  
16 essential charge. So there is different  
17 procedures now in different counties, the way  
18 they handle the cases. This may give an  
19 opportunity.

20 One of my guesses would be that this  
21 would be somewhat invisible in many  
22 environments. A lot of counties have been  
23 conditioned to do what they have been doing for  
24 the last twenty or thirty years and would  
25 probably not note.

1 I know that one always thinks, the law  
2 changes, are going to make major changes in the  
3 behavior, but I would suspect that, in many  
4 cases, they would continue doing what they have  
5 been doing historically until, perhaps, over  
6 time, they would learn from other judges, and  
7 others, the opportunities of using it. Or, the  
8 Commission might train them in ways to do it, if  
9 the Commission picked that up as one of the  
10 vehicles for trying to look at sentencing, may  
11 be another way. But I think a lot of it would  
12 be lost and the system would probably continue  
13 as it does right now, to be honest.

14 MR. BERGSTROM: I guess I would just  
15 caution, it is a little bit dangerous to  
16 speculate what judges would do, especially when  
17 there is 500 some across the state, different  
18 counties, different kinds of practices locally.

19 What we tend to hear from practitioners  
20 out there is that many of the cases are  
21 determined before they go to the judge. I mean,  
22 I hear that from judges, often times, that maybe  
23 ninety percent of the cases are plead so the  
24 judge really is just sort of whether agreeing or  
25 not agreeing with what the plea negotiation is.

1 In those ten percent of cases in that instance  
2 that remain, then the judge maybe is a full  
3 player in that. That is some of the feedback we  
4 get.

5 The only caution I would throw out is  
6 it could go in either direction, to the degree  
7 that judges might give a longer sentence knowing  
8 that there is a state tail. Judges might also  
9 agree to a sentence that has a long minimum and  
10 remains a county sentence so that they could  
11 parole the person immediately at sentencing  
12 because the judge would retain paroling  
13 authority. And there really isn't any appellate  
14 review of that paroling authority so it is sort  
15 of a double-edged sword. I guess you could play  
16 at one side or the other. I think, it is just a  
17 new set of rules, it would be a different  
18 approach and I think the court communities would  
19 sort of accommodate those new rules.

20 MR. PRESKI: Thank you.

21 CHAIRMAN BIRMELIN: Thank you, Mr.  
22 Kramer, Mr. Bergstrom, for your testimony. And  
23 that concludes our Subcommittee meeting, unless  
24 anyone has any further business to bring before  
25 us.

1 We are finished. Thank you.

2 (Whereupon, the hearing was adjourned  
3 at 10:50 a.m.)

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1 I hereby certify that the proceedings  
2 are contained fully and accurately in the notes  
3 taken by me on the within proceedings, to the  
4 best of my ability, and that this copy is a  
5 correct transcript of the same.

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10 Roxy Cressler

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12 Roxy Cressler, Reporter

13 Notary Public  
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