Testimony on behalf of the
Pennsylvania Association of Criminal Defense Lawyers
Before the Pennsylvania Commission on Sentencing
June 12, 2019, Harrisburg

I am Bradley Winnick, President of the Pennsylvania Association of Criminal Defense Lawyers. My testimony today will address the Commission's Proposed Amendment 5 to the 7th Ed. Guidelines and the Proposed Resentencing Guidelines. PACDL recognizes that much of the Commission's work is the result of legislative mandate. Accordingly, our testimony is focused on those provisions with the greatest likelihood to impact our 850 plus members actively practicing in the Commonwealth.

First and foremost, we offer support for and applaud the Commission's efforts to propose revisions to 303.3 – pertaining to the offense gravity score assignments for fentanyl. It is critical that prosecuting attorneys in the Commonwealth be required to prove beyond a reasonable doubt that a defendant knowingly possessed, distributed, or manufactured fentanyl prior to the imposition of the increased OGS assignment. While we understand that was the Commission's intent behind the Supplement to Amendment 4, in practice that was not the experience of our members.

Following the passage of the Supplement to Amendment 4, throughout the Commonwealth, our members regularly encountered prosecuting attorneys who took the position that they were not required to prove that a defendant knew that the drugs he or she possessed contained fentanyl. During the Commission meeting addressing the Supplement to Amendment 4, it was opined that judges would sort the knowledge issue out at sentencing. In practice, however, the proof issue has had significant impact during pre-trial litigation and plea negotiations. Prosecuting attorneys have used the threat of the sentencing enhancement to prevent the filing of suppression motions and to secure guilty pleas. Use of the enhancement under these conditions violates our clients' rights to due process and equal protection.

The issue of knowledge goes beyond the proposed revisions to 303.3. The number of cases that involve a mixture of a minimal amount of fentanyl with other controlled substances is significant. According to the DEA, between 2015 and the second quarter in 2017, cocaine exhibits submitted, analyzed, and reported to NFLIS in Pennsylvania totaled 30,914. The current amendment fails to address this crucial issue of proportions within mixtures, treating a "microgram" amount of fentanyl the same as a pure sample. Failure to address this inequity will result in disparate results in the future.

Accordingly, we urge the Commission to adopt the proposed revisions to 303.3 pertaining to the offense gravity score for fentanyl.

Second, PACDL opposes the proposed revisions to 303.6 that would include prior juvenile adjudications for driving under the influence and operating a watercraft under the influence. At the outset, it is important to note what would NOT change as a result of this amendment:

- Juvenile adjudications for ALL first offense DUIs will continue to be *excluded* from the prior record score; and
- Juvenile adjudications for M1 DUI offenses will continue to be *included* in the prior record score.

It is only those repeat offenses which are not graded as M1s which are affected by this amendment: Tier I-2nd offense (M); Tier 2-2nd offense (M); and Tier 1-3rd offense (M2). Note that, for juveniles, Tier 1s only

exist in the context of alcohol-related blood test refusals. This is an admirable goal. Our current DUI sentencing structure, especially as it applies to juveniles, often leads to absurd results when comparing cases. The tier system does not necessarily reflect the level of impairment that the juvenile exhibited or the extent to which the juvenile endangered others. Here are some examples of some absurd results that could occur under the present sentencing scheme:

- Juvenile A gets a second DUI due to a BAC of .159. He is adjudicated delinquent of a Tier 2 DUI. Under current rules, this would not be included in his PRS. Juvenile B incurs a second DUI based on a negligible amount of Deta-9-Carboxy-THC (the inactive metabolite universally understood to cause NO impairment) in his system. He is adjudicated delinquent of a Tier 3 DUI. Under current rules, this would be +1 to his PRS. **RESULT**: Juvenile A was quite impaired and likely endangered himself and others while driving. Juvenile B simply had a fat-soluble molecule in his blood that is not affecting his functioning at all. Yet Juvenile B is the one that ends up with the point on his PRS.
- Juvenile Y is stopped for a third DUI due to driving erratically and nearly striking several curbs. He has been drinking liquor for hours and knows that he is absolutely wasted, so he refuses the blood test. He is adjudicated delinquent of a Tier 1 DUI because Tier 1 is the only option when no BAC is available. Under current rules, this would not be included in his PRS. Juvenile Z is stopped for a third DUI due to having a headlight out. He has a mild odor of alcohol so is taken in for blood. He is cooperative and consents to the blood test. His BAC is .03, which would not rise to the level of a DUI for an adult and is inconsistent with impairment according to most studies. He is adjudicated delinquent of a Tier 2 DUI because any BAC over .02 is an automatic Tier 2 for an underage driver. Under current rules, this would be +1 to his PRS. **RESULT**: Juvenile Y, who was more intoxicated, more dangerous on the road, and less cooperative would have avoided the PRS point, while the cooperative and barely-even-buzzed juvenile ends up with a point.

While the examples above may seem outrageous, they are drawn from the real courtroom experience of our members. The current system has the potential to lead to unfair and disproportionate treatment.

Both drugs and alcohol are illegal for juveniles; yet they only have a chance of getting Tier 1 and Tier 2 offenses – and therefore keeping the offense off their PRS – if alcohol is involved. There is no legitimate reason to treat drug and alcohol offenses so incredibly differently when we're talking about a group of people for whom ALL of these substances are illegal. Because the proposed revision would level the playing field a bit, PACDL believes it to be an improvement of the current structure, which could lead to the absurd results described above.

Ultimately, PACDL believes that the focus should not be on fixing an imperfect and potentially arbitrary sentencing scheme. Instead, the Commission should level the playing field by removing all DUI offenses from 303.6, including the M1 DUIs that are currently included.

Under current law, the only other types of offenses that can follow a juvenile offender into their adult PRS are:

- All felonies;
- Certain M1 offenses that involve weapons; and
- Certain M1 offenses that involve the death of, or danger to, a child.

DUI offenses are simply not on par with the first 3 criteria above. Felonies are obviously serious, that's why they are graded as felonies. Weapons are very dangerous, especially firearms, and especially in the

hands of a juvenile. Intentionally endangering or hurting a child is obviously a big deal as well, and not something that should be taken lightly or quickly forgotten. There is a legitimate reason for the first three situations to trigger a PRS point.

Under the current scheme, the result is that juveniles with potentially insignificant BACs are treated the same as juveniles who are committing serious, dangerous, violent crimes. A juvenile who is on his second or third DUI at such a young age likely has substance abuse issues. They need counseling, treatment, and the ability to move forward. Their life is already going to be harder than those who do not struggle with addiction; let's not make their life any harder by adding to their PRS.

The current system of including M1 DUIs is already unfair and disproportionate. And, with this new amendment, DUI would become the ONLY non-M1 eligible for inclusion in the PRS. This has the effect of elevating DUI offense over other misdemeanors, including, simple assault, open lewdness, indecent exposure, recklessly endangering another person, or indecent assault to name a few.

In sum, the amendment does do some good in that it levels the playing field by basing inclusion in the PRS simply on whether or not there were prior offenses, and not a combination of offense number and tier that could lead to disproportionate outcomes as noted earlier. However, while it is a positive that similarly situated DUI offenders will be treated similarly, a new problem has been created. Now, juveniles convicted of DUI are being treated differently than juveniles convicted of other low-level misdemeanors. There is no basis for this distinction, and in fact, there are many misdemeanors that the average person would consider much more serious/offensive than DUI. Instead of expanding the reach of 303.6 by making it apply to all DUIs and not just M1s, we should look into narrowing 303.6 so that it no longer encompasses DUIs at all.

Next, PACDL opposes the proposed changes to §7314 pertaining to the fraudulent traffic in Supplemental Nutrition Assistance Program ("SNAP") benefits. The proposed amendments increase the maximum offense grading to a felony of the second degree for trafficking offenses in excess of $2,500. Additionally, the amendment would create a mandatory punishment of at least twice, but up to three times the amount stolen as restitution. PACDL views the proposed amendments as excessively punitive. The result will be a targeting of the poor for profit – the double return on restitution sought will create a financial incentive for prosecuting attorneys to target the poor more than other groups. The poor are particularly vulnerable to searches and seizures in public housing environments and as a result of consent to search clauses in applications for benefits.

Our members have direct experience with fraudulent trafficking in SNAP cases, particularly in Philadelphia's protracted preliminary hearing room. They are lengthy cases to prosecute and the people targeted usually have little to no violent record, but are facing felony charges. To compound the issue, these individuals are unable to afford ARD because they are already poor, and the restitution amounts are too high. The people charged with these offenses are usually already vulnerable and struggling populations that will only be further dissuaded from applying for SNAP benefits when the penalty is so high for misuse. In an environment where family members and loved ones are equally poor and destitute, our clients find it difficult not to share their SNAP benefit or to report family members who take their SNAP benefits.

The Commonwealth has already realized an increase in SNAP based prosecutions in the first quarter of 2019. The Commonwealth has also already realized economic benefit from SNAP prosecutions without the proposed amendment. Between July 1, 2013 and June 30, 2014, BFPP effectively collected and

realized a savings of an excess of $22.4 million of public funds through its investigative and prosecutorial activities.

UC Irvine School of Law Professor, Kaaryn Gustafson – known for her work exploring the role of law in remedying inequality - has aptly noted that,

> The criminalization of poverty highlights economically and legally institutionalized ideologies of neo-liberalism, racism, sexism, and the dehumanization of the poor. The growth of punitive welfare policies and the policing of welfare fraud add up to something more than the policing of crime. These policies and practices are rooted in the notion that the poor are latent criminals and that anyone who is not part of the paid labor force is looking for a free handout. In many ways, the policy goals of punishing non-working welfare recipients, welfare cheats, and aid recipients who engage in unrelated crimes has overwhelmed the goal of protecting poor families, adults, and children from economic instability.

PACDL urges the Commission to re-evaluate the proposed changes to Section 7314 and its underlying goals.

Similarly, PACDL opposes the change to 62 P.S. §481, pertaining to false statements made in connection with applications for assistance. The proposed change lowers the bar for a felony of the third degree from $3000 or more to $1000 or more based upon the amount of assistance or food stamps. The proposed new schedule is far less than the amounts used to trigger and grade traditional theft offenses. For the reasons stated above, PACDL views the proposed change as an effort to criminalize poverty that will have the ultimate effect of dissuading those in need from applying for benefits or needlessly exposing those who misstate a material fact on their application to a felony.

Finally, I will address our Associations' concerns regarding the proposed Resentencing Guidelines. PACDL acknowledges the testimony provided on this issue by Helene Placey, Executive Director of the County Chief Adult Probation and Parole Officer Association of Pennsylvania, on May 29, 2019. PACDL mirrors the concerns raised by Director Placey regarding the lack of county-specific data related to current resentencing practices, which is the direct result of the infancy of the mandate itself. Errors with the Resentencing Guidelines begin with the instrument's definition section, which defines "Offense gravity score" by referring directly to the Sentencing Guidelines, which specifically exclude their application to sentences imposed as a result of revocation hearings. (see Section 303.1(b)). We also share the Association's concerns about the arbitrary nature of the proposed recommendation for resentencing on a conviction violation by added a prior record score point to an offender's guidelines, which would result in the court penalizing the individual twice for the same prior criminal conduct, first at the time of a resentencing and then again when sentencing the accused on the new conviction.

Finally, the Resentencing Guidelines also reference the use of a Risk Assessment Instrument, which this Commission has spent more than three years trying to draft while conducting multiple hearings, and listening to hundreds of hours of testimony by ex-offenders, the defense bar, victims and families of victims, probation/parole officials, and law enforcement, all of which offered the same message, that the instrument had critical flaws that made it no more reliable than a coin-flip.

PACDL urges the Commission to re-evaluate the proposed Resentencing Guidelines until more data is available to assess the Instrument and its underlying goals.