

**REMARKS OF
ERNEST D. PREATE, JR.**
August 29, 2000
House Subcommittee on Courts Hearing
Lancaster, Pennsylvania

Mr. Chairman, members of the Committee and Legislators, thank you for permitting me and this panel (Reverend Edward Bailey and Julie Stewart) the opportunity to present you our thoughts on H.B. 2165.

First of all, I recognize that the issue of what to do about the possession and/or use of a firearm in connection with illegal drug use and transactions is an important policy and public safety issue. We all want to do more to protect the public, and, to rid our street of drug violence, and, ensure that our children are drug-free.

As Attorney General and before that as Lackawanna County District Attorney, the drug problem was my top priority. I worked with many of you in the Legislature to create and develop Pennsylvania's first comprehensive Local Drug Task Force Program. Today it still is considered the single most effective tool in arresting drug law violators. I asked for stricter sentences for drug dealers; I even supported mandatory drug sentences. But, I also endorsed, as an important part of my agenda, treatment and prevention programs. Moreover, I walked the streets of many communities with neighborhood groups showing my personal support for their heartfelt desire to fight for safe streets and drug-free kids. I even funded their efforts with a grants program.

The question before us is whether this Bill - sentencing anyone to a five-year mandatory for mere possession of a firearm in connection with a drug violation, is going to have any real impact in the ongoing struggle against illegal drugs. Sadly, I

must suggest to you that, based on all that we know, it will not. What it surely will do is cause a rise in the prison population, and, regrettably, the vast majority of those imprisoned will be people of color. To be sure, there are programs that you and the community can undertake that will have a positive impact in the anti-drug effort. I will touch upon them in a moment.

First of all, this Bill will take away judicial discretion in sentencing, as if that will be the answer to making our streets safer. I reject the implication underlying this Bill that judges aren't sentencing drug and firearm violators to long enough prison terms. While that may have been the case in the 1970s and early 1980s, that is no longer the case.

Why? Because of the Sentencing Guidelines. Those Guidelines acknowledge that judges have a constitutional role in sentencing - mold a punishment to fit a crime. A close study of the Sentencing Guidelines shows that in addition to the option of a full range of minimum sentences approaching five years for possession and use of drugs for first offenses, the Courts are obligated to apply a range of mandatory sentences up to five years or more triggered by a legislatively-mandated ever smaller quantity of drugs. For example, you just passed Act 41 this June which lowered the threshold for a mandatory five-year sentence for possession of heroin from 100 grams to 50 grams. And if the individual has a prior record substantially more years get tacked on.

Since there is no fiscal or prison impact note or research publicly evident in regard to H.B. 2165, I have gathered the following data from the Department of Corrections Annual Statistical Reports. It shows conclusively judges are doing their job and that this five-year mandatory is essentially not necessary.

Of the 3,413 Court commitments to the State Prison system in 1998, 1,816 or 27.5% were for narcotics law violations and no other category of crime including crimes of violence come even close. The next category is robbery with 968 commitments or 14.6% of all court commitments. The average minimum sentence for these narcotics offenses is 3.6 years with the average maximum being 7.4 years. The average time served is now 39 months; and in 1995 it was 33 months. So, the time spent in prison is clearly getting longer every year. Moreover, the Sentencing Guidelines also mandate that there be 1 to 2 year mandatory for possession or use of a deadly weapon to be tacked on to the narcotics offenses.¹

And, if you don't believe these range of sentences on the time served is long enough, then, the answer is to get immediate relief starting today, not by enacting this legislation, but, to have the Police and District Attorney refer these "guns and drugs" cases to the U. S. Attorney for Federal prosecution where the drug mandatories and the weapon enhancements are much more severe under Title 18, §924(c). Julie Stewart of FMM will give you a detailed analysis of the Federal law and its impact.

In short, H.B. 2615 seems totally unnecessary given the current law and judicial sentencing practices.

But, I have to tell you that the chief reason you should not enact this five-year mandatory is that the effect of this Bill in operation - as it is with all drug mandatories- will be to imprison Blacks and Latinos in numbers that are so

¹ From the data, it is not clear whether that 1 to 2 year is included in the narcotics sentence or calculated separately. Perhaps the Sentencing Commission has that data.

disproportionate to their numbers in the general population (12%) that it has become, as "Human Rights Watch" recently described, is "nothing short of a national scandal."²

According to Norval Morris, noted author and Professor of Criminal Law at the University of Chicago Law School, there is "measurable racial discrimination in our police practices, in our prosecutorial practices and in our sentencing," and, the "whole law and order movement that we have heard so much about is, in operation though not in intent, anti-black and anti-underclass—not in plan, not in desire, not in intent, but in operation" (Donziger, Steven (ed.) (1996), p. 114 The Real War on Crime, the Report of the National Criminal Justice Commission).

In his book, Malign Neglect, a study of the war on drugs and its impact on minorities, noted author and researcher Professor Michael Tonry (1995) wrote, "Urban African Americans have borne the brunt of the war on drugs. They have been arrested, prosecuted, convicted and imprisoned at increasing rates since the early 1980's, and grossly out of proportion to their numbers in the general population or among drug users."

I call it "unintended racism" and nobody wants to talk about it.

Dr. Jerome Miller of the National Center for Institutions and Alternatives in Alexandria, VA, calls it our "national selective inattention." Here are the facts from published studies done not just by myself, but by the Associated Press (March 2000), Human Rights Watch (May 2000), If you are a Black or Latino in Pennsylvania, and even though you use drugs according to every national study the same as whites, to wit, 13%, you will receive 59% of all drug incarcerations and you will receive an astounding 80% of the mandatory drug sentences handed out by our system.

2. Human Rights Watch, May 2000, "Punishment and Prejudice: Racial Disparities in the War on Drugs", P.17.

If you look at table 14 of the Human Rights Watch Study, you will see that for every 18 whites incarcerated in state prison for drug violations, 279 blacks and latinos get incarcerated, a ratio of 16 to 1. In fact, we are sixth in the nation when it comes to putting more blacks in prison than whites. There is nothing to suggest that this recent trend in Pennsylvania over the last decade will not apply to the 5 year guns with drugs mandatory of HR 2165.

As I have said people of color have borne the brunt of our "War on Drugs", and the operation and effect of this bill will be no different. Indeed, looking at table 5, "State Incarceration Rates of Adult Males by Race", Pennsylvania has the ignominious distinction of being 6th in the nation in imprisoning black males for all crimes, with a ratio of 18.4 blacks to 1 white.

Martin Luther King in the 1960's had a dream that people of color could break the chains of racial bondage. Little could he anticipate that all those civil rights gains he saw, and his death propelled forward, would be today significantly set back by the scandalous incarceration of people of color who now constitute 66% of our jails nationally and in Pennsylvania. Moreover, these same people of color are being systematically and significantly disempowered by felon disenfranchisement laws like our 1995 Pennsylvania 5 year Felon Disenfranchisement law, which, despite bi-partisan support, this legislature failed to repeal in May of this year.

In just 20 years at the current rates, according to the 1996 study of the National Commission on Crime, nearly 2 in every 3 black males and 1 in every 4 hispanic males between 18-34 will be in prison. These respected Criminologists tell us we as a nation are headed for a social catastrophe and, HR 2165 will only propel us even faster to that tragedy.

Some people want to believe that by handing out mandatories and lengthening sentences to levels unheard of in the world, we will put a stop to drug crime and increase our security. Sadly, according to the research, there is virtually no deterrent effect to what we are doing. Look at the facts:

- In Pennsylvania we have built a prison a year for 18 years.
- We have increased our prison population from 8500 in 1980 to a record 37,000 this year.
- Our prison budget is now \$1.2 billion, up 1200% from the \$100 million in 1980.
- It now costs the taxpayers over \$25,000 per year to house each inmate.
- Our average state prison sentence served by inmates is now 54 months, up from 38 months just six years ago.
- Our national prison population is now a record 2,000,000, more than any other nation in the world.
- In just 20 short years we have gone from incarcerating 1 in every 350 Americans to 1 in every 146.
- One in every 34 Americans is currently in jail or on some form of probation or parole.

The question is do we feel any more secure after this 20 year incarceration binge? The answer is-No. A Bureau of Justice Statistics study from the U.S. Department of Justice tells us that 42% of all Americans feel afraid to walk alone at night in their own neighborhood, essentially the same percentage as when we started mandatory sentencing laws.

As for deterrence, while violent crime is down, the PA State Police revealed that in 1998 we had a record number of drug arrests-37,000. So much for kids and

adults getting scared away from using and dealing drugs by mandatories. President Clinton recently announced that despite all the threatened and imposed criminal sanctions, the number of drug addicted in America now numbers 2.7million, 3 times that of just 8 years ago in 1992.

The respected and conservative criminologist, Professor John DiIulio of the University of Pennsylvania, and a strong mandatory sentence advocate, recently completely changed his position, calling for Zero Prison Growth, and the abolition of mandatories because we have reached the point of diminishing returns. He wrote in the May 17, 1999 issue of the "National Review:"

"Our 3 state survey found that, at the time of the conviction offense, under a third of the prisoners now serving mandatory sentences for drugs either knew that the penalty as in effect or expected to go to jail if caught. So much for deterrence."

Indeed, the highly regarded think tank, the Rand Corporation, announced in a thorough study in 1999 that mandatory minimum sentences are not justifiable on the basis of cost effectiveness at reducing cocaine consumption or drug related crime "because of the high cost of incarceration." They found that conventional sentencing where judges have the discretion to punish the drug kingpins with harsher sentences rather than their drug mules or street dealers is more effective than the one size fits all mandatories.

Then, too, the recidivism data confirms the folly of our incarceration binge. As we have made our sentences longer, the rate of recidivism has grown. Of the 6,000 inmates let out by paroles and the 3,000 more who maxed out serving all their sentence, approximately 66% are returned to prison within 3 years. So much for teaching them a lesson.

For all of the above reasons, I urge you to resist the temptation to go for a politically popular quick fix of dubious value, and to concentrate your time, effort, and resources on getting federal and state money for community policing to better protect our streets, and for drug courts to get people off of drugs, and to greatly enlarge prison drug treatment, education, training, and faith based programs. These are the proven programs that work - - not more mandatories.

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There are, for example, five times more white drug users than black. Relative to population, black men are admitted to state prison on drug charges at a rate that is 13.4 times greater than that of white men. In large part because of the extraordinary racial disparities in incarceration for drug offenses, blacks are incarcerated for all offenses at 8.2 times the rate of whites. One in every 20 black men over the age of 18 in the United States is in state or federal prison, compared to one in 180 white men.

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Table 14. Rates of Admission for Black and White Male Drug Offenders

State	Black	White	Black/White Ratio	States Ranked by Black Male Drug Offender Rates	States Ranked by Black/White Ratio
ALABAMA	340	34	10	ILLINOIS 1146	ILLINOIS 57
ARKANSAS	123	29	4	OHIO 968	WISCONSIN 53
CALIFORNIA	669	139	5	KENTUCKY 869	MINNESOTA 39
COLORADO	463	19	24	NEW JERSEY 850	MAINE 36
FLORIDA	486	23	21	WASHINGTON 779	IOWA 29
GEORGIA	278	25	11	IOWA 696	MARYLAND 28
HAWAII	60	12	5	WISCONSIN 689	OHIO 28
ILLINOIS	1146	20	57	CALIFORNIA 669	NEW JERSEY 28
IOWA	696	24	29	MARYLAND 628	WEST VIRGINIA 28
KENTUCKY	869	43	20	NORTH DAKOTA 623	NORTH CAROLINA 27
LOUISIANA	402	32	12	VIRGINIA 514	MICHIGAN 25
MAINE	314	9	36	FLORIDA 486	COLORADO 24
MARYLAND	628	22	28	SOUTH CAROLINA 479	FLORIDA 21
MICHIGAN	291	12	25	COLORADO 463	VIRGINIA 21
MINNESOTA	424	11	39	OKLAHOMA 460	KENTUCKY 20
MISSISSIPPI	320	39	8	NEBRASKA 455	TEXAS 19
MISSOURI	303	33	9	NEW YORK 440	NEW HAMPSHIRE 18
NEBRASKA	455	36	13	MINNESOTA 424	SOUTH DAKOTA 18
NEVADA	321	33	10	LOUISIANA 402	PENNSYLVANIA 16
NEW HAMPSHIRE	358	19	18	TEXAS 381	OREGON 15
NEW JERSEY	850	30	28	UTAH 372	WASHINGTON 14
NEW YORK	440	39	11	NEW HAMPSHIRE 358	NEBRASKA 13
NORTH CAROLINA	60	29	27	ALABAMA 340	LOUISIANA 12
NORTH DAKOTA	623	23	2	NEVADA 321	TENNESSEE 12
OHIO	968	34	28	MISSISSIPPI 320	GEORGIA 11
OKLAHOMA	460	57	8	MAINE 314	NEW YORK 11
OREGON	301	20	15	MISSOURI 303	ALABAMA 10
PENNSYLVANIA	279	18	16	OREGON 301	NEVADA 10
SOUTH DAKOTA	260	47	18	MICHIGAN 291	MISSOURI 9
SOUTH CAROLINA	479	26	6	PENNSYLVANIA 279	UTAH 9
TENNESSEE	72	6	12	GEORGIA 278	MISSISSIPPI 8
TEXAS	381	20	19	SOUTH DAKOTA 260	OKLAHOMA 8
UTAH	372	43	9	WEST VIRGINIA 252	SOUTH CAROLINA 6
VIRGINIA	514	25	21	ARKANSAS 123	HAWAII 5
WASHINGTON	779	56	14	TENNESSEE 72	CALIFORNIA 5
WEST VIRGINIA	252	9	28	NORTH CAROLINA 60	ARKANSAS 4
WISCONSIN	689	13	53	HAWAII 60	NORTH DAKOTA 2
NATIONAL	482	36	13		

Rates calculated per 100,000 adult male residents of each race

Source: Calculated from National Corrections Reporting Program, 1996 and Bureau of Census data.

Table 5. State Incarceration Rates of Adult Males by Race

State	Black	White	Black/white Ratio	States Ranked By Black/White Ratio	
ALABAMA	3918	592	6.6	DC	49.0
ALASKA	5542	924	6.0	MINNESOTA	26.8
ARIZONA	5740	1151	5.0	WISCONSIN	21.3
ARKANSAS	4173	517	8.1	CONNECTICUT	20.0
CALIFORNIA	5214	423	12.3	IOWA	19.1
COLORADO	4627	621	7.5	PENNSYLVANIA	18.4
CONNECTICUT	6848	343	20.0	ILLINOIS	17.2
DELAWARE	6888	736	9.4	NEW JERSEY	15.2
DC	7818	160	49.0	TEXAS	12.5
FLORIDA	4902	561	8.7	NEBRASKA	12.4
GEORGIA	3424	547	6.3	RHODE ISLAND	12.4
HAWAII	1240	466	2.7	CALIFORNIA	12.3
IDAHO	2279	694	3.3	MASSACHUSETTS	11.1
ILLINOIS	4383	255	17.2	OHIO	10.9
INDIANA	4503	476	9.5	KANSAS	10.8
IOWA	7859	410	19.1	MARYLAND	10.2
KANSAS	5445	502	10.8	INDIANA	9.5
KENTUCKY	4840	584	8.3	MICHIGAN	9.4
LOUISIANA	4731	532	8.9	DELAWARE	9.4
MARYLAND	3602	353	10.2	UTAH	9.3
MASSACHUSETTS	2852	256	11.1	VIRGINIA	9.0
MICHIGAN	5243	557	9.4	OREGON	8.9
MINNESOTA	4169	156	26.8	LOUISIANA	8.9
MISSISSIPPI	3346	506	6.6	FLORIDA	8.7
MISSOURI	5345	637	8.4	NORTH CAROLINA	8.7
MONTANA	3987	560	7.1	MISSOURI	8.4
NEBRASKA	4503	363	12.4	WASHINGTON	8.3
NEVADA	5064	784	6.5	KENTUCKY	8.3
NEW HAMPSHIRE	3286	438	7.5	ARKANSAS	8.1
NEW JERSEY	4529	298	15.2	OKLAHOMA	7.8
NEW MEXICO	3069	686	4.5	NEW HAMPSHIRE	7.5
NEW YORK	3525	565	6.2	COLORADO	7.5
NORTH CAROLINA	3692	427	8.7	WYOMING	7.4
NORTH DAKOTA	1329	222	6.0	MONTANA	7.1
OHIO	6047	554	10.9	ALABAMA	6.6
OKLAHOMA	7467	963	7.8	MISSISSIPPI	6.6
OREGON	4758	535	8.9	SOUTH CAROLINA	6.6
PENNSYLVANIA	5168	281	18.4	TENNESSEE	6.5
RHODE ISLAND	7099	574	12.4	NEVADA	6.5
SOUTH CAROLINA	3855	588	6.6	WEST VIRGINIA	6.3
SOUTH DAKOTA	3471	595	5.8	GEORGIA	6.3
TENNESSEE	2881	440	6.5	NEW YORK	6.2
TEXAS	7291	583	12.5	NORTH DAKOTA	6.0
UTAH	4632	500	9.3	ALASKA	6.0
VERMONT	1195	471	2.5	SOUTH DAKOTA	5.8
VIRGINIA	3885	433	9.0	ARIZONA	5.0
WASHINGTON	3713	446	8.3	NEW MEXICO	4.5
WEST VIRGINIA	2142	340	6.3	IDAHO	3.3
WISCONSIN	7311	343	21.3	HAWAII	2.7
WYOMING	4668	635	7.4	VERMONT	2.5
NATIONAL	4631	482	9.6		

Rate per 100,000 adult male residents of each race.

Source: Bureau of Justice Statistics, *Correctional Populations in the United States, 1996* and Bureau of Census

Blacks spend more time in prison

Racial, economic factors cited in state's sentencing disparities

BY TIM MOLLOY
OF THE ASSOCIATED PRESS

PITTSBURGH — The crimes were the same but not the punishments.

Kyle Banks, 25, and Martin Ward, 21, both were convicted of third-degree murder: Ward for shooting a friend with a gun he said he thought was unloaded and Banks for shooting a friend in what he said was self-defense. Neither had a record, and their crimes were deemed equally severe under state sentencing guidelines.

But now Banks is serving a 10- to 20-year sentence, a term that is in the middle of the state's recommended range, and Ward is serving a five- to 10-year sentence that was the lowest he could have received.

Another difference: Banks is black; Ward is white.

Blacks routinely receive longer sentences than whites in Pennsylvania even when their crimes and records are nearly identical, an Associated Press review of thousands of state sentencing records found.

For violent crimes such as robbery and aggravated assault, the difference between average sentences for blacks and whites can amount to years of prison time.

Black leaders say the gaps contribute to blacks' vast overrepresentation in state prisons. Blacks account for 9 percent of Pennsylvania's residents but 56 percent of its prisoners, according to the 1990 U.S. Census and state corrections records.

"Look at it from a black perspective," said Richard P. Burton, former president of the state NAACP and now a member of the group's national board of directors. "It kills us all around. It takes away your right to vote. It's hard enough to get a job as it is, and then you come out of prison with a felony record."

The differences may have more to do with judges cutting

breaks to whites than disfavoring blacks, said Esther Bush, president of Pittsburgh's Urban League.

"It's not that somebody sits down and plans to give African-Americans more time, but that is the result," Bush said. "It's de facto racism. There is something in this country called white skin privilege."

State Rep. Harold James, Democratic chairman of the House Subcommittee on Crime and Corrections, said he will call for legislative hearings into the discrepancies.

"If you have more money, you can get a better lawyer," James said. "But I don't think that's the root of the evil. I think the root of the evil is racism."

The AP's computer-assisted analysis relied on data supplied by judges to the Pennsylvania Commission on Sentencing about sentences handed down in 1996 — the only year for which complete statewide information has been released.

Judges and criminologists caution that no case-by-case comparison alone proves any unfairness and that the disparities may be caused more by widespread black poverty than by race.

Some judges acknowledge that the poor often fare worse in court than the more affluent.

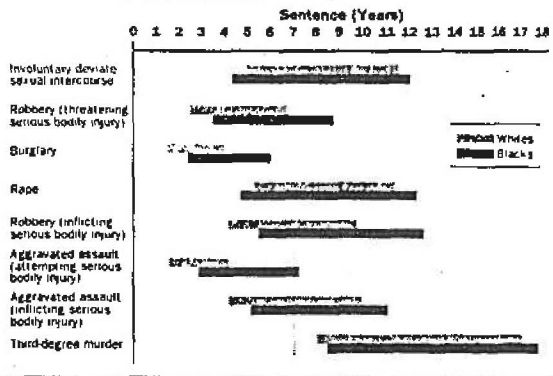
"There are factors that get put into the sentencing guidelines: Does the person have a job? Does the person have family and community ties?" said Pamela Dembe, president of the Pennsylvania Conference of Trial Judges. "When the economy is tough, it probably plays out that young white guys have an easier time getting jobs than young black guys, certainly."

Twenty-nine percent of blacks compared to 9 percent of whites lived in poverty in Pennsylvania as of 1990, according to the census.

In cases where defendants

Unequal time

Pennsylvania judges sentence defendants to minimum and maximum terms of incarceration. This chart shows the average sentence range for crimes committed by defendants with one misdemeanor or no prior record.



J. POET / OF THE ASSOCIATED PRESS



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had one prior misdemeanor or no record, the analysis found that on average:

- Blacks received at least 1.4 years more than whites for inflicting serious injury in a robbery, getting 5.5 to 12.5 years compared to 4.1 to 9.7 years for whites.
- Blacks received 1.3 years more than whites for trying to inflict a serious injury in an aggravated assault, getting 2.9 to 7.1 years compared to 1.6 to 4.1 years for whites.
- Blacks received at least one year more than whites for causing serious bodily injury in an aggravated assault or threatening serious bodily injury in a robbery.

Blacks' sentences are weeks or months longer for several less serious crimes. Blacks received longer sentences in 13 of 20 common crimes researched

by the AP, including several types of theft and drug charges.

There were too few defendants convicted of first- or second-degree murder for a fair comparison of sentences for blacks and whites convicted of those crimes.

But discounting one white and one black who received life sentences, blacks were sentenced on average to at least 5.5 months more than whites in third-degree murder cases in which defendants had, at most, one misdemeanor on their records. Seventy-seven percent of defendants for all crimes had one misdemeanor or no record.

The Pennsylvania Commission on Sentencing, a panel of judges, attorneys and lawmakers, helps design the state guidelines judges use to mete out sentences that are supposed to be fair and equal for all. However, the guidelines are simply recommendations, and many judges acknowledge that they allow wide leeway in sentencing.

The commission has never used the 1996 data for racial comparisons.

"I certainly think the sentencing commission will go into it," said Westmoreland County Judge Gary Caruso, one of four judges on the panel.

The commission records not name individual judges, making it impossible to compare their sentencing records. Many judges oppose the release of such information out of fear their records could be distorted.

"I'm color-blind," said Li Richette, the Philadelphia judge who sentenced Ward. She said she gave him the low sentence possible because he was remorseful and because the victim's mother wanted mercy not because he was white.

Richette said black defendants often appear uncomfortable in the criminal justice system and do not try as hard as white defendants to win judge sympathies.

"White defendants are able to get really good support letters and speak eloquently, and sometimes black defendants don't," said Richette, who is white. "Many black defendants just clam up and don't say a word."

Ward, she said, "really talked his heart out."

Some black defendants are quiet because they have little education or because their attorneys tell them not to speak up, said the NAACP's Burton.

Banks' attorney, Daniel Preninger, said he did not blame racism for his client's sentence which was handed down by a black judge.

Greater diversity and sensitivity from the bench would help close the gaps, Burton said.

But Burton said the disparities reflect persistent racial inequality in all aspects of life, not just the criminal justice system. As long as inequalities remain in education, job opportunities and economic levels, gaps will remain in sentencing, he said.

To close the gaps, the National Association for the Advancement of Colored People is trying to increase educational programs for black prisoners to make sure they can find jobs and stay away from crime once they are released, Burton said.

State leaders can do their part by reconsidering their approach to crime fighting, James said.