TESTIMONY OF PETRA K. GROSS BEFORE THE PENNSYLVANIA SENTENCING COMMISSION ON THE PRELIMINARY SENTENCING RISK ASSESSMENT INSTRUMENT

I'd like to thank the Commission for this opportunity to present testimony today concerning the Preliminary Sentence Risk Assessment Instrument. I am here today as a member of the Pennsylvania Association of Criminal Defense Lawyers, for whom it is my pleasure to serve as a member of P.A.C.D.L.'s Legislative Committee.

PACDL's stated purposes include achieving justice and dignity for defendants and the criminal justice system itself, as well as 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.

I have been a member of PACDL since 2010, when I accepted a position as a member of the Dauphin County Public Defender's office. I held that position for nearly eight years until recently when I joined Martson Law Offices as an associate attorney, where I have continued my criminal defense practice.

The members of PACDL 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. Similar concerns were raised by the United States Department of Justice in its July 29, 2014, letter to the U.S. Sentencing Commission, concerning the use of similar risk assessment tools at federal sentencings. The basis for these concerns is set forth below.

A. The Right to be Judged as Individuals.

The foundation of our criminal justice system is individualized sentencing. When a defendant appears for sentencing, the court considers the evidence presented, applies it to the applicable law and determines the sentence that is most appropriate for the specific defendant who committed the specific crime. This process allows for the court to exercise its own discretion after considering any additional mitigating or aggravating testimony that may be offered at the time of sentencing such as: (1) the persuasion of counsel, (2) speeches by family members, victims and even service providers, (3) the results and age of treatment records, as well as (4) the length of time between convictions and the type of offenses previously committed by the defendant. All of which are unique to the individual defendant standing before the court for his/her criminal conduct.

The Preliminary Risk Assessment Instrument proposes a new form of evidence for the court to consider. This evidence is a prediction, a guess, of what the future *might* hold. This prediction of the future does not consider the impact of a needs assessment and responsivity capacity, which in most cases would have a direct impact upon the likelihood that a defendant will recidivate. In other words, the Preliminary Sentence Risk Assessment Instrument changes the rules depending upon where you live, your gender, and your contact with law enforcement, all of which improperly exhibits racial and gender bias and improperly utilizes mere arrests as risk factors for future convictions.

B. Utilization of Arrest Rather Than Conviction to Determine likelihood of Recidivism.

Pennsylvania Law is clear that mere arrests cannot be utilized to impeach a character witness. See Pa.R.E. 405(a)(2); *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981); *Commonwealth v. Morgan*, 559 Pa. 248, 739 A.2d 1033 (1999). The reason for this is because there has not been a judicial determination of the legitimacy for an arrest until there is a conviction. In contrast to this unchallenged directive, the Risk Assessment Instrument continues to relay on a definition of recidivism that is based on mere arrests or violations of probation or parole that result in incarceration.

The fundamental problem with the Tools' use of this definition is that the tool does not actually predict the individual's behavior at all. Rather, it predicts law enforcement's behavior as to whether the police are likely to arrest that individual again. As we know, factors that contribute to the likelihood that an individual will be subjected to encounters with police include an individual's race and the neighborhoods that are targeted by police activity.

This single issue is evidence enough that the Risk Assessment Instrument improperly ignores the well-established principle that mere arrests cannot be utilized as an indicator of risk, as they are as consistent with innocence as with guilt. While the tool doesn't explicitly take county or zip code into account, its reliance on police conduct that results in the arrest and/or incarceration of an individual, produces a disparate impact for people living in neighborhoods with a regular police presence. For this reason, the result offered by the Risk Assessment Instrument is flawed.

C. Static Historical Offender Data

Criminal accountability should be primarily about prior bad acts proven by the government before a court of law. This is an ideal expressed by the Justice Department in their letter to the U.S. Sentencing Commission, in support of their position that the use of static historical offender data such as education level, employment history, family circumstances, and demographic information "raises constitutional questions because of the use of group-based characteristics and suspect classifications in the analytics." See, U.S. Department of Justice Letter to U.S. Sentencing Commission, dated July 29, 2014, p. 5-8 (available at

http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/DOJ.pdf). These same concerns are present with the Preliminary Sentence Risk Assessment Instrument proposed by the Commission.

The very idea that an algorithm with an error rate of 40%[1] can account for the unique circumstances of an individual's life is illogical. The purpose of an algorithm is to apply objective order to a set of fact for the purpose of receiving a likely results. The fact that an individual has freedom of choice, to learn and to adjust their conduct, and even alter their environment, is why this tool is incompatible with the interests of Justice. The Risk Assessment Instrument's objective of reducing an individual's personal history to a mathematical equation based on their luck at birth will create illogical results, absent the Due Process that our justice system requires. For this reason, the use of this approach to help determine whether someone

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[1] Note that the method of calculating risk used by PCS has changed without explanation. They initially reported that the tool had 58.8% accuracy, meaning it is barely more accurate than a coin flip. (PCS, Interim Report 7: Validation of Risk Scale (2013)). In subsequent reports, the error rate is reported as ranging from about 28-35% Interim Report 2: Validation of Risk Assessment Instrument by OGS for All Offenses (2016).

will be incarcerated and for how long, is a dangerous endeavor and one that run counter to our

State's goals for justice.

I would like to again thank the Commission for providing this opportunity to PACDL to testify

concerning the Preliminary Sentencing Risk Assessment Instrument.

Respectfully Submitted,

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