

**TESTIMONY OF
PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

**BEFORE THE PENNSYLVANIA SENTENCING COMMISSION
ON ITS REVISED VERSION OF THE SENTENCING RISK ASSESSMENT INSTRUMENT
DECEMBER 6, 2018**

Thank you for the opportunity to testify, I am Bradley A. Winnick, President of the Pennsylvania Association of Criminal Defense Lawyers (PACDL) and I am testifying on behalf of PACDL concerning the Preliminary Sentence Risk Assessment Instrument. PACDL's stated purposes include achieving justice and dignity for defendants, assuring a fair criminal justice system, and protecting those individual rights guaranteed by the Pennsylvania and United States Constitutions. PACDL is the only statewide organization that represents the interests of both private and public defender members of the criminal defense bar in the Commonwealth of Pennsylvania.

The members of PACDL continue to have significant concerns about the use of the Risk Assessment Instrument as proposed by the Commission in determining the length of an individual's sentence. Act 2010-95 mandates the Commission to adopt an Instrument, which can be used by the sentencing court to determine the appropriate sentence for an individual offender, within the limits of the law. Yet after more than three years, multiple hearings, and hundreds of hours of testimony by ex-offenders, the defense bar, victims and families of victims, probation/parole officials, and law enforcement, the instrument currently being considered by this Commission, as an empirical tool to identify those offenders at a high risk of reoffending, is still no more reliable than a coin-flip.

In addition to the concerns raised during our prior testimony, we raise additional concerns for your consideration today and urge the Commission to inform the General Assembly that it should rescind its mandate, in favor of economic and judicial economy.

A. The Instrument's stated purpose is duplicative of existing Sentencing Guidelines and Pre-Sentence Investigation Report practice.

The Commission's own report on the Instrument acknowledges that the imperfect predictors relied on by the tool **are not determinative of future outcomes** (See Commentary to Annex A, page 5). With the Instrument's most reliable statistics applying to low risks offenders, whom predictably the instrument shows are unlikely to reoffend, as well as confirming that recidivism for crimes against a person are rare, we must consider the true value of such data. These results are not only unsurprising,

but also already addressed in the current sentencing guidelines, as well as the statute outlining the requirements for the court's use of Pre-Sentence Investigation (PSI) Reports.

Section 9731 of Title 42 specifies the directives regarding the use of PSI Reports by the Court. It states that the sentencing judge *may*, in the judge's discretion, order a pre-sentence investigation report in any case, and that the sentencing judge *shall* place on the record the reasons for dispensing with the pre-sentence investigation report if the judge fails to order a pre-sentence report, (a) when incarceration for one year or more is a possible disposition under the applicable sentencing statutes; (b) when the defendant is less than 21 years old at the time of conviction or entry of a plea of guilty; or (c) when a defendant is a first offender in that he or she has not heretofore been sentenced as an adult.

This is an important statute to consider as the Commission's report makes it clear that the purpose of the Instrument is to determine whether to recommend that the Court seek a PSI prior to sentencing both low and high-risk offenders. Yet, Section 9731 already addresses this concern as it applies to both groups. The most youthful offenders, those less than 21 years of age, are assessed a risk score of 5 by the Instrument. This allocation is based solely on their age and will generally result in their classification as high-risk offenders. Section 9731 requires the Court, absent a reason placed on the record, to order a PSI prior to the sentencing of such an offender. The Instrument would recommend the same.

Section 9731 also provides similar guidance to the court for those individuals with no prior criminal history. In such instances, pursuant to Section 9731, the Court must again choose between placing a reason on the record or ordering a PSI prior to sentencing such offenders. The Instrument assigns first time offenders with a score of 0, thus identifying them as low risk offenders and recommends a pre-sentence investigation.

The Instrument fails to consider counsel's right to seek a pre-sentence investigation report on behalf of his/her client under any circumstance. In that instance, the Instrument suggests that the Risk Assessment would still need to be completed, but to what end? The purpose for it, to determine whether a PSI is required, no longer exists.

The Instrument pulls from a smaller pool of information than the sentencing guidelines. Where the guidelines consider an individual's criminal history from all states, federal convictions, international and even military dispositions, the Instrument looks only at those convictions within Pennsylvania. Where the Sentencing Guidelines acknowledge that an individual who has attained the age of twenty-nine without engaging in criminal conduct, is not the same person that he/she was at 14 – 17 years, thus allowing juvenile adjudications to lapse, the Instrument does not. Such inconsistencies

will result in conflicting recommendations from the Risk Assessment Score and the Sentencing Guidelines to the Court. Scenarios such as this benefit no one.

B. The reliance upon gender as a risk factor calculation violates the Equal Protection Clause of the United States Constitution.

It is well accepted that distinctions made by the government based on gender are constitutionally suspect. This tenet applies with equal force and import to the criminal justice system. Indeed, our criminal justice system has a long history of:

1. Striking down statutes that treat men and women differently, See *Craig v. Boren*, 429 U.S. 190 (1976) (concluding that a statute that prohibited the sale of alcohol to males under 21 years of age and females under 18 years of age unconstitutionally discriminated based on gender);
2. Rejecting sentencing procedures that treat men and women differently, See *Commonwealth v. Daniel*, 430 Pa. 642 (Pa. 1968) (finding that the Muncy Act’s sentencing scheme was an unconstitutional violation of equal protection where it limited judicial discretion when sentencing women but allowed a judge sentencing a male to consider extenuating facts and circumstances); and
3. Recognizing that the equal protection clause applies to criminal sentencing procedures that create disparity in sentences resulting from one gender being disfavored or receiving favorable treatment over another.

As written, the Sentence Risk Assessment Instrument uses risk factors and scales to determine the relative likelihood of recidivism. The Instrument identifies the following factors as statistically significant in relation to risk of recidivism: age, *gender*, number of prior convictions, prior convictions offense types, current conviction offense type, multiple current convictions, and prior juvenile adjudications. (Emphasis added). If implemented, the “Sentence Risk Assessment Summary” and “risk factor” calculations would require the court to assign one point if the offender is male and no points if the offender is female. Thus, the Instrument relies upon gender to treat male and female offenders differently, subjecting one group to a higher risk score solely because of their gender.

In order to withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to those objectives. The Commission relies upon statistical data to demonstrate that gender is related to recidivism and its stated object of reducing threats to public safety. As noted in our prior testimony, the Instrument relies upon an algorithm with an error rate of 40%. In his opinion in *Craig v. Boren*, Justice Brennan aptly noted that

“proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.” 429 U.S. at 204. In this instance, the statistics at issue are simply insufficient to justify the Instrument’s disparate treatment of male and female offenders.

In response to the foregoing, the impulse may be to remove gender as a factor for inclusion in score calculations. However, to the extent that “gender” is a statistically relevant factor, its removal from the Instrument will further undermine reliability and accuracy of the algorithm. Accordingly, PACDL calls for reconsideration of the Sentence Risk Assessment Instrument as constitutionally infirm and, as noted in greater detail below, financially overly burdensome, unreliable and unnecessary.

C. It is financially prudent to urge the General Assembly to rescind its mandate.

The cost of the Instrument, both in money and time, is obvious and acute. This is especially true where the tools already exist to provide the information that this Instrument seeks to offer. The guidance that the General Assembly has already provided to the court regarding the appropriate use of PSI Reports at sentencing, accomplishes many of the same goals as the Instrument purports. In addition, there are multiple Probation and Parole Departments throughout the state that have already purchased and completed training in the application of tools such as the Ohio Risk Assessment System (O.R.A.S.), which consists of tools that can be used pretrial, prior to or while on community supervision, at prison intake, and in preparation for reentry just prior to release from prison. Those same agencies are also using the Youth Level of Services/Case Management Instrument (Y.L.S./C.L.I.), for juvenile offenders, both of which are evidence-based models. The same cannot be said of the proposed Instrument.

I would like to again thank the Commission for providing this opportunity to PACDL to testify concerning the Preliminary Sentencing Risk Assessment Instrument.