

**TESTIMONY OF
PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE PENNSYLVANIA SENTENCING COMMISSION
ON ITS FIFTH REVISED VERSION OF THE SENTENCING RISK ASSESSMENT
INSTRUMENT**

AUGUST 22, 2019

Thank you for the opportunity to testify, I am Laurel Gift, Regional Vice President of the Pennsylvania Association of Criminal Defense Lawyers (PACDL) for the Western District of Pennsylvania and I am testifying on behalf of PACDL concerning the current version of the 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.

- I. The current approach delegates a second-layer assessment to individual county probation departments, which will result in a decrease in transparency and an increased risk of disparate results.**

Proposed section 305.3 mandates use of the Sentence Risk Assessment Instrument to identify cases for which an RNR Report is recommended. This calculation will then be reflected on the sentencing guideline form pursuant to section 305.4(a)(1)(v). Only those offenders identified as low or high risk offenders will include a notation of “RNR Report Recommended.” (See §305.5(c)). The Instrument encourages courts to “adopt procedures to permit preparation of RNR Reports based on the guideline sentence form recommendations.” The preparation of RNR Reports will fall to county probation departments, which presently use recommended risk and need assessment instruments to assess appropriate supervision levels. The systems, however, vary widely among the counties. For example:

- The “Level of Service Inventory-Revised” or (LSI-R), (LSI-R(SV)), and (LS/CMI) system relies upon factors that would perpetuate existing disparities, including questions related to criminal history, education, employment, marital status, and incarceration history.
 - This system is currently used by Lancaster, Lebanon, Lycoming and Venango counties.
- The “Ohio Risk Assessment System” (ORAS) similarly relies upon factors that would perpetuate existing disparities. In addition to those factors relied upon by LSI systems, ORAS includes factors relating to “neighborhood problems” and “peer associations.”
 - This system is currently used by Dauphin, Berks, Cumberland and York counties.
- Allegheny County has its own risk assessment instrument used for pretrial assessments.
- Philadelphia’s Adult Probation and Parole Department uses a forecasting future offending model based upon the statistical analysis of Dr. Richard Berk. Dozens of factors directly correlated to race are used to determine “risk,” such as zipcode, household income, and zipcode house value.
- There are several counties unaccounted for in terms of identifying which system is used or the statistical accuracy and factors relied upon by such systems.

PACDL has several concerns related to reliance upon the various systems identified above. Chief among them is the inability of our members representing defendants in multiple counties simultaneously to attain any semblance of transparency or ability to predict the potential outcomes of an RNR report. This will directly impair our members’ professional responsibility and ability to inform our clients of any decision or circumstance related to the material risks

associated with decisions pertaining to sentencing proceedings, including whether to enter a plea and how to answer questions associated with the RNR RAT. (See Rule of Professional Conduct 1.4 relating to communication).

Additionally, a defendant who has multiple cases in multiple counties may trigger very different RNR reports depending on the system used that would in turn result in significantly different treatment by courts in neighboring counties.

Other concerns relate to the fact that these systems were developed primarily for setting appropriate levels of supervision and not for use by judges prior to sentencing and that the accuracy rates of these tools is unknown.

Given the analysis above, it would be a disservice to our criminal justice system to replace the statutory requirement of a presentence investigation report, which provides a judge with accurate individualized information, with an RNR report based upon potentially unreliable, biased, inaccurate, and stigmatizing factors.

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

As we have previously noted, 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. Public comment before the Commission in December 2018 highlighted very real and significant concerns regarding the use of gender as statistically relevant to the risk of recidivism.

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.

Despite those concerns and now armed with CMU’s analysis of the effect of gender on the accuracy rate of the instrument, the Commission continues to support use of gender in the instrument. During its investigation, CMU determined that the current model results in the assignment of more females to the low risk category and less females to the high risk category. Model 2 would not assign points to gender and resulted in decreasing the accuracy of the high

risk prediction for females. Model 3 would create separate risk scales for males and females and similarly resulted in a decrease in overall accuracy. Under either Model 2 or Model 3, there was a reduction in the overall percentage of females correctly classified.

CMU's investigation highlights and underscores the danger of relying upon statistical analysis to support use of the Instrument. Instead of using CMU's analysis to support a vote against the Sentence Risk Assessment as a constitutionally viable tool, the Commission voted to retain gender because "females would be negatively impacted if gender was not considered."

In order to withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to those objectives. The Commission continues to rely 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. Accordingly, PACDL calls for reconsideration of the Sentence Risk Assessment Instrument as constitutionally infirm.

III. PACDL's response to the Commission's requests concerning implementation.

A. *Scope*

The Commission requested comment about whether the initial implementation of the Sentence Risk Assessment should apply to all non-DUI cases or whether it should be limited to certain types of cases. As noted above, PACDL opposes adoption of the Instrument.

B. *Funding*

The Commission requested comment about whether the implementation of the Sentence Risk Assessment Instrument should be linked to funding for preparation of RNR Reports. First, we note that PACDL opposes the Instrument. In the event that the Commission approves the Instrument, we have previously expressed concern about the cost of the Instrument, both in money and time. This is especially poignant 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.

Further, as our comments above make plain, we believe that there should be uniformity among the counties with respect to the RNR/RAT process. Multiple probation and parole departments throughout the state that have already purchased and completed training in the application of tools such as the ORAS and LSI systems. We would advocate for use of the same system in every county in the Commonwealth, thereby necessitating additional costs and training for those counties not already using the recommended system.

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